# THE
# INDIAN LAW REPORTS
## ALLAHABAD SERIES

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**(2024) 7 ILRA 6**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 08.07.2024**

**BEFORE**

**THE HON'BLE ARUN BHANSALI, C.J.**
**THE HON'BLE MANOJ KUMAR GUPTA, J.**
**THE HON'BLE VIKAS BUDHWAR, J.**

Special Appeal No. 31 of 2021

**Ramjit Ram Yadav ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Ajay Kumar Srivastava, Ramesh Chandra Dwivedi, Samir Sharma (Senior Adv.)

**Counsel for the Respondents:**
C.S.C., Sunil Kumar Misra

**A. Uttar Pradesh Road Transport Corporation Employees 16 (Other than Officers) Service Regulations, 1981 - Special Appeal Maintainable or not ? -** Orders impugned in the writ petition were passed by the Officers/Authority in the exercise of appellate and revisional jurisdiction conferred under the Regulations, 1981- Held- Road Transport Corporations Act, 1950 has been made by the Parliament under Item 43 of List-I - Regulations have been framed by UPSRTC in the exercise of the power delegated to it by virtue of Section 45 of the Road Transport Corporations Act, 1950 - An Intra-court appeal against a judgment of a Single Judge in a writ proceeding preferred against an order passed by an authority exercising appellate/revisional power under U.P. State Road Transport Corporation Employees (Other than Officers) Service Regulations, 1981, is maintainable - Special appeal would be maintainable as the power has been exercised under the regulations framed under a Central Act in respect of matters enumerated in the Union List. It would, therefore, not fall within the ambit of the exclusions stipulated under Chapter VIII Rule 5 of the Rules of Court **(Para 67)**

**B. Uttar Pradesh Road Transport Corporation Employees 16 (Other than Officers) Service Regulations, 1981 -** Regulations have been framed by UPSRTC in the exercise of the power delegated to it by virtue of Section 45 of the Road Transport Corporations Act, 1950 - Road Transport Corporations Act, 1950 has been made by the Parliament under Item 43 of List-I - Act is referable to List I Entry 43 and 44. The power to legislate in relation to the 'regulation of the corporations' under the aforesaid Entries includes, within its umbrella, the regulation of its workforce. The same is an essential part of incorporation and making functional any corporation and in ensuring its proper functioning. Merely because Section 45(2)(c) invests the Corporation with the power to make Regulations, inter alia, concerning the conditions of appointment and service of its employees, would not bring the legislation within the ambit of List-III Item No. 22 or 24 **(Para 61)**

**C. Interpretation - Doctrine of 'pith and substance' -** The main object and the true scope and effect of legislation is determined in its entirety, and even if some topic incidentally encroaches on a matter assigned to another Legislature, it does not detract from the true nature of legislation or the field under which it has been enacted. The theory of pith and substance is applied without exception in interpreting legislative competence *qua* the Entries in various Lists under the Seventh Schedule to the Constitution - If, in pith and substance, the legislation falls within one entry or the other, but some portion of the subject matter of the legislation incidentally trenches upon and might enter a field under another List, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence **(Para 44, 60).**

**Special Appeal allowed.** (E-5)

**<u>List of Cases cited:</u>**

1. UPSRTC through RM Vs Abhai Raj Singh & 2 ors., Special Appeal (Defective) No. 862 of 2014, decided on 30.10.2014.

2. Jageshwar Prasad Tiwari Vs UPSRTC & ors. 2018 (4) ADJ 263 (DB)

3. Madan Pal Singh Vs St. of U.P. & ors., Special Appeal No. 1488 of 2006, decided on 22.5.2014.

4. South Asia Industries Pvt. Ltd. Vs S.B. Sarup Singh AIR 1965 SC 1442

5. Sharda Devi Vs St. of Bih. (2002) 3 SCC 705

6. Sheet Gupta Vs St. of U.P. (FB) AIR 2010 All 46

7. Dr. Indramani Pyarelal Gupta & ors. Vs W.R. Natu & ors. AIR 1963 SC 274

8. UPSRTC through R.M. Vs Abhay Raj Singh & 2 ors. Special Appeal Defective No. 862 of 2014 decided on 30.10.2014

9. A.P. Jeet Singh (Constable) Vs St. of U.P. & ors. 2013 (8) ADJ 715 (DB)

10. M/s Vajara Yojna Seed Farm, Kalyanpur & ors. Vs Presiding Officer, | Lower Court & anr. 2003 ALL.L. J 883

11. St. of U.P. & ors. Vs Madhav Prasad Sharma 2011 (2) SCC 212

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

1. The present reference to Larger Bench is on the following questions: -

"(a) Whether an intra court appeal under Chapter VIII Rule 5 of the High Court Rules against a judgment of single Judge in a writ proceeding under Article 226 of the Constitution of India preferred against an order passed by an authority exercising appellate or revisional power under U.P. State Road Transport Corporation Employees (Other than Officers) Service Regulations, 1981 would be maintainable?

(b) Whether the Division Bench decision in the case of U.P.S.R.T.C. Thru R.M. Vs. Abhay Raj Singh and 2 others (supra) or the earlier two Division Bench decisions, namely, Jageshwar Prasad Tiwari Vs. U.P.S.R.T.C. and others (supra) and Madan Pal Singh Vs. State of U.P. and others (supra), lays down the correct law ?"

**The backdrop in which the reference has been made:**

2. The appellant was a Conductor in the U.P. State Road Transport Corporation (for short hereinafter referred to as "UPSRTC"). It has been constituted by a notification dated 31.5.1972 by the State Government, issued under Section 3 of the Road Transport Corporations Act, 1950 (for short hereinafter referred to as "the Act"). The appellant was removed from service by order dated 5.10.2019, passed by Assistant Regional Manager, UPSRTC (the sixth respondent herein). The appellant being aggrieved thereby, filed a departmental appeal, but it came to be dismissed by order dated 16.3.2020, passed by Regional Manager, UPSRTC (the fifth respondent herein). The matter was taken up in revision, which too came to be dismissed by order dated 12.11.2020, passed by Chairman, UPSRTC (the fourth respondent herein). The appellant challenged all the aforesaid orders by filing Writ – A No. 254 of 2021 before this Court. It has been dismissed by a learned Single Judge by order dated 13.1.2021 on the ground of availability of alternative remedy.

3. The appellant has thereafter preferred the instant appeal challenging the judgment of the learned Single Judge.

4. When the appeal came up for consideration before a Division Bench of this Court, it was contended on behalf of the respondents that special appeal would not be maintainable in view of the

exceptions contained in Chapter VIII Rule 5 of the Rules of Court. Reliance was placed on a Division Bench judgment of this Court in **UPSRTC through RM vs. Abhai Raj Singh and 2 others1**. On the other hand, it was contended on behalf of the appellant that special appeal would be maintainable as the power has been exercised under the regulations framed under a Central Act in respect of matters enumerated in the Union List. It would therefore not fall within the ambit of the exclusions stipulated under Chapter VIII Rule 5 of the Rules of Court. In support of the contention, reliance was placed on Division Bench judgments of this Court in **Jageshwar Prasad Tiwari vs. UPSRTC and Others2 and Madan Pal Singh vs. State of U.P. and Others3.**

5. The Division Bench which heard the appeal noticed that the judgment in **Abhai Raj Singh and 2 others1** proceeded on a wrong assumption that the legislation under which the orders were passed by the officers/authority, was a State Legislation, although it is a Central Legislation, but as the said judgment was passed by Bench of co-equal strength therefore, having regard to judicial propriety, the matter was referred to the Larger Bench after formulating the aforesaid questions.

6. Before we proceed to record the rival contentions, it would be advantageous to have an overview of the existing legal provisions and the legislative history of special appeals or Letters Patent Appeals as was the nomenclature assigned to such appeals at the inception of such jurisdiction.

**History of Statutory Regime of Letters Patent Appeals: -**

7. On 17th March, 1866 High Court of Judicature for the North-Western Provinces was established by the Royal Charter. It conferred upon the newly formed High Court, Civil, Criminal, Testamentary and Intestate as well as Matrimonial jurisdiction. Clause 10 of the Letters Patent dated 17th March, 1866 provided for appeals to the High Court from judgement of one Judge in certain circumstances. As intra-court appeal was a creation of Letters Patent, it was christened as Letters Patent Appeal. Clause 10 reads as follows:-

"10. And We do further ordain that an appeal shall lie to the said High Court of Judicature for the North-Western Provinces from the judgement (not being a sentence or order passed or made in any criminal trial) of one judge of the said High Court or of one judge of any Division Court, pursuant to Section 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court in such case shall be to Us, Our Heirs or Successors, in Our or their Privy Council, as hereinafter provided."

8. By a supplementary Letters Patent dated 11th March, 1919, the name of the High Court was changed to – High Court of Judicature at Allahabad.

9. On 28th January, 1928, Clause 10 of the Letters Patent was amended as follows:

"10. And We do further ordain that an appeal shall lie to the said High Court of Judicature at Allahabad from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything here- inbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall to Us, Our Heirs or Successors in Our or Privy Council, as herein provided."

10. On 26th January, 1929, Clause 10 was further amended so as to provide as follows:

"In the tenth clause of the said Letters Patent between the words 'pursuant to section 108 of the Government of India Act, made' and the words 'in the exercise of appellate jurisdiction' the words 'or or after the first day of February One thousand nine hundred and twenty-nine' shall be inserted."

11. Clause 10, after amendment, reads as follows:-

"10. And we do further ordain that an appeal shall lie to the said High Court of Judicature at Allahabad from the judgment (not being a judgment passed in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional, jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of Criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made, on or after the first day of February one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other Judgments of Judges of the said High Court or of such Division Court shall be to us, Our Heirs or successors or our or their Privy Council, as hereinafter provided."

12. After independence, the Chief Court of Oudh was amalgamated with the

High Court of Judicature at Allahabad in pursuance of U.P. High Courts (Amalgamation) Order, 1948 vide notification published in Government of India Gazette (Extraordinary) dated 19th July, 1948 and the Letters Patent of Her Majesty dated 17th March, 1866 stood abrogated. Clause 17 of the said Order provided as follows:

"17. As from the appointed day-

(a) the Letters Patent of Her Majesty, dated the 17th March, 1866, establishing the High Court of Judicature for the North-Western Provinces and Chapter II of the Oudh Courts Act, 1925 (U. P. Act .IV of 1925), shall cease to have effect except for the purpose of construing, or giving effect to, the provisions of this Order;"

13. At the same time, the provisions of the Amalgamation Order were made subject to any provision made by the legislature or authority having power to make such provision. Clause 18 of the Amalgamation Order, which so provided, is extracted below: -

“18. Nothing in this Order shall prejudice the application to the new High Court of any relevant provisions of the Act, and this Order shall have effect subject to any provisions that may be made on or after the appointed day with respect to the new High Court by any Legislature or authority having power to make such provision.”

14. Article 225 of the Constitution of India provided that jurisdiction and law administered in any existing High Court shall be the same as immediately before the commencement of this Constitution subject to provisions of the Constitution and to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that Legislature by the Constitution.

15. The Rules of the Court were framed by Allahabad High Court in exercise of power conferred by Article 225 of the Constitution and all other powers enabling in that behalf. Article 225 of the Constitution is extracted below for ready reference: -

"225. Jurisdiction of existing High Courts. Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make Rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction."

16. In Rules of the Court framed in 1952, Chapter VIII, Rule 5 provided for intra-court appeal, labelled as ‘special appeal’. Chapter VIII, Rule 5 as it originally existed in the Rules of the Court, 1952 is quoted as below: -

"5. An appeal shall lie to the Court from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the Court, and not being an order made in the exercise of revisional jurisdiction, and not being an order passed or made in the exercise of its power of Superintendence, or in the exercise of Criminal Jurisdiction of one Judge, and an appeal shall lie to the Court from a judgment of one Judge made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the Court, where the Judge who passed the judgment declares that the cases is a fit one for appeal."

17. In view of the circumstances obtaining after the establishment of the Supreme Court, a Bill was introduced, namely, the U.P. High Court (Abolition of Letters Patent Appeals) Bill, 1962, with the object of abolishing appeals against appellate jurisdiction of Single Judge.

18. U.P. Act No.14 of 1962, namely, the U.P. High Court (Abolition of Letters Patent Appeals) Act, 1962 was passed by Uttar Pradesh Legislature which came into force with effect from 13th November, 1962. Section 3 of the aforesaid Act provided for abolition of special appeal from a judgment or order of one Judge of High Court, made in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the superintendence of the High Court. Section 3 of U.P. Act No.14 of 1962 is quoted as below:--

"3. (1) No appeal, arising from a suit or proceeding instituted or commenced, whether prior or subsequent to the enforcement of this Act, shall be to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court, subject to the Superintendence of the High Court, anything to the contrary contained in Clause 10 of the Letters Patent of Her Majesty, dated the 17th March, 1866, read with Clause 17 of the U.P. High Courts' (Amalgamation) Order, 1948, or in any other law, notwithstanding.

(2) Notwithstanding anything contained in sub-section (1) all appeals pending before the High Court on the date immediately preceding the date of enforcement of this Act shall continue to lie and be heard and disposed of as heretobefore, as if this Act had not been brought into force."

19. In view of the provisions of U.P. Act No.14 of 1962, the Rules of the Court, 1952 were also amended vide notification dated 6th November, 1963. Chapter VIII, Rule 5 was substituted by the following Rule:---

"5. An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction) of one Judge."

20. In 1972 another Bill was introduced to further amend the U.P. High Court (Abolition of Letters Patent Appeals)

Act, 1962 so as to exclude Letters Patent Appeals in cases decided by Board of Revenue under various Tenancy Laws.

21. Accordingly, in terms of the U.P. High Court (Abolition of Letters Patent Appeals) Act, 1972, Section 4 stood inserted, as follows: -

"4. (1) No appeal, arising from a suit or proceeding instituted or commenced, whether prior or subsequent to the commencement of this section, shall lie to the High Court from a judgement or order of one judge of the High Court, made in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution, in respect of a judgment, decree or order made or purported to be made by the Board of Revenue under the United Provinces Land Revenue Act, 1901, or the U.P. Tenancy Act, 1939, or the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, or by the Director of Consolidation (including any other officer purporting to exercise the powers and to perform the duties of Director of Consolidation) under the U.P. Consolidation of Holdings Act, 1953, anything to the contrary contained in clause ten of the Letters Patent of Her Majesty, dated March 17, 1866, read with clauses 7 and 17 of the U.P. High Courts (Amalgamation) Order, 1948, or in any other law notwithstanding.

(2) Notwithstanding anything contained in sub-section (1), all appeals pending before the High Court on the date immediately preceding the date of commencement of this section shall be heard and disposed of as if this section had not been enacted."

22. That once again, further amendment was made in the U.P. High Court (Abolition of Letters Patent Appeals) Act, 1962 inserting Section 5, with intent to narrow down the scope of Letters Patent Appeals. Newly added Section 5 is extracted below:

"5. (1) No appeal, arising from an application or proceeding instituted or commenced, whether prior or subsequent to the commencement of this section, shall lie to the High Court from a judgment or order of one judge of the High Court, made in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution, in respect of a judgment or order made or purported to be made in the exercise or purported exercise of appellate or revisory jurisdiction by a District Judge, Additional District Judge, Civil Judge or Additional Civil Judge under any Uttar Pradesh Act (including any Central Act as amended by an Uttar Pradesh Act) anything to the contrary contained in clause 10 of the Letters Patent of Her Majesty, dated March 17, 1866, read with clauses 7 and 17 of the U.P. High Courts (Amalgamation) Orders, 1948, or in any other law notwithstanding.

(2) Notwithstanding anything contained in sub-section (1), all appeals pending before the High Court on the date immediately preceding the date of commencement of this section shall be heard and disposed of as if this section had not been enacted."

23. Despite the aforesaid measures, the number of cases in the High Court, continued to increase and impediments in the way of speedy justice could not altogether be removed. It was, therefore, considered necessary to further amend the U.P. High Court (Abolition of Letters Patent Appeals) Act, 1962 with a view to abolishing the Letters Patent

Appeals against the judgment or order of a Single Judge of the High Court under Article 226 or Article 227 of the Constitution in respect of any judgment order or award of the Subordinate Courts, Tribunals or Statutory Arbitrators made in exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act relating to any of the matters enumerated in the State List or Concurrent List of the Seventh Schedule to the Constitution or in respect of any order made in exercise of the appellate or revisional jurisdiction under any such Act, by the State Government or any officer or authority. It is also being provided that the pending Letters Patent Appeal shall continue to be disposed of as before. The Uttar Pradesh High Court (Abolition of Letters Patent Appeals) (Amendment) Act, 1981, was introduced accordingly. The Statement of Objects and Reasons of the aforesaid Act were as follows:-

"Prefatory Note---Statement of Objects and Reasons.---Prior to the enactment of the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 1962 a Letters Patent Appeal could (except in certain cases), be filed before a Division Bench of a High Court against the judgment of the Single Judge. In view of the circumstances obtaining after the establishment of the Supreme Court the said Act of 1962 was enacted under which Letters Patent Appeal against the judgment of a Single Judge of the Allahabad High Court given in exercise of his appellate jurisdiction arising out of the judgment of a Subordinate Court in civil or other proceedings was abolished.

2. Amendments were made in the aforesaid Act in 1972 and 1975 to abolish the Letters Patent Appeals against the judgments of a Single Judge of the High Court in writ petitions arising out of certain judgments of the Board of Revenue, the Director of Consolidation, the District Judge and the civil Judge.

3. Despite the aforesaid measures, the number of cases in the High Court, continued to increase and impediments in the way of speedy justice could not altogether be removed. It is, therefore, considered necessary to make a similar provision in the U.P. High Court (Abolition of Letters Patent Appeals) Act, 1962 with a view to abolishing the Letters Patent Appeals against the judgment or order of a Single Judge of the High Court under Article 226 or Article 227 of the Constitution in respect of any judgment order or award of the Subordinate Courts, Tribunals or Statutory Arbitrators made in exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act relating to any of the matters enumerated in the State List or Concurrent List of the Seventh Schedule to the Constitution or in respect of any order made in exercise of the appellate or revisional jurisdiction under any such Act, by the State Government or any officer or authority. It is also being provided that the pending Letters Patent Appeal shall continue to be disposed of as before.

24. By 1981 Amendment Act, Section 5 of 1962 Act was substituted by the following provision:-

"2. Substitution of Section 5 of U.P. Act 14 of 1962.----For Section 5 of the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 1962, the following section shall be substituted, namely:---

"5. Abolition of Letters Patent Appeals in certain other cases.---(1) Notwithstanding anything to the contrary

contained in Clause 10 of the Letters Patent of Her Majesty, dated March 17, 1866 read with Clauses 7 and 17 of the U.P. High Courts (Amalgamation) Order, 1948, or in any other law, no appeal arising from an application or proceeding, instituted or commenced whether prior or subsequent to the commencement of the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) (Amendment) Act, 1981, shall lie to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of jurisdiction conferred by Articles 226 or 227 of the Constitution, in respect of any judgment, order or award---

(a) of a Tribunal, Court of Statutory Arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or

(b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act.

(2) Notwithstanding anything contained in sub-section (1), all appeal of the nature referred to in that sub-section pending before the High Court immediately before the commencement of the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) ( Amendment) Act, 1981, shall be heard and disposed of as if that sub-section had not been enacted."

25. Chapter VIII, Rule 5 of the Rules of the Courts was again amended by Notification dated 27th July, 1983 to bring it in accord with Section 5 of the Amendment Act, 1981. Chapter VIII, Rule 5 now existing in the Rules of the Court is as follows:---

"5. Special Appeal.---An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction (or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award---(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitutions or (b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge."

26. It transpires from the legislative history of Letters Patent Appeals that at present, the special appeal is governed by U.P. High Court (Abolition of Letters Patent Appeals) Act, 1962, as amended from time to time, and Chapter VIII Rule 5 of the Rules of Court.

27. It is well settled that an appeal is a creature of statute and it can be circumscribed by the conditions in the Grant. A Constitution Bench of the Supreme Court in **South Asia Industries Pvt. Ltd. vs. S.B. Sarup Singh4,** considered the Letters Patent of the Lahore High Court and held that if the appropriate legislature has, expressly or by necessary implication, not taken away the right to

appeal, the inevitable conclusion is that the appeal shall lie from the judgment of a Single Judge. In a later judgment in **Sharda Devi vs. State of Bihar5**, the Supreme Court has reiterated the aforesaid legal proposition in paragraph 9 of the Law Report –

"9. A Letters Patent is the charter under which the High Court is established. The power given to a High Court under the Letters Patent are akin to the constitutional powers of a High Court. Thus when a Letters Patent grants to the High Court a power of appeal, against a judgment of a single Judge, the right to entertain the appeal would not get excluded unless the statutory enactment concerned excludes an appeal under the Letters Patent."

28. A Full Bench of this Court **in Sheet Gupta vs. State of U.P. (FB)6**, considered the existing legal provisions, particularly Chapter VIII Rule 5 of the Rules of the Court, relating to special appeals and succinctly laid down the class of cases where special appeal would not lie. It would be advantageous to extract paragraph 15 of the Full Bench judgment –

"15. Having given our anxious consideration to the various plea raised by the learned counsel for the parties, we find that from the perusal of Chapter VIII Rule 5 of the Rules a special appeal shall lie before this Court from the judgment passed by one Judge of the Court. However, such special appeal will not lie in the following circumstances:

"1. The judgment passed by one Judge in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the Superintendence of the Court;

2. the order made by one Judge in the exercise of revisional jurisdiction;

3. the order made by one Judge in the exercise of the power of Superintendence of the High Court;

4. the order made by one Judge in the exercise of criminal jurisdiction;

5. the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award by

(i) the tribunal,

(ii) Court or

(iii) statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India;

6. the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or 227 of the Constitution of India in respect of any judgment, order or award of

(i) the Government or

(ii) any officer or

(iii) authority,

made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India."

**Analysis:-**

29. One of the class of cases culled out in para-15(6) in **Sheet Gupta6** where special appeal would not lie is when the jurisdiction is exercised by Single Judge

under Article 226 or 227 in respect of any judgment, order or award of

"(i) the Government or
(ii) any officer or
(iii) authority,
made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India."

30. For an appeal to fall under the exclusion clause noted above, it should be (i) under any Uttar Pradesh Act or under any Central Act, (ii) with respect to any of the matter enumerated in the State List or the Concurrent List.

31. The orders impugned in the writ petition were passed by the Officers/Authority in exercise of appellate and revisional jurisdiction conferred under Uttar Pradesh Road Transport Corporation Employees (Other than Officers) Service Regulations, 1981. The Regulations have been framed by UPSRTC in exercise of the power delegated on it by virtue of Section 45 of the Act, which undoubtedly is a Central Act. Section 45 of the Act is extracted for convenience of reference: -

**"45. Power to make regulations.**—(1) A Corporation may, with the previous sanction of the State Government, make regulations, not inconsistent with this Act and the rules made thereunder, for the administration of the affairs of the Corporation.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—

(a) the manner in which, and the purposes for which, persons may be associated with the Board under section 10;

(b) the time and place of meetings of a the Board and the procedure to be followed in regard to transaction of business at such meetings;

(c) the conditions of appointment and service and the scales of pay of officers and other employees of the Corporation other than the Managing Director, the Chief Accounts Officer and the Financial Adviser, or as the case may be, the Chief Accounts Officer-cum-Financial Adviser.

(d) the issue of passes to the employees of the Corporation and other persons under section 19;

(e) the grant of refund in respect of unused tickets and concessional passes under section 19."

32. The first question which therefore arises is whether the exercise of power by the Officers/Authority under the Regulations could be said to be a power exercised under a Central Act.

33. In **Sheet Gupta6**, the Full Bench considered a similar question in reference to the power exercised by the Officers/Authority under the Uttar Pradesh Scheduled Commodities Distribution Order, 2004 framed under Section 3 read with Section 5 of the Essential Commodities Act, 1955. The contention that the appellate power in the said case, exercised by the Divisional Commissioner, was under the Distribution Order framed by the State Government in exercise of its delegated power under Section 5 of the Essential Commodities Act, 1955 and not under the Act itself and therefore, would not fall within the clutches of the exclusion

clause was repelled holding that an order framed under the delegated provision of the Act is "definitely a power exercised under the Act" and it is not necessary that the power should be "given by the Act" itself. In reaching to the aforesaid conclusion, the Full Bench relied on the judgment of the Supreme Court in **Dr. Indramani Pyarelal Gupta and others vs. W.R. Natu and others7.** Further, in the said case, the Essential Commodities Act, 1955 was found to have been enacted under Article 246(2) in respect of matters enumerated in the Concurrent List, and therefore the special appeal was held to be not maintainable. The relevant discussion in this regard as contained in para-17 of the Law Report is extracted below:-

"The exercise of original jurisdiction by any tribunal, Court or statutory arbitrator or exercise of appellate or revisional jurisdiction by the Government or any officer or authority is to be under any U.P. Act or any Central Act with respect to the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India. The powers have to be exercised under the Act and not given by the Act. As held by the Apex Court in the case of Dr. Indramani Pyarlal Gupta (supra) the words 'powers exercised under the Act' would comprehensively embrace in its power conferred by any bye laws or delegated legislation. If the appellate or revisional powers has been conferred by the Government through an order issued under the delegated provisions of the Act then it is definitely a power exercised under the Act and in that event no special appeal under Chapter VIII Rule 5 of the Rules would lie against the judgment and order passed by the learned single Judge. In the present case, we find that the Commissioner had exercised powers conferred under Clause 28 of the Distribution Order, 2004, which order has been passed under the provisions of the Act, therefore, the appellate power has been exercised under the Act and, thus, no special appeal would lie."

(emphasis supplied)

34. The enunciation of law by Apex Court on the aforesaid issue in **Dr. Intramani Pyarelal Gupta7** is extracted to make the legal position more explicit :-

"15. A more serious argument was advanced by learned Counsel based upon the submission that a power conferred by a bye-law framed under S.11 or 12 was not one that was 'conferred "by or under the Act or as may be prescribed". Learned Counsel is undoubtedly right in his submission that a power conferred by a law is not one conferred "by the Act", for in the context the expression "conferred by the Act" would mean "conferred expressly or necessary implication by the Act itself." It is also common ground that a bye law framed under Sections 11 or 12 could not fall within the phraseology "as may be prescribed", for the expression "prescribed" has been defined to mean "by rules under the Act", i.e, those framed under S.28 and a bye law is certainly not within that description. The question therefore is whether a power "conferred by a bye-law could be held to be a power conferred under the Act". The meaning of the words "under the Act" is well known. "By an Act would mean by a provision directly enacted in the statute in question and which is gatherable from its express languages or by necessary implication therefrom. The words "under the Act" would in that context signify what is not directly to be found in the statute itself but is conferred or

imposed by virtue of powers enabling this to be done; in other words, bye-laws made by subordinate law-making authority which is empowered to do so by the parent Act.

(emphasis supplied)

35. The impugned orders have been made by the Officers/Authority exercising appellate and revisional powers conferred upon them by the Regulations. The Regulations have been framed 'under the Act. 'It is a piece of delegated legislation. It owes its existence to Section 45 of the Act. The phrase 'under the Act' is wide enough to include the powers conferred by a delegated legislation framed under the Act, as held by Supreme Court in **Dr. Indramani Pyarelal Gupta7** and Full Bench in Sheet Gupta6. Thus, it cannot be doubted that while passing the impugned orders, the officers/authority had acted under a Central Legislation.

36. The core issue however is whether the Act, albeit a Central Legislation, has been enacted in exercise of the legislative power conferred on the Parliament in the Union List or the Concurrent List. In case the power has been exercised in respect of any of the matters enumerated in the Union List, it would not be covered by the exception carved out under Chapter VIII Rule 5 of the Rules of the Court and the appeal would be maintainable. However, in case the Central Legislation is referable to any entry in the Concurrent List, it would fall within the clutches of the exclusion clause of Rule 5 Chapter VIII and special appeal would not be maintainable.

37. Learned counsel for the respondents contended that the Regulations framed by the Corporation under Section 45 of the Act under which the appellate and revisional powers have been exercised relates to conditions of service of the employees of the Corporation and is referable to Entries 22 and 24 of the Concurrent List. Therefore, appeal would not be maintainable. He placed reliance on the judgment of this Court in **UPSRTC through R.M. vs. Abhay Raj Singh and 2 others8, A.P. Jeet Singh (Constable) vs. State of U.P. & others9, and M/s Vajara Yojna Seed Farm, Kalyanpur and Others vs. Presiding Officer, |Lower Court & Another10** and judgment of the Supreme Court in **State of U.P. & Others vs. Madhav Prasad Sharma11.**

38. Per contra, learned counsel for the appellant submitted that the Act relates to incorporation and regulation of Road Transport Corporation and is referable to Entries 43 & 44 of List-1 of the Seventh Schedule to the Constitution. Therefore, the instant appeal would not fall under the exclusion clauses of Chapter-VIII Rule 5 of the Rules of the Court. He further submitted that the laying down of service conditions of the employees is incidental to the main object of the Act viz. incorporation and regulation of Road Transport Corporations. It is urged that while determining the field of legislation the Court has to examine the enactment as a whole in context of its main object. The true subject matter of legislation is to be ascertained to find out the field of legislation i.e. what constitutes the pith and substance of an enactment. Merely because the legislation incidentally encroaches on matter assigned to another list would not be determinative of the Entry under which a particular enactment has been framed. If so examined, the Act and the Regulations framed thereunder, though incidentally touches upon certain subjects in the Concurrent List would still be referable to

the legislative power of the Parliament under the Union List. In support of his contention, he placed reliance on the decisions of this Court in **Madan Pal Singh vs. State of U.P. and others12 and Jageshwar Prasad Tiwari vs. UPSRTC & others13.**

39. Entries 43 & 44 of List-1 are as follows :-

"43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations, but not including co-operative societies.

44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities."

40. Entries 22 & 24 of List-III are as follows:

"22. Trade unions; industrial and labour disputes.

24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits."

41. Undoubtedly, the Regulations whereunder the orders impugned before the Writ-Court were passed relates to the conditions of service of employees of the Corporation in respect of which power has been conferred on the Corporation to frame Regulations by virtue of Section 45(2)(c). The core issue is whether the said fact is sufficient to bring the legislation under which the Regulations have been framed within the four corners of Entries 22 & 24 of the Concurrent List as is contended by learned counsel for the respondents. In order to determine the question whether the Legislature has kept itself within bounds of its jurisdiction or has encroached upon a forbidden field, the Courts have consistently applied the doctrine of 'pith and substance'. The main object and the true scope and effect of legislation is determined in its entirety and even if some topic incidentally encroaches on matter assigned to another Legislature, it does not detract from the true nature of legislation or the field under which it has been enacted. In **K.K. Baskaran v. State14,** the Supreme Court explained the principles governing the applicability of the doctrine of pith and substance as follows:

"21. The doctrine of pith and substance means that an enactment which substantially falls within the powers expressly conferred by the Constitution upon a legislature which enacted it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature. The Court must consider what constitutes in pith and substance the true subject-matter of the legislation. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid even though it incidentally trenches on matters beyond its legislative competence, vide Union of India v. Shah Goverdhan L. Kabra Teachers' College, (2002) 8 SCC 228 (SCC para 7).

22. For applying the doctrine of pith and substance regard is to be had to the enactment as a whole, its main objects and the scope and effect of its provisions vide Special Reference No. 1 of 2001, In re, (2004) 4 SCC 489 (SCC para 15). For this purpose the language of the entries in the Seventh Schedule should be given the

widest scope of which the meaning is fairly capable, vide State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201, [SCC para 31(4)], Union of India v. Shah Goverdhan L. Kabra Teachers' College, (2002) 8 SCC 228 (SCC para 6) and ITC Ltd. v. State of Karnataka, 1985 Supp SCC 476 (SCC para 17)."

Applying the doctrine of pith and substance in considering overlapping of fields in Central and State List, it has been held as follows:

"18. It often happens that a legislation overlaps both List I as well as List II of the Seventh Schedule. In such circumstances, the doctrine of pith and substance is applied. We are of the opinion that in pith and substance the impugned State Act is referable to Entries 1, 30 and 31 of List II of the Seventh Schedule and not Entries 43, 44 and 45 of List I of the Seventh Schedule.

19. It is well settled that incidental trenching in exercise of ancillary powers into a forbidden legislative territory is permissible vide the Constitution Bench decision of this Court in State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201 [vide SCC paras 31(4), (5) & (6) and 129(5)]. Sharp and distinct lines of demarcation are not always possible and it is often impossible to prevent a certain amount of overlapping vide ITC Ltd. v. State of Karnataka, 1985 Supp SCC 476 (SCC para 17). We have to look at the legislation as a whole and there is a presumption that the legislature does not exceed its constitutional limits."

42. In **State Bank of India v. Santosh Gupta15**, the question arose concerning the right of banks to enforce security interests outside the courts' process by acting under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') vis-a-vis the provision of the Transfer of Property Act of Jammu & Kashmir, 1920 (for short 'the JK Act'). The applicability of the SARFAESI Act in respect of State of Jammu & Kashmir was being objected to on the ground that the provisions thereof come in conflict with Section 140 of the JK Act. The contention was repelled by examining the object of the Central Legislation i.e. the SARFAESI Act. In doing so, the doctrine of pith and substance was applied. It was held that the legislation would fall under List-1 Entry-45 which relates to 'banking'. Although, the transfer of property by way of sale or assignment is stipulated as one of the several ways for recovery of debts under the SARFAESI Act, but when the said Act is considered in the light of the objects with which it has been enacted, it cannot be said to be relatable to the subject of 'transfer of property', covered under List-III Entry 6. The relevant observations are as follows:

"37. Applying the doctrine of pith and substance to SARFAESI, it is clear that in pith and substance the entire Act is referable to Entry 45 List I read with Entry 95 List I in that it deals with recovery of debts due to banks and financial institutions, inter alia through facilitating securitisation and reconstruction of financial assets of banks and financial institutions, and sets up a machinery in order to enforce the provisions of the Act. In pith and substance, SARFAESI does not deal with "transfer of property". In fact, insofar as banks and financial institutions are concerned, it deals with recovery of debts owing to such banks and financial institutions and certain measures which can be taken outside of the court process to enforce such recovery. Under Section 13(4)

of the SARFAESI, apart from recourse to taking possession of secured assets of the borrower and assigning or selling them in order to realise their debts, the banks can also take over the management of the business of the borrower, and/or appoint any person as manager to manage secured assets, the possession of which has been taken over by the secured creditor. Banks as secured creditors may also require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom money is due or payable to the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt. It is thus clear that the transfer of property, by way of sale or assignment, is only one of several measures of recovery of a secured debt owing to a bank and this being the case, it is clear that SARFAESI, as a whole, cannot possibly be said to be in pith and substance, an Act relatable to the subject-matter "transfer of property"."

43. A Constitution Bench of Supreme Court in **Pandurang Ganpati Chaugule v Vishwasrao Patil Murgud Sahakari Bank Limited16** considered the issue as to whether Cooperative Banks which are Cooperative Societies also are governed by List-1 Entry-45 or List-II Entry 32 of the Seventh Schedule to the Constitution and whether Central Government has the power to provide for different mode of recovery in respect of Cooperative Banks under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, though Cooperative Banks are registered and regulated by the State Legislation viz. the Maharashtra Cooperative Societies Act, 1960. The Constitution Bench after examining in great detail the main object of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act held that it was within the competence of the Parliament to include Cooperative Societies carrying on banking activities, registered under the Maharashtra Cooperative Societies Act, 2002 under the definition of 'banking company' under the Banking Regulation Act, 1949. The Parliament is held to have legislative competence under List-I Entry 45 to provide for additional procedures for recovery under Section 13 of the SARFAESI Act with respect to Cooperative Banks and it does not in any manner impinges upon the field occupied by List-II Entry-32 under which the State Act has been enacted.

44. In **Delhi Cloth & General Mills Co. Ltd.17** upon which reliance was placed by the Constitution Bench, it was held that in pith and substance, if a legislation falls within one or the other Entry of a particular List but some portion of the subject matter of the legislation incidently trenches upon or enters a field under another List, then it must be held to be valid in its entirety. The relevant portion is as follows:

"33. Mr O.P. Malhotra raised a contention as to the legislative competence of Parliament to enact Section 58-A and the Deposits Rules enacted in exercise of the power conferred by Section 58-A read with Section 642 of the Companies Act, 1956. This is only to be mentioned to be rejected. Mr Malhotra urged that when a company invites and accepts deposits, there comes into existence a lender-borrower relationship between the depositor and the company, and therefore the legislation dealing with the subject squarely falls under Entry 30 of the State List, 'money lending and moneylenders'. If this

submission were to carry conviction, every depositor in the bank would be a moneylender and the transaction would be one of money lending. Is the banking industry to be covered under Entry 30? On the other hand, Entry 45 in Union List is a specific Entry 'Banking' and therefore any legislation relating to banking would be referable to Entry 45 in the Union List. Entry 43 in the Union List is: 'Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including cooperative societies'. Entry 44 refers to 'incorporation, regulation, and winding up of corporation whether trading or not when business is not confined to one State but not including universities'. Obviously the power to legislate about the companies is referable to Entry 44 when the objects of the company are not confined to one State and irrespective of the fact whether it is trading or not. When a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions (see A.S. Krishna v. State of Madras, SCR p. 410). To resolve the controversy if it becomes necessary to ascertain to which entry in the three Lists, the legislation is referable, the court has evolved the doctrine of pith and substance. If in pith and substance, the legislation falls within one entry or the other but some portion of the subject-matter of the legislation incidentally trenches upon and might enter a field under another List, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence (see Ishwari Khaetan Sugar Mills (P) Ltd. v. State of U.P., (1980) 3 SCR 331, 343, Union of India v. H.S. Dhillon, (1972) 2 SCR 33, Kerala State Electricity Board v. Indian Aluminium Company Ltd., (1976) 1 SCR 552 and State of Karnataka v. Ranganatha Reddy (1978) 1 SCR 641"

(emphasis supplied)

45. In **State of Madhya Pradesh v. M.V. Narasimhan18,** the Supreme Court repelled the contention that doctrine of pith and substance is applicable only where the legislative competence is in issue. It has been held that the said doctrine can conveniently be applied to cases involving statutory interpretation founded on source of legislation as in the instant case. The relevant observations are as follows:

"173. The doctrine of pith and substance can be applied to examine the validity or otherwise of a legislation for want of legislative competence as well as where two legislations are embodied together for achieving the purpose of the principal Act. Keeping in view that we are construing a federal Constitution, distribution of legislative powers between the Centre and the State is of great significance. Serious attempt was made to convince the Court that the doctrine of pith and substance has a very restricted application and it applies only to the cases where the court is called upon to examine the enactment to be ultra vires on account of legislative incompetence.

174. We are unable to persuade ourselves to accept this proposition. The doctrine of pith and substance finds its origin from the principle that it is necessary to examine the true nature and character of the legislation to know whether it falls in a forbidden sphere. This doctrine was first applied in India in Prafulla Kumar Mukherjee v. Bank of Commerce Ltd.,

(194647) 74 IA 23 : AIR 1947 PC 60. The principle has been applied to the cases of alleged repugnancy and we see no reason why its application cannot be extended even to the cases of present kind which ultimately relates to statutory interpretation founded on source of legislation."

(emphasis supplied)

46. In another Constitution Bench in **H.C. Narayanappa and others v. State of Mysore and others19** the Supreme Court held that while interpreting Entries in a List in context of legislative competence, widest possible amplitude should be given and not a narrow or restricted meaning:-

"The expression used in a constitutional enactment conferring legislative powers must be construed not in any narrow or restricted sense but in a sense beneficial to the widest possible amplitude of its powers: Navinchandra Mafatlal v. Commissioner of Income-tax, Bombay City, 1955-1 SCR 829 at p. 836 : (S) AIR 1955 SC 58 at p. 61); United Provinces v. Atiqua Begum, 1940 FCR 110 : (AIR 1941 FC 16)."

47. The Road Transport Corporations Act, 1950 provides for the incorporation and regulation of Road Transport Corporations. It extends to whole of India. It envisages establishment of Road Transport Corporations in the States. Section 3 of the Act is extracted for ready reference :-

"**3. Establishment of Road Transport Corporations in the States.**— The State Government having regard to—

(a) the advantages offered to the public, trade and industry by the development of road transport;

(b) the desirability of co-ordinating any form of road transport with any other form of transport;

(c) the desirability of extending and improving the facilities for road transport in any area and of providing an efficient and economical system of road transport service therein;

may, by notification in the Official Gazette, establish a Road Transport Corporation for the whole or any part of the State under such name as may be specified in the notification."

48. By virtue of Section 4 of the Act, every Corporation is a body corporate by the name notified under Section 3 having perpectual succession and a common seal. The general superintendence, direction and management of the affairs and business of a Corporation vests in a Board of Directors. The Board comprises of a Chairman and such other Directors, as the State Government may think fit to appoint. The Board has been given power under Section 12 to appoint committees and delegate its functions. By virtue of Sections 14 and 19, the Corporation has power to provide for the conditions of service and other matters relating to the employees of the Corporation.

49. Under Section 17-A of the Road Transport Corporations Act, 1950, the Corporation is conferred with power to establish one or more subsidiary corporations for the more efficient discharge of its functions.

50. Section 18 of the Act lays down the general duty of Corporation which is to provide or secure or promote the provision of an efficient, adequate, economical and properly coordinate system of road transport services in the State or

part of the State for which it is established and in any extended area.

51. The powers of the Corporation are stipulated under Section 19, which are as follows:

"(a) to operate road transport services in the State and in any extended area;

(b) to provide for any ancillary service;

(c) to provide for its employees suitable conditions of service including fair wages, establishment of provident fund, living accommodation, places for rest and recreation and other amenities;

(d) to authorise the issue of passes to its employees and other persons either free of cost or at concessional rates and on such conditions as it may deem fit to impose;

(e) to authorise the grant of refund in respect of unused tickets and concessional passes."

52. Sub-Section (2) of Section 19 of the Act provides for additional powers which are as follows:

"(a) to manufacture, purchase, maintain and repair rolling stock, vehicles, appliances, plant, equipment or any other thing required for the purpose of any of the activities of the Corporation referred to in sub-section (1);

Explanation.—In this clause, the expression "manufacture" does not include the construction of the complete unit of a motor vehicle except for purposes of experiment or research;

(b) to acquire and hold such property, both movable and immovable, as the Corporation may deem necessary for the purpose of any of the said activities, and to lease, sell or otherwise transfer any property held by it;

(c) to prepare schemes for the acquisition of, and to acquire, either by agreement or compulsorily in accordance with the law of acquisition for the time being in force in the State concerned and with such procedure as may be prescribed, whether absolutely or for any period, the whole or any part of any undertaking of any other person to the extent to which the activities thereof consist of the operation of road transport services in that State or in any extended area;

(d) to purchase by agreement or to take on lease or under any form of tenancy any land and to erect thereon such buildings as may be necessary for the purpose of carrying on its undertaking;

(e) to authorise the disposal of scrap vehicles, old tyres, used oils, any other stores of scrap value, or such other stores as may be declared to be obsolete in the prescribed manner;

(f) to enter into and perform all such contracts as may be necessary for the performance of its duties and the exercise of its powers under the Act;

(g) to purchase vehicles of such type as may be suitable for use in the road transport services operated by the Corporation;

(h) to purchase or otherwise secure by agreement vehicles, garages, sheds, office buildings, depots, land, workshops, equipment, tools, accessories to and spare parts for vehicles, or any other article owned or possessed by the owner of any other undertaking for use thereof by the Corporation for the purposes of its undertaking;

(i) to do anything for the purpose of advancing the skill of persons employed by the Corporation or the efficiency of the equipment of the Corporation or of the

manner in which that equipment is operated, including the provision by the Corporation, and the assistance by the Corporation to others for the provision of facilities or training, education and research;

(j) to enter into and carry out agreements with any person carrying on business as a carrier of passengers or goods providing for the carriage of passengers or goods on behalf of the Corporation by that other person at a thorough fare or freight;

(k) to provide facilities for the consignment, storage and delivery of goods;

(l) to enter into contracts for exhibition of posters and advertising boards on and in the vehicles and premises of the Corporation and also for advertisement on tickets and other forms issued by the Corporation to the public;

(m) with the prior approval of the State Government to do all other things to facilitate the proper carrying on of the business of the Corporation."

53. Section 45 of the Act as noted in the foregoing paragraphs empowers the Corporation to frame regulations with the previous sanction of the State Government and by notification in the Official Gazette. It, inter alia, includes the power to lay down conditions of appointment and service of its officers and employees.

54. It is evident from the scheme of the Act that the main object of the legislation is to provide for the incorporation and regulation of Road Transport Corporations in order to establish an adequate, economical and properly coordinated system of road transport services in the State or part of the State for which it is established having regard to the advantages offered to the public, trade and industry by the development of road transport.

55. In **Sita Ram Sharma and others vs. State of Rajasthan and others20** the Supreme Court has observed that the Road Transport Corporations Act, 1950 has been made by the Parliament under Item 43 of List-I. The relevant observation made in this regard in para 11 of the Law Report is reproduced below:

"11. The Road Transport Corporation Act, 1950 is made by Parliament under Item 43 of List I. Section 19(2)(c) enables the Road Transport Corporation :

. . . to prepare schemes for acquisition of, and to acquire, either by agreement or compulsorily in accordance with the law of acquisition for the time being in force in the State concerned and with such procedure as may be prescribed, whether absolutely or for any period, the whole or any part of any undertaking of any other person to the extent to which the activities thereof consist of the operation of road transport services in that State or in any extended area."

56. A Full Bench of Madhya Pradesh High Court in **M.P.S.R.T.C. Bairagarh, Bhopal vs. Ram Chandra & Others21** considered the issue as to whether Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 of the State Legislature would prevail over the Regulations framed by the Madhya Pradesh State Road Transport Corporation in exercise of its powers under Section 45 of the Road Transport Corporations Act, 1950 in respect of age of retirement of the employees. In that context, it was examined as to whether the Regulations would fall within the purview of Entries 43 and 44 of

the Union List or Entry 24 of the Concurrent List of the Seventh Schedule to the Constitution.

57. The Full Bench applied the test of 'pith and substance' in determining the legislative field under which the Act has been enacted. It has been held that the source of power of the Legislation are Entries 43 & 44 of the Union List. The contention that the Regulation being under Section 45(2)(c) of the Act which relates to conditions of service of employees, is referable to Entry 22 of the Concurrent List has been repelled holding that the Act, when examined as a whole, is referable to the exclusive powers reserved with the Parliament under the Union List (Entries 43 and 44) and even if it incidentally entrenches upon some subject in the Concurrent List, it is of no consequence. The relevant observations in this behalf are as follows:

"8. The Madhya Pradesh State Road Transport Corporation was established under Section 3 of the Act. In exercise of its powers under S. 45, it has made regulations which, inter alia, provide for conditions of appointment and service within the meaning of Cl. (c) of sub-section (2) of S. 45, Regulation 59 reads thus:—

"59. Employees of State Transport are liable to compulsory, retirement on the date of their completion of fifty eight years of age unless specifically permitted by the Corporation to continue in service for a specified period thereafter, but he must not be retained after the age of 60 years without the sanction of State Government."

9. Now, the last mentioned subject comes within the purview of Entry 24 in the concurrent list of the Seventh Schedule to the Constitution : "Welfare of labour, including conditions of work, provident funds, employer's liability, workmen's compensation invalidity and old-age pensions and maternity benefits". It must however, be said that the true subject-matter of the Corporation Act, in pith and substance, falls within the legislative field of Parliament, by which it has been enacted. Even if S. 45(2)(c) incidentally trenches upon the subject-matter in the concurrent list, the validity of' the Act is not affected, firstly because of the pith and substance doctrine, and secondly, because the subject-matter in the concurrent list is also within the legislative field of Parliament."

58. Applying the above propositions to the present case, we have reached the following results:

"(1) (a) The essential subject-matter of the Road Transport Corporations Act, 1950, falls within the purview of Entries 43 and 44 of the Union List. It is valid, being within the Parliament's Legislative competence."

59. The aforesaid Full Bench judgment was considered by a Larger Bench of five Judges in **MPSRTC vs. Heeralal Ochhelal and others.** The Five Judges Full Bench did not approve the view of Full Bench in Ramchandra's case to the effect that Standing Order-11 relating to termination would also take within its ambit retirement of an employee. However, the judgment in **Ramchadra's** case in so far as it held that the Act was referable to power of the Parliament under Entries 43 & 44 of the Union List, was approved with the clarification that Article 254 would not apply as the standing orders were framed by the State Legislature under Entry 24 of the Concurrent List. Article 254 would

apply only if there are two competing legislations, one made by the Parliament and another by the State Legislature pertaining to a subject in the Concurrent List, which was not the case under consideration.

60. The theory of pith and substance is now firmly grounded and is being applied without exception in interpreting legislative competence qua the Entries in various Lists under the Seventh Schedule to the Constitution.

61. Applying the doctrine of pith and substance, we are of the considered opinion that the Act is referable to List 1 Entry 43 and 44. The power to legislate in relation to 'regulation of the corporations' under the aforesaid Entries, includes within its umbrella the regulation of its workforce. The same is essential part of incorporation and making functional any corporation and in ensuring its proper functioning. Merely because Section 45(2)(c) invests the Corporation with power to make Regulations, inter alia, concerning the conditions of appointment and service of its employees, would not bring the legislation within the ambit of List-III Item No. 22 or 24, as is sought to be contended by counsel for the respondents. The enactment is with the avowed object of incorporation and regulation of Road Transport Corporations in different States in the country and the fountainhead of the Legislation are Entries Nos. 43 and 44 of List 1 and even if it incidently entrenches upon certain Entries in List-III, it would still be referable to the power of the Parliament under List-I.

62. The judgment of this Court **in Jageshwar Prasad Tiwari** (supra) and **Madan Pal Singh** (supra) takes the same view and which in our opinion is in accord with the interpretation made by us. The judgment of this court in **Abhai Raj Singh** (supra) although rightly holds that the expression "such Act" in Rule 5 of Chapter VIII of the Allahabad High Court Rules, would include a statutory regulation, but it proceeds on a wrong assumption that the Regulations were framed in pursuance of a State Legislation. Therefore, in our considered opinion, the ultimate conclusion arrived at in **Abhai Raj Singh** (supra) to the effect that special appeal would not be maintainable, does not lay down the correct law. The exclusion clause would not be applicable as the orders of officers/authority had been passed under a Central Legislation in respect of matters enumerated in the Union List and not the State List or the Concurrent List in the Seventh Schedule to the Constitution of India.

63. In line with the aforesaid legal position, a Division Bench of this Court in The **District Judge, Rampur vs. Vinod Kumar Verma22**, held the special appeal to be maintainable as it arose out of an order passed by learned Single Judge against order of officers/authority under the Service Rules framed under Article 309 of the Constitution of India and not under any Central or State Act. The relevant part is extracted below: -

"13. The submission of the first respondent is that since the order of the Administrative Judge was passed in the exercise of appellate jurisdiction and the order of the learned single Judge has been passed in a writ petition under Article 226 of the Constitution challenging such order, a Special Appeal will not be maintainable. Reference has also been made to a decision of the Full Bench of this Court in Sheet

Gupta v. State of U.P., 2010 (1) ADJ 1: (AIR 2010 All 46) (FB).

14. There is no merit in the submission. Under Rule 5 of Chapter VIII, a Special Appeal will not be maintainable against an order passed in the exercise of the jurisdiction conferred by Article 226 or 227 of the Constitution in respect of any judgment, order or award (i) of a Tribunal, Court or Statutory Arbitrator made or purported to be made in the exercise of jurisdiction under any Uttar Pradesh Act or Central Act with respect to any of the matter enumerated in the State List or the Concurrent List of the Seventh Schedule of the Constitution or (ii) of the Government officer or authority, made or purported to be made in the exercise of appellate or revisional jurisdiction under any such Act. In the present case, the order of the Administrative Judge was made under the provisions of Rule 7(2)(b) of the U.P. Subordinate Courts Staff (Punishment & Appeal) Rules, 1976. These Rules have been framed under Article 309 of the Constitution and not "under any Act". The expression "under any such Act" means under any Uttar Pradesh Act or under any Central Act with respect to a matter enumerated in the State List or the Concurrent List of the Seventh Schedule of the Constitution. Since the exercise of powers by the Administrative Judge was not under any such Act as specified but under the Rules which have been framed under Article 309 of the Constitution, the bar to the maintenance of the Special Appeal would not be applicable."

(emphasis supplied)

64. Another Division Bench of this Court in **Sharp Industries vs. Bank of Maharashtra23,** has held a special appeal arising out of an order of learned Single Judge in a writ petition filed against order of the Tribunal under Section 17 of the SARFAESI Act, 2002 (a Central Legislation), referable to the power under List 1 of the Seventh Schedule to the Constitution of India, to be maintainable. The relevant observations are as follows: -

13. From the authoritative pronouncement of law by the Supreme Court in the matter in issue it is no longer in doubt that the constitution of Debt Recovery Tribunal is in exercise of powers by the Parliament under entry 45 of list I i.e. 'Banking'. Similar view has been taken by this Court in Special Appeal No. 552 of 2013 (Ballia-Etawah Gramin Bank v. Dr. Ramji Properties & Hotels P. Ltd.), Special Appeal No. 814 of 2009 (U.P.S.I.D.C. v. Debts Recovery Appellate Tribunal, Allahabad), Special Appeal Defective No. 136 of 2019 (Pradeep Tekriwal v. Debt Recovery Appellate Tribunal) and Special Appeal Defective No. 735 of 2014 (Oriental Bank of Commerce v. Debts Recovery Appellate Tribunal).

14. Once the tribunal has been constituted in exercise of powers under the Union list, the exclusion clause curtailing entertainment of appeal arising out of orders passed by tribunals constituted under List II or List III would not apply. So far as the contrary opinion of the Division Bench in Special Appeal Defective No. 356 of 2022 (Tarun Kumar v. Indian Bank) is concerned, we find that the attention of the Court was not invited to the fact that Debts Recovery Appellate Tribunal has been constituted by the Parliament under the union list nor the Supreme Court judgment in the case of Delhi High Court Bar Association (supra) was placed before the Court and, therefore, it cannot be treated as a binding precedent. We, therefore, hold that the present

special appeal is maintainable and the objection of the respondents is turned down."

(emphasis supplied)

65. The Division Bench of this Court in **M/s Vajara Yojna Seed Farm10** holds the special appeal against order of learned Single Judge passed in exercise of jurisdiction conferred under Article 226 and 227 of the Constitution of India against (I) orders of Labour Court passed under any Uttar Pradesh Act, (ii) orders of Joint Director of Education under Statutory Regulations framed under U.P. Intermediate Act, 1921 and (iii) against orders of Election Tribunals under the U.P. Panchayat Raj Act, all State Legislations, to be not maintainable. Similarly, in **A.P. Jeet Singh (Constable)9**, once again the orders impugned in the writ petition was held to have been passed under U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 and therefore not maintainable. Same was the position before the Supreme Court in **Madhav Prasad Sharma11**. These cases are therefore of no help to the respondents.

66. Learned counsel for the respondent also tried to contend that while construing whether the exercise of power of appellate or revisional jurisdiction is with respect to any matter enumerated in the State List or the Concurrent List, it is the subject matter of the dispute in hand which has to be examined and not the legislation itself. However, we are unable to accept the contention. It is amply clear that the expression "with respect to" refers to source of State or Central Legislation and not the subject matter of dispute involved in a particular case. Such an interpretation not only goes against the express language of the provision itself, but also against the well established principle that while interpreting the source of power of the legislature, any incidental entrenchment on the power reserved for the other legislature, is of no consequence.

**Conclusion: -**

67. We, accordingly, answer the questions referred to us as follows: -

(a) Intra-court appeal under Chapter VIII Rule 5 of the High Court Rules against a judgment of Single Judge in a writ proceeding under Article 226 of the Constitution of India, preferred against an order passed by an officer or authority exercising appellate or revisional power under U.P. State Road Transport Corporation Employees (Other than Officers) Service Regulations, 1981, is maintainable.

(b) The Division Bench decisions in **Jageshwar Prasad Tiwari vs. UPSRTC and Others and Madan Pal Singh vs. State of U.P. and Others** lay down the correct law while the judgment of this court in **UPSRTC through RM vs. Abhai Raj Singh and 2** others does not and is overruled to the extent it holds the special appeal to be not maintainable.

68. Let the papers of the instant appeal, be placed before appropriate Bench, along with our opinion, for disposal.

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**(2024) 7 ILRA 29**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 08.07.2024**

**BEFORE**

**THE HON'BLE SALIL KUMAR RAI, J.**

Writ A No. 91 of 2022

**Aditya Kumar Mishra ...Petitioner**
**Versus**
**State of U.P. Road Transport Corporation, Hqrs. Tehri Kothi ...Respondent**

**Counsel for the Petitioner:**
Mohd. Ali

**Counsel for the Respondents:**
Ratnesh Chandra

**A. Service Law – UP St. Road Transport Employees (OtherThan Officers) Service Regulation, 1981 – Reg. 84 – Financial Handbook – Vol. 2, Rule 54 & 54-A – Disciplinary proceeding – Punishment – Nine passengers were found without tickets – Charge against conductor was found proved and removal order was passed – But, the Revisional authority punished the conductor by withholding the four annual increment for dereliction of duty by setting aside the removal order as it was found disproportionate – Validity challenged – No charge of negligence or dereliction of duty was there in charge-sheet – Defence that when nine nine passengers refused to pay their fare, the petitioner had asked the driver to station the bus but on the insistence of other passengers, the driver of the vehicle continued to drive, was found proved in revision – Effect – Held, the disciplinary authority can not travel beyond the charge-sheet and any punishment imposed for a charge which was not the subject matter of the charge-sheet would be illegal. In any case, the petitioner cannot be held liable even for dereliction of duty once the revisional authority accepted the defense of the petitioner. (Para 9 and 20)**

**B. Constitution of India,1950 – Article 226 – Writ – Judicial review – Disciplinary proceeding – Scope of interference – Held, under Article 226 of the Constitution, the High Court is not a court of appeal over the decision of the disciplinary authority and does not either re-appreciate the evidence submitted against the employee nor does the High Court records an independent finding on evidence – However, under Article 226 the High Court can interfere where the findings of the disciplinary authority are wholly arbitrary and capricious or are based on no evidence or where the findings are such which no reasonable man can ever arrive at. (Para 12)**

**Writ petition allowed.** (E-1)

**List of Cases cited:**

1. Nirmala J. Jhala Vs St. of Guj. & anr.; 2013 (31) LCD 762

2. Pradeep Vs Manganese Ore (INDIA) Limited & ors.; 2022 (3) SCC 683

3. Deepali Gundu Surwase Vs Krinti Junior Adhyapak Mahavidyalaya (D.Ed.) & ors.; 2013 (10) SCC 324

4. M.P. St. Agro Industries Development Cooperation Ltd. & anr. Vs Jahan Khan; 2007 (10) SCC 88

5. Chandra Kumar Mishra Vs St. of U.P. & ors.; 2022 (40) LCD 3001.9

6. U.O.I.& ors. Vs P. Gunasekaran; 2015 (2) SCC 610

7. Uttar Pradesh St. Road Transport Corporation & anr. Vs Gopal Shukla & anr.; 2015 (17) SCC 603

8. St. of A.P. Vs S. Sree Rama Rao; AIR (1963) SC 1723

9. St. of A.P. Vs Chitra Venkata Rao; (1975) 2 SCC 557

10. St. of Haryana Vs Rattan Singh; (1977) 2 SCC 491

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. Heard Shri Mohd. Ali, counsel for the petitioner and Shri Ratnesh Chandra, Advocate, representing the Uttar Pradesh State Road Transport, Corporation.

2. The petitioner was employed as conductor with Uttar Pradesh State Road Transport, Corporation (hereinafter referred

to as, 'Corporation'). On 1.11.2013, the petitioner was on duty in a 32 Seater Bus No. UP 57 T 2765 plying on the Gorakhpur-Padrauna route. The bus was inspected in mid route by a team led by the Transport Superintendent, Gorakhpur Region. The inspection team found that nine passengers in the bus were travelling without ticket.

3. On 2.11.2013, the inspection team submitted a report to the Regional Manager of the Corporation stating that, on inspection, nine passengers in the bus were found to be without ticket even though they had paid the fare. In his report, the Regional Manager noted that the nine passengers had deposed orally but had refused to give any written statement. It is relevant to note that the report does not disclose the contents of the oral statements of the nine passengers. The report also does not refer to any evidence in support of the finding that the petitioner had charged fares from the nine passengers. By order dated 19.11.2013 disciplinary proceedings were instituted against the petitioner and a charge-sheet was served on him. The charge against the petitioner was that he had acted against the Uttar Pradesh State Road Transport Employees (Other Than Officers) Service Regulation, 1981 (hereinafter referred to as, 'Regulation, 1981'), caused financial loss to the Corporation and indulged in corruption by not issuing tickets to the nine passengers.

4. In his reply, the petitioner denied the charges levelled against him. The defense of the petitioner was that the nine passengers were students and had refused to pay their fare, therefore, tickets were not issued to them. The petitioner claimed that when the aforesaid nine passengers refused to pay their fare, the petitioner asked the driver to halt the bus but the driver did not halt the bus because of opposition by other passengers.

5. During the enquiry proceedings, the Transport Superintendent and two Assistant Transport Inspectors, who were part of the inspection team, appeared as witness of the Corporation to prove the report submitted by the Transport Superintendent. In his defense the petitioner produced, as witness, two passengers who were travelling in the bus on 1.11.2013. The Inquiry Officer submitted his report on 8.1.2014. In his report the Inquiry Officer held the petitioner guilty of the charges levelled against him. A show cause notice dated 9.1.2023 was served on the petitioner to show cause as to why he should not be removed from service.

6. In his reply to the show cause notice, the petitioner reiterated his defense as submitted before the Inquiry Officer. The defense of the petitioner was not accepted by the Regional Manager, who vide his order dated 7.10.2014 awarded the punishment of 'removal from service' to the petitioner. The petitioner filed appeal before the Chief Manager (Finance & Account), which was also rejected vide order dated 16.11.2015. Against the orders dated 7.10.2014 and 16.11.2015, the petitioner filed Revision before the Chairman of the Corporation, which was partly allowed by order dated 31.8.2021. In his order dated 31.8.2021, the Chairman accepted the defense of the petitioner and set aside the orders dated 7.10.2014 and 16.11.2015. In his order dated 31.8.2021, the Chairman held that the nine passengers had not paid their fare despite the petitioner having demanded it from them and when the passengers refused to pay the fare, the

petitioner asked the driver to halt the bus, but the driver continued to drive the vehicle. The Chairman held that the inspection team was under a duty to recover the fare from the nine passengers. However, the Chairman also held that the petitioner was responsible for letting the nine passengers to travel without ticket but the punishment of 'removal from service' awarded to the petitioner was disproportionate to his conduct. By order dated 31.8.2021, the petitioner has been reinstated in service without any financial benefits for the period he was not in service and four annual increments of the petitioner have also been withheld.

7. The present petition has been filed challenging the order dated 31.8.2021 passed by the Chairman so far as it witholds four annual increments of the petitioner and also denies financial benefits to the petitioner for the period he was not in service.

8. It was argued by the counsel for the petitioner that the charges levelled against the petitioner were not established in the departmental proceedings and there was no evidence that the petitioner had purposely not issued tickets to the nine passengers or the nine passengers had paid their fare. It was argued that the explanation of the petitioner that nine passengers were students and had refused to pay the fare was proved by the witnesses of the petitioner. It was argued that the order passed by the Chairman holding the petitioner responsible for letting nine passengers to travel without ticket is also without any evidence and has been recorded without considering the evidence submitted by the petitioner. It was argued that the driver of the Bus was a material witness to prove the charges against the petitioner but was not produced by the department. It was further argued by the counsel for the petitioner that withholding of financial benefits even after reinstatement of the employee is not included in Regulation 63 of the Regulations, 1989 which prescribes the penalties that can be awarded to a delinquent, therefore, the impugned order passed by the Chairman refusing financial benefits to the petitioner for the period he was not in service is without jurisdiction. It was argued that there is no finding by the Chairman that the petitioner was gainfully employed while he was out of service and, therefore, pay and other allowances for the period the petitioner was out of service could not have been denied to him. It was argued that for the aforesaid reasons, the impugned order passed by the Chairman so far as it denies financial benefits to the petitioner and so far as it withholds four annual increments of the petitioner is without jurisdiction. In support of his contention, the counsel for the petitioner has relied on the following judgements of the Supreme Court and of this Court :-

**(a) Nirmala J. Jhala Vs. State of Gujarat & Another, 2013 (31) LCD 762;**

**(b) Pradeep Vs. Manganese Ore (INDIA) Limited & Others, 2022 (3) SCC 683;**

**(c) Deepali Gundu Surwase Vs. Krinti Junior Adhyapak Mahavidyalaya (D.Ed.) & Others, 2013 (10) SCC 324;**

**(d) M.P. State Agro Industries Development Cooperation Ltd. & Another Vs. Jahan Khan, 2007 (10) SCC 88; and**

**(e) Chandra Kumar Mishra Vs. State of U.P. & Others, 2022 (40) LCD 3001.**

9. Rebutting the argument of the counsel for the petitioner, the counsel for the respondents, i.e., the Corporation and its officers, has argued that the driver was not a material witness to prove the charges against the petitioner and it was the petitioner who was required to produce the driver as witness to prove his defense. It was argued that the petitioner did not inform the inspection team that tickets were not issued to the nine passengers because they had refused to pay their fare. It was argued by the counsel for the respondent that the petitioner as Conductor had committed breach of trust and in matters of corruption no mercy can be shown. It was argued by the counsel for the respondents that the findings recorded by the Inquiry Officer are based on evidence on record and the punishment awarded to the petitioner was not disproportionate to the charges, therefore the findings of the Inquiry Officer and the punishment awarded to the petitioner were not susceptible to interference under Article 226 of the Constitution of India.

10. Replying to the jurisdictional issue raised by the petitioner, the counsel for the respondents has argued that the petitioner has been held responsible for letting nine passengers to travel without ticket and punishment has been awarded to him, therefore, status quo has not been restored and thus there is no jurisdictional error in the order passed by the revisional authority refusing financial benefits to the petitioner for the period the petitioner was out of service and the judgement of the Supreme Court in **Deepali (supra)** is not applicable in the present case. It was argued that for the aforesaid reasons, the petition lacks merit and is liable to be dismissed. In support of his contention, the counsel for the respondent has relied on the judgements of the Supreme Court reported in **Union of India and Others Vs. P. Gunasekaran, 2015 (2) SCC 610 and Uttar Pradesh State Road Transport Corporation & Another Vs. Gopal Shukla & Another, 2015 (17) SCC 603.**

11. I have considered the submissions of the counsel for the parties.

12. The law regarding judicial review of disciplinary proceedings is well settled. Disciplinary proceedings are quasi judicial proceedings and the Inquiry Officer performs a quasi judicial function. Under Article 226 of the Constitution, the High Court is not a court of appeal over the decision of the disciplinary authority and does not either reappreciate the evidence submitted against the employee nor does the High Court records an independent finding on evidence. However, under Article 226 the High Court can interfere where the findings of the disciplinary authority are wholly arbitrary and capricious or are based on no evidence or where the findings are such which no reasonable man can ever arrive at. The findings in the disciplinary proceedings as well as the punishment awarded to the delinquent should also not be influenced by irrelevant considerations. The Inquiry Officer and the disciplinary authority can not record findings or pass orders of punishment on mere suspicion. The Inquiry Officer and the disciplinary authority can also not travel beyond the charges and any punishment imposed on the basis of a charge which was not the subject matter of the charge-sheet would be illegal.

13. It is also well settled that the punishment awarded to the delinquent employee should be proportionate to the gravity of his alleged misconduct and in

cases of corruption, there can be no punishment other than dismissal. It has been held by the courts that sympathy in cases of corruption is uncalled for and opposed to public interest (reference may be made to the judgement of the Supreme Court in **Gopal Shukla (supra).** However, merely because the employee is charged with an act of corruption can not be a reason for the Inquiry Officer or the disciplinary authority to deviate from the procedure prescribed in the service rules or from the principles of natural justice. In cases of extreme punishment like dismissal, it is more necessary that the findings against the employee should not be recorded on mere probabilities.

14. At this stage it would be apt to refer to certain judgements of the Supreme Court which expound the law relating to judicial review of departmental enquiries.

15. It was observed by the Supreme Court in **State of A.P. Vs. S. Sree Rama Rao, AIR (1963) SC 1723** that :

"7. ... The High Court is not constituted in a proceeding under Article 226 of the Constitution as a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. **The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds**. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution."

(Emphasis added)

16. In **State of A.P. Vs. Chitra Venkata Rao, (1975) 2 SCC 557**, the Supreme Court observed as follows :-

"The jurisdiction to issue a writ of certiorari under Article 226 is a supervisory jurisdiction. The Court exercises it not as an appellate court. The findings of fact reached by an inferior court or tribunal as a result of the appreciation of evidence are not reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. **In**

**regard to a finding of fact recorded by a tribunal, a writ can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Again if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari.** A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal."

(Emphasis added)

17. The Supreme Court observed in **State of Haryana v. Rattan Singh, (1977) 2 SCC 491** that :-

"4. ...in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case-law and other authorities by counsel on both sides. **The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fair play is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good."**

(Emphasis added)

18. At this stage, it would be relevant to rehearse the facts of the present case.

19. The inspection team found that nine passengers were travelling without ticket. The inspection report noted that the nine passengers had paid their fare to the petitioner, i.e., the conductor of the bus. The inspection report also noted that the nine passengers had orally deposed before the inspection team, but had refused to give their written statement. It is noted that the inspection report does not attribute to the passengers the recital in the report that the petitioner had charged fare from them. The inspection report does not state as to how the inspection team came to know that the passengers had paid their fare. The charge against the petitioner was that he indulged in corruption by not issuing tickets to the nine passengers even after having received fare from them. In the inquiry proceedings, the Traffic Superintendent who led the inspection team, appeared as a witness and in his evidence, the Traffic Superintendent only stated that nine passengers were found to be travelling without ticket. In his evidence, the Traffic Superintendent again did not attribute to the passengers any statement implicating the petitioner, i.e., the petitioner had charged fare from the passengers. It may be noted that none of the said passengers were produced as witness in the case. The enquiry report submitted

against the petitioner only notes that the petitioner had the duty to ensure that the bus moved only after the passengers had paid thier fare and tickets had been issued to them and the failure of the petitioner to act accordingly shows bad intention of the petitioner. There is no finding in the enquiry report that the petitioner had charged fare from the nine passengers. The enquiry report, the order dated 7.10.2014 passed by the disciplinary authority removing the petitioner from service and the order dated 16.11.2015 passed by the appellate authority do not refer to any evidence which even prima facie establishes that the petitioner had taken the fare of the bus from the nine passengers. The mere fact that the passengers were travelling without ticket would not in itself lead to the conclusion that the nine passengers had paid the fare and the petitioner had misappropriated the amount. Apparently, there was no evidence on record that the nine passengers had paid their fare to the petitioner and the petitioner had misappropriated the amount. The order passed by the departmental authorities removing the petitioner from service and also dismissing his appeal are based on findings which are without any evidence.

20. The order dated 31.8.2021 passed by the revisional authority, even though it exonerates the petitioner of the charges levelled in the charge-sheet, holds the petitioner responsible for letting nine passengers to travel without ticket. In his impugned order, the revisional authority has accepted the plea of the petitioner that when the nine passengers had refused to pay their fare the petitioner had asked the driver of the bus to station the bus but the driver continued to drive because of protest by other passengers. The opinion of the revisional authority that the petitioner was responsible for letting nine passengers to travel without ticket is contrary to his own findings that when the nine passengers refused to pay their fare the petitioner had asked the driver to station the bus but on the insistence of other passengers, the driver of the vehicle continued to drive and did not halt the bus. Apart from the aforesaid, the findings of the revisional authority can, at the most, lead only to a charge of dereliction of duty by the petitioner. In the charge-sheet the petitioner was not charged with negligence or dereliction of duty and as noted earlier, the disciplinary authority can not travel beyond the charge-sheet and any punishment imposed for a charge which was not the subject matter of the charge-sheet would be illegal. In any case, the petitioner can not be held liable even for dereliction of duty once the revisional authority accepted the defense of the petitioner that when the nine passengers did not pay their fare, the petitioner asked the driver to station the bus but the driver did not stop the bus because other passengers insisted that the bus be not stationed. Further, no reasons have been given in the order dated 31.8.2021 for holding against the petitioner. Evidently, the order 31.8.2021 passed by the revisional authority so far as it holds the petitioner responsible for letting nine passengers to travel without ticket and consequently imposes punishment of withholding four increments of the petitioner is a non-speaking order, without any evidence and is also perverse and to the said extent the order is liable to be quashed.

21. It has been argued by the counsel for the petitioner that the order dated 31.8.2021 passed by the revisional authority so far as it denies financial benefits to the petitioner for the period he was out of service is without jurisdiction

because under Regulations 63 and 64 of Regulations, 1981 the departmental authorities do not have the jurisdiction to award any such punishment. The counsel for the petitioner has argued that, in any case, in view of the judgement of the Supreme Court **in Deepali Gundu Surwase (supra)** the petitioner was entitled to full back-wages on being reinstated in service.

22. For reasons stated subsequently the order dated 31.8.2021 so far as it denies financial benefits to the petitioner for the period he was out of service is contrary to law and is liable to be quashed.

23. Regulations, 1981 do not contain any provision regarding payment of back-wages to an employee for the period he was out of service if the order removing or dismissing him from service is set aside in appeal or revision and the employee is reinstated in service. However, Regulation 84 of the Regulations 1981 provides as follows :-

**"84. Regulation of other matters**.-Subject to the orders of the Board, in regard to maters not covered by these Regulations or any other Regulations or orders of the Boards issued from time to time, **decision shall be taken in conformity with the Rules or Orders applicable to the State Government employees** or issued under the authority of the State Government, as the case may be."

(Emphasis added)

24. By virtue of Regulation 84 of the Regulations, 1981 any decision regarding pay and allowances payable to the petitioner for the period he was out of service had to be taken in accordance with the rules and orders applicable to the State Government Employees or issued under the authority of the State Government, as the case may be. The rules applicable to State Government employees, which regulate the powers of the appropriate authority regarding payment of back-wages to an employee, for the period the employee was out of service if the order of dismissal or removal is set aside and the employee is reinstated in service, are provided in Rule 54 and Rule 54-A of Financial Handbook Volume 2 (Parts 2 to 4). Rule 54 and Rule 54-A of the Financial Handbook are reproduced below :-

**Rule 54**

"54. (1) When a Government servant who has been dismissed, removed or compulsorily retired is reinstated as a result of appeal or review or would have been so reinstated but for his retirement on superannuation while under suspension or not, the authority competent to order reinstatement shall consider and make a specific order—

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal, or compulsory retirement, as the case be; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) **Where the authority competent to order reinstatement is of opinion that the Government servant who had been dismissed, removed or compulsorily retired, has been fully exonerated, the Government servant shall, subject to the provisions of sub-rule (6), be paid the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or**

**suspended prior to such dismissal, removal or compulsory retired, as the case may be:**

Provided that where such authority is of opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing, that the Government servant shall subject to the provisions of sub-rule (7), be paid for the period of such delay, only such amount (not being the whole) of such pay and allowances as it may determine.

(3) **In a case falling under sub-rule (2), the period of absence from duty including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be, shall be treated as a period spent on duty for all purposes.**

[(4) In cases other than those covered by sub-rule (2) [including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of non-compliance with the requirements of clause (1) or clause (2) of article 311 of the Constitution and no further inquiry is proposed to be held], the Government servant shall, subject to the provision of sub-rules (6) and (7) be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection, within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.]

(5) In a case falling under sub-rule (4), the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if the Government servant so desires such authority may direct that the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement as the case may be, shall be converted into leave of any kind due and admissible to the Government servant.

Note-The order of the competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary for the grant of-

(a) extraordinary leave in excess of three months in the case of temporary Government servant; and

(b) leave of any kind in excess of five years in the case of permanent Government servant.

(6) The payment of allowances under sub-rule (2) of sub-rule (4) shall be subject to all other conditions under which such allowances are admissible.

(7) The amount determined under the proviso to sub-rule (2) or under sub-rule (4), shall not be less than the subsistence

allowance and other allowance admissible under Rule 53.

(8) Any payment made under this rule to Government servant on his reinstatement shall be subject to adjustment of the amount, if any, earned by him through an employment during the period between the date of his removal, dismissal or compulsory retirement, as the case may be, and the date of reinstatement. Where the emoluments admissible under this rule are equal to or less than the amounts earned during the employment elsewhere, nothing shall be paid to the Government servant.

Note—Where the Government servant does not report for duty within reasonable time after the issue of the orders of the reinstatement after dismissal, removal or compulsory retirement, no pay and allowances will be paid to him for such period till he actually takes over charge."

(Emphasis added)

**Rule 54-A**

"54-A (1) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by a court of Law and such Government servant is reinstated without holding any further inquiry, the period of absence from duty shall be regularised and the Government servant shall be paid pay and allowances in accordance with the provisions of sub-rule (2) or (3) subject to the directions, if any, of the Court.

[(2) (i) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by the court solely on the ground of non-compliance with the requirements of clause (1) or clause (2) of Article 311 of the Constitution, and where he is not exonerated on merits, and no further inquiry is proposed to be held, the Government servant shall subject to the provisions of sub-rule (7) of Rule 54, be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and considering the representation, if any submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.

(ii) The period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be, and date of judgment of the Court shall be regularised in accordance with the provisions contained in sub-rule (5) of Rule 54.]

(3) **If the dismissal, removal or compulsory retirement of a Government servant is set aside by the Court on the merits of the case, the period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal, or compulsory retirement, as the case may be, and the date of reinstatement shall be treated as duty for all purposes and he shall be paid the full pay and allowances for the period, to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be.**

(4) The payment of allowances under sub-rule (2) or sub-rule (3) shall be

subject to all other conditions under which such allowances are admissible.

(5) Any payment made under this rule to a Government servant on his reinstatement shall be subject to adjustment of the amount, if any, earned by him through an employment during the period between the date of dismissal, removal or compulsory retirement and the date of reinstatement. Where the emoluments under this rule are equal to or less than those earned during the employment elsewhere, nothing shall be paid to the Government servant.

Note.—Where the Government servant does not report for duty within reasonable time after the issue of the orders of reinstatement after the dismissal, removal or compulsory retirement, no pay and allowances will be paid to him for such period till he actually takes over charge."

(Emphasis added)

25. A reading of Rules 54(2), 54(4), 54-A(2) and 54-A(3) shows that, in Uttar Pradesh, the principle 'no work-no pay' is not applicable while considering the entitlement of State Government employees for pay and allowances for the period they were not in service if the order dismissing, removing or compulsory retiring them from service is set aside either in appeal or review or by a court and the government servant is reinstated in service and no further inquiry is proposed to be held. Rules 54 and 54-A provide that if the government servant is fully ***exonerated*** of the charges or the order dismissing or removing him from service is set aside by a court on the ***merits*** of the case, the government servant shall be entitled to full pay and allowances that he would have been entitled had he not been removed or dismissed from service and the period of absence from service shall be treated as period spent on duty for all purposes. However, where the government servant is not exonerated on merits but is still reinstated in service or the order dismissing or removing a government servant is set aside either in appeal or review or by a court solely on the ground of non-compliance with the requirements of Article 311(1) and (2) of the Constitution and no further enquiry is proposed to be held, the government servant shall not be entitled to full pay and allowances but will be entitled to be paid such amount (not being the whole) of the pay and allowances as the competent authority may decide after giving the employee notice of the quantum proposed and after considering his representation but it shall not be less than the subsistence allowance and other allowances admissible under Rule 53. It is apparent that, on his reinstatement after the order of dismissal or removal is set aside, a government servant can not be denied his entire pay and allowances for the period he was out of service and which he would have been entitled to had he not been dismissed or removed from service. The amount which the government servant would be entitled to get would depend on whether the case of the government servant is covered by Rule 54(2) and Rule 54-A (3) or is covered by Rule 54 (4) and Rule 54-A (2)(i).

26. The only circumstance in which the government servant can be denied his pay and allowances or part of the same for the period he was out of service is specified in Rule 54 (8) and Rule 54 -A (5). The rules provide that any payment made to a government servant on his reinstatement shall be subject to adjustment of the amount earned by the employee through an employment during the period he was out of service and

nothing shall be paid to the government servant where the emoluments payable to him are equal to or less than those earned by him during employment elsewhere.

27. In view of Regulation 84 of Regulations, 1981 the claim of the petitioner and the validity of the revisional order dated 31.8.2021 denying financial benefits to the petitioner for the period he was out of service is to be decided in accordance with Rules 54 and 54-A.

28. A reading of the order dated 31.8.2021 passed by the revisional authority shows that the revisional authority has accepted the defense of the petitioner and has fully exonerated the petitioner from the charges levelled against him in the charge-sheet. The revisional authority has held the petitioner responsible for letting nine passengers to travel in the bus without ticket, but as noted earlier the opinion and the findings of the revisional authority are without any evidence and perverse and also beyond the charges levelled against the petitioner in the charge-sheet. The order dated 31.8.2021 so far as it withholds four increment of the petitioner has been held to be liable to be quashed. The petitioner stands exonerated on merits as envisaged in Rule 54(2) and Rule 54-A(3). But as the order removing the petitioner from service has been set aside by the revisional authority vide its order dated 31.8.2021, the case of the petitioner is covered under Rule 54(2).

29. There is nothing on record to show that any delay in termination of disciplinary proceedings instituted against the petitioner can be attributed to the petitioner. Thus, the Proviso to Rule 54(2) is not applicable in the present case. There is no finding by any authority that during the period the petitioner was out of service, he was earning through any employment elsewhere. In the circumstances, under Rule 54(2) of Financial Handbook Volume 2 (Parts 2 to 4) read with Rule 84 of Regulations 1981 the petitioner was entitled to full pay and allowances for the period he was out of service as a consequence of the removal order dated 7.10.2024 and his absence from service had to be treated as a period spent on duty for all purposes.

30. For the aforesaid reasons, the order dated 31.8.2021 passed by the revisional authority denying financial benefits to the petitioner for the period he was not in service as a consequence of the removal order, is contrary to law and also without jurisdiction.

31. The judicial precedents cited by both sides regarding the claim of the petitioner for full pay and allowances for the period he was out of service are not being discussed as the case has been decided on the basis of statutory rules which were not in issue in the precedents cited by the counsel for the parties.

32. Consequently, the order dated 31.8.2021 passed by the Chairman of the Corporation, i.e., the revisional authority only so far as it withholds four increments of the petitioner and denies financial benefits to the petitioner for the period he was out of service as a consequence of the removal order is liable to be quashed and is hereby quashed.

33. The respondents are directed to pay to the petitioner his full pay/salary and other allowances for the period he was out of service as a consequence of the order dated 7.10.2014 and which he would have

been entitled to get had he not been removed from service, alongwith 6% simple interest per annum. The aforesaid amount shall be paid to the petitioner within three months from today.

34. With the aforesaid observations and direction, the petition is **allowed.**

35. Let this order be communicated to the Chairman, Uttar Pradesh State Road Transport Corporation, Head Quarters Tehri Kothi, Lucknow and the Regional Manager, Uttar Pradesh State Road Transport Corporation, Azamgarh, Region Azamgarh by the Registrar (Compliance).

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**(2024) 7 ILRA 42**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 04.07.2024**

**BEFORE**

**THE HON'BLE MANISH MATHUR, J.**

Writ A No. 341 of 2023

**Ram Niwas Singh & Ors. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Girish Chandra Verma, Manvendra Singh

**Counsel for the Respondents:**
C.S.C., Ajay Kumar

**A. Service Law – Arrears of Salary – Post of Assistant Teacher and Class IV posts – Appointment accorded financial approval, later on salary was stopped on 09.10.1998 and financial approval was cancelled – Subsequently St. Govt. found the initial appointment valid vide order dated 30.06.2021 – Whether order dated 30.06.2021 will apply retrospectively or prospectively – Held, order dated 30.06.2021 would relate back to the date when the initial order dated 09.10.1998 was passed stopping salary payment to petitioners – Mere fact that the St. has omitted to pass any orders with regard to arrears of salary to petitioners would be irrelevant in view of the aforesaid fact, since the dispute itself related to the initial appointment of petitioners – High Court directed the respondent to implement the order dated 30.06.2021 upon the petitioners with retrospective effect from 09.10.1998. (Para 13 and 18)**
**B. Service Jurisprudence – Doctrine of relation back – Meaning and applicability – *Sweety Bhalla's case* relied upon – The Black's Law Dictionary defines 'relation back' as : "The doctrine an act done at a later time is, under certain circumstances, treated as though it occurred at an earlier time – The Supreme Court applied the Doctrine of Relation Back in service Jurisprudence by holding that the findings of a disciplinary enquiry exonerating an Officer would have to be given effect to as they relate back to the date on which the charges are framed – Held, order dated 30.06.2021 would relate back to the date when the initial order dated 09.10.1998 was passed stopping salary payment to petitioners. (Para 13 and 16)**

**Writ petition allowed.** (E-1)

<u>**List of Cases cited**</u>:

1. Man Singh Vs St. of U.P. through Secretary & others; 2022 SCC Online SC 726

2. Delhi Jal Board Vs Mahinder Singh; (2000) 7 SCC 210

3. Sweety Bhalla Vs Industrial Financial Corp. of India Ltd.; 2019 SCC OnLine Del 6409

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

1. Heard Mr. Girish Chandra Verma, learned counsel for petitioners and learned State Counsel appearing on behalf of

opposite parties 1 to 5. No-one has put in appearance on behalf of opposite party no.6, who even otherwise is a proforma party.

2. Petition has been filed seeking implementation of order dated 30.06.2021 issued by the State Government pertaining to payment of salary to petitioners. Further prayer for arrears of salary on the respective posts with effect from March 1998 up to June 2021 or till the date of superannuation has also been sought.

3. It has been submitted that earlier petitioners had been appointed as Assistant Teachers and on Class IV posts respectively in the institution concerned whereafter financial approval was granted and they were being paid salary in lieu thereof. It is submitted that the institution in question is a recognized and aided Junior High School.It has also been submitted that subsequently, vide order dated 09.10.1998 salary payment was stopped and vide order dated 15.07.1999, the earlier approval granted to petitioners was cancelled leading to filing of various writ petitions, leading petition being WRIT - A No. - 37807 of 1999 (Smt. Rajmuni Devi & others v. Director of Education, Allahabad and others). Details of all the petitions have been indicated in the order dated 30.06.2021. The aforesaid petitions were thereafter disposed of by means of judgment and order dated 02.11.2016. The said judgment clearly indicates the submission that the institution in question was brought under grant-in-aid in year 1978 and Teachers and other employees were paid salary through State Funds with effect from 01.07.1984 whereafter a formal order of approval was also granted. Intermittently, certain disputes arose but payment of salary continued to employees of the institution whereafter order dated 15.07.1999 was passed. This Court vide its judgment and order dated 02.11.2016 thereafter remitted the matter for a decision to the Director of Education to pass appropriate orders for purposes of satisfaction of grievance of the employees and their entitlement as per the U.P. Recognized Basic Schools (Junior High Schools) (Recruitment & Condition of Service of Teachers) Rules, 1978.

4. It is in pursuance of this direction that order dated 30.06.2021 has been passed by the State Government.

5. Learned counsel for petitioners submits that by means of aforesaid order, the State Government has found the petitioners of the present writ petition qualified and eligible for being granted salary through State Exchequer after noticing the fact that their appointments were valid. It is submitted that however only prospective application of aforesaid order has been made and salary payment to petitioners with effect from March 1998 has been withheld.

6. It is submitted that the direction issued by this Court and subsequent finding recorded by the State Government would be applicable from the date when such salary was withheld particularly in view of fact that the initial appointment of petitioners was found to be valid and as per the rules.

7. Learned counsel for petitioners has placed reliance on following judgments:-

(i) decision of Hon'ble the Supreme Court in Man Singh v. the

State of U.P. through Secretary & others reported in 2022 SCC Online SC 726.

(ii) decision of Hon'ble the Supreme Court in Delhi Jal Board v. Mahinder Singh, reported in (2000) 7 SCC 210;

(iii) decision of Delhi High Court in Sweety Bhalla v. Industrial Financial Corporation of India Ltd., reported in 2019 SCC OnLine Del 6409

8. Learned State Counsel on the basis of counter affidavit has refuted the submissions advanced by learned counsel for petitioner with the submission that since there is no direction of the State Government in order dated 30.06.2021 for its retrospective applicability and for payment of arrears, there is no question of grant of salary or arrears with effect from March 1998 and the order dated 30.06.2021 would in fact be applicable prospectively and in pursuance thereof, salary payment has already been made.

9. Upon consideration of submissions advanced by learned counsel for the parties and perusal of material on record, it appears from judgment and order of this Court dated 02.11.2016 and the consequent order dated 30.06.2021 passed by the State Government that admittedly the institution in question was a recognized aided Junior High School which was brought under grant in aid and salary payment to employees including petitioners was being made through State Exchequer till passing of orders dated 09.10.1998 and 15.07.1999. The said order was thereafter challenged and directions were issued by this Court as indicated herein above. The dispute clearly pertained to validity of appointment of petitioners and their right to be granted salary through the State Exchequer. The dispute therefore clearly arose due to passing of orders dated 09.10.1998 and 15.07.1999.

10. A perusal of order dated 30.06.2021 passed by the State Government makes it evident that after consideration of all the material on record, the State Government has clearly found the petitioners? initial appointment to be valid and in consonance with the relevant Rules. The order also stipulates that the petitioners are eligible for salaries through State Exchequer while also indicating that they had already been paid salaries for a period of nine years from 1989 till 1998. Directions were thereafter issued for payment of salaries from State Exchequer.

11. The only dispute required to be adjudicated upon in the present writ petition is with regard to whether order dated 30.06.2021 would have any retrospective application or would be applicable only prospectively.

12. With regard to aforesaid dispute, it is quite evident as narrated herein above that petitioners were initially appointed in the School in question on various dates from 1975 onward. As per order dated 30.06.2021 itself, it is indicated that they were paid salaries from the State Exchequer from 1989 till 1998 whereafter it was stopped in year 1998 and subsequently vide order dated 15.07.1999. The said order was challenged before this Court in year 1999 itself with such petition being decided vide judgment and order dated 02.11.2016 and in pursuance thereof the order dated 30.06.2021 has been passed finding petitioners eligible and qualified in terms of the rules ever since the date of their initial appointment. Clearly, the

dispute pertaining to petitioners? eligibility, qualification and entitlement for being paid salary through State Exchequer relates back to orders dated 09.10.1998 and 15.07.1999 whereby salary through the State Exchequer was stopped. It is thus apparent that the dispute has continued ever since 09.10.1998 continuously without any break and therefore in the considered opinion of this Court, the dispute would relate back to the date when the initial order dated 09.10.1998 was passed.

13. Vide order dated 30.06.2021 as well, it is the initial appointment of petitioners which has been held to be valid whereafter the State Government itself has found petitioners to be eligible for payment of salary from the State Exchequer. In such circumstances, in the considered opinion of this Court, the order dated 30.06.2021 would relate back to the date when the initial order dated 09.10.1998 was passed stopping salary payment to petitioners. The mere fact that the State has omitted to pass any orders with regard to arrears of salary to petitioners would be irrelevant in view of the aforesaid fact, since the dispute itself related to the initial appointment of petitioners.

14. Hon?ble the Supreme Court in **Man Singh** (supra) has held that even if appointment is irregular and persons have discharged duties in lieu thereof, they have to be paid their salaries since the State cannot take work from any employee without payment of any salary. The aforesaid judgment is squarely applicable in the present facts and circumstances of the case since admittedly petitioners have continued in service ever since the date of initial appointment and have now as well been found to be eligible for salary payment through State Exchequer.

15. Considering aforesaid circumstances, it is evident that order dated 30.06.2021 would be covered by the doctrine of relation back as has been explained by Hon'ble the Supreme Court in **Delhi Jal Board (supra)** in the following terms:-

*"5. The right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the disciplinary inquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. If the disciplinary inquiry ended in his favour, it is as if the officer had not been subjected to any disciplinary inquiry..................".*

16. The Delhi High Court in **Sweety Bhalla** (supra) has also considered the said aspect of the doctrine in the following manner:-

*'15. Learned counsel further submits that the principle of* ***'relation-back'*** *was mention in order of the chief Commissioner for Disabilities dated 12.04.2006. The Black's Law Dictionary defines ?relation back? as : - ''**The doctrine that an act done at a later time is, under certain circumstances, treated as though it occurred at an earlier time''.** This doctrine has international relevance and application and has been highlighted in the 2010 judgment of the US Supreme Court in the case of ?Krupski v. Costa Crociere S.P.A.?, wherein the American*

*Supreme Court allowed Krupski's amendment to add a new defendant, after the period of limitation was over, to relate back to the time of the original filing, thereby satisfying the applicable statute of limitations. In India, this doctrine or rule has been incorporated in a number of legislations and service jurisprudence including number of Judgments of the Hon'ble Supreme Court of India. In the case of Delhi Jal Board v. Mahinder Singh, (2000) 7 SCC 210, the Supreme Court applied the Doctrine of Relation Back in service Jurisprudence by holding that the findings of a disciplinary enquiry exonerating an Officer would have to be given effect to as they relate back to the date on which the charges are framed."*

17. It is thus quite evident that doctrine of relation back would be applicable in service matters particularly when subsequent exoneration or order passed in favour of an employee relates to the initial dispute.

18. In view of aforesaid, the opposite parties are directed to implement the decision dated 30.06.2021 upon the petitioners with retrospective effect from 09.10.1998. As a consequence thereof, the petitioners would be eligible for payment of their arrears of salary with effect from March, 1998 till June, 2021 or till the date of their superannuation, as applicable.

19. Opposite party no.2 and other competent authorities shall ensure payment of arrears of salaries to petitioners within a period of four months from the date a certified copy of this order is produced before authority concerned.

20. Consequently, the writ petition succeeds and is **allowed**. Parties to bear their own costs.

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**(2024) 7 ILRA 46**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 02.07.2024**

**BEFORE**

**THE HON'BLE MAHESH CHANDRA TRIPATHI, J.**
**THE HON'BLE PRASHANT KUMAR, J.**

Special Appeal Defective No. 345 of 2024

**Supreintending Engineer Electricity Work Division Prayagraj & Anr. ...Appellants**
**Versus**
**Israr Ali & Anr. ...Respondents**

**Counsel for the Appellants:**
Adarsh Bhushan

**Counsel for the Respondents:**
C.S.C., Shamim Uddin Khan

**CIVIL LAW – Constitution of India,1950 – Article 226, Allahabad High Court Rules, - Chapter VIII, Rule 5 -** Intra-court Appeal - against order of Single Judge – respondent-petitioner's claiming a month's extra salary (honorarium) in every financial year on the basis of an order issued by corporation which was instituted with the explicit objective of compensating drivers for the additional work and hardships they endure – principle of acquiescence - court finds that, as respondent-Petitioner's prolonged inaction and failure to demand the honorarium during his service period, despite being aware that he was not performing the duties of a driver, constitutes acquiescence - although his designation has never been changed through any formal order during service period - he cannot take an advantage of this clerical mistake - if the corporation will be saddled to pay the honorarium, as directed by writ court, will create a huge financial impact for the corporation - therefore, his claim for the honorarium is not justified –consequently, special appeal allowed. (Para – 13, 17, 20, 23)

**Special Appeal Allowed**. (E-11)

**List of Cases cited**:

1. J N Srivastava Vs U.O.I.( 1998 (9) SCC 559),

2. State of Kerla Vs E K Bhaskaran Pillai (2007 (6) SCC 524),

3. Syndicate Bank Vs K. Umesh Nayak (AIR 1995) SC 319),

4. Union Territory Chandigarh Vs Brijmonhan Kaur (2007 (11) SCC 488),,

5. U.O.I.. Vs Tarsem Singh (2008 (8) SCC 648).

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.
&
Hon'ble Prashant Kumar, J.)

(Civil Misc. Delay Condonation Application No. 1 of 2024)

1. Shri Shamim Uddin Khan, learned counsel for the respondent-petitioner states that he is not inclined to file an objection to the delay condonation application and he has no objection in case delay condonation application is allowed.

2. For the reasons stated in affidavit filed in support of delay condonation application, as the same constitutes sufficient cause for condoning delay in filing Special Appeal, the delay condonation application is allowed. The Special Appeal is treated to have been filed well within time.

**(Order on Special Appeal)**

1. Heard Shri Adarsh Bhushan, learned counsel for the appellant-respondents and Shri Shamim Uddin Khan, learned counsel for the respondent-petitioner.

2. The present intra-court appeal is preferred against the Judgement dated 15.02.2024 passed by the learned Single Judge in Writ-A No. 19152 of 2021 (Israr Ali vs. State of U.P. and others) on the ground that the relief that has been sought for by the respondent-petitioner in the aforesaid writ petition was at belated stage, as the aforesaid writ petition was instituted in the year 2021 and respondent-petitioner was superannuated on 30.06.2019, whereas, the cause of action arose way back in the year 2011.

3. The learned Single Judge vide it's order dated 15.02.2024 had finally allowed the writ petition with a direction to the Superintending Engineer, Electricity Works Division, Prayagraj, ordering him to pay the petitioner, arrears of one month additional salary (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.

4. Shri Adarsh Bhushan, learned counsel for the appellant-respondents has vehemently submitted that during the year 2010 to 2019, admittedly the petitioner had not discharged his duty as driver. But on his request, on account of his suffering from serious heart ailment and lungs disease, appellant-respondents on humanitarian ground had not assigned any work to the respondent-petitioner in the capacity of driver, and he was assigned only office work to keep and maintain the record of files. Even in the counter affidavit a categorical stand was taken before

learned Single Judge that the appellant-respondent had released an amount of Rs. 1,39,600/- in favour of respondent-petitioner with regard to the treatment of his heart ailment during 05.07.2013 to 18.07.2013 and necessary bills have also been brought on record alongwith counter affidavit.

5. In this background, learned counsel for the appellant-respondents further submits that it is not in dispute that the petitioner had performed the work as driver in the Corporation only till 2010. Due to his own medical condition, he moved an application for some ministerial work and admittedly on the basis of his insistence, and on humanitarian ground, the said request was processed by the department and he was accorded lighter work. No where, in the writ petition it has been mentioned that he has actually performed the work of driver. He fairly states that no formal order to that effect has although been passed by the department but admittedly, the petitioner has not performed the work as driver in the Corporation and the said one month additional salary was also not paid since year 2010. Further, he had never made any claim qua the additional one month salary from the Corporation since 2010 and he kept mum through out his service period. He further submits that after two years of superannuation, respondent-petitioner initiated a claim of one month additional salary w.e.f. 2010 to 2019 after lapse of almost 12 years by way of filing the aforesaid writ petition. He submits that the learned Single Judge erred in law and has passed the impugned judgement without considering the above said aspect of the matter finally allowed the writ petition and accorded the relief vide order dated 15.02.2024.

6. Per contra, learned counsel for the respondent-petitioner vehemently opposed the submission advanced by the appellants-respondents and submits that so far as the nomenclature of the post of petitioner in the department is concerned, it has not been changed and he continuously got the salary for the post of driver. He further submits that in view of the order dated 05th July, 2011 issued by the U.P. Power Corporation, respondent-petitioner was entitled to get a month's extra salary (honorarium) in every financial year, but appellant-respondents in arbitrary manner denied the said benefit. He further submits that aggrieved with the said denial, petitioner approached this Court by way of filing writ petition and ventilated his grievance before the learned Single Judge and learned Single Judge has rightly proceeded to consider the order dated 05th July, 2011 issued by the U.P. Power Corporation and has accorded the relief and allowed the petition vide order dated 15.02.2024, which warrants no interference by this Bench. But, he fairly states that so far as the actual working of the petitioner is concerned, actually respondent-petitioner has not performed his work as driver in the Corporation, although his designation has never been changed through any formal order. In absence thereof, he is entitled for one month additional salary in every financial year.

7. After considering the rival submissions advanced by the parties and perusal of the record as well as counter affidavit which is appended alongwith record of the present appeal, we find that categorical stand has been taken by the appellants-respondents that the respondent-petitioner was not assigned the job of driver from the year 2010 onwards and the same was being outsourced from agency.

Looking into the serious health condition of the petitioner, on humanitarian ground, he was assigned a desk job. Further to meet out his medical expenses a sum of Rs. 1,39,600/- was granted for his treatment. Paragraph Nos. 9 and 10 of the counter affidavit is reproduced herein below for ready reference :-

*"9. That the contents of paragraph 13 of the writ petition not correct as stated the same are misconceived hence denied. From the year of 2010 to 2019 the work of driving of vehicle done by the outsource agency and petitioner was seriously ill due to heart diseases and lung diseases due to this reason on the request of petitioner only on the humanitarian ground petitioner was done only office work to kept and maintain the record and file, it is also pertinent to mention over here the petitioner was received medical allowance one lac thirty nine thousand sis hundred (1,39,600/-) for the treatement of heart from 05.07.2013 to 18.07.2013 in the hospital of heart line cardiac centre Allahabad. A true copy of the medical bill passed by respondents along with Medical certificate are being filed here with and marked as Annexure no. CA-2 to this Counter Affidavit.*

*10. That the contents of the paragraph 14 and 15 of the writ petition are not correct as stated the same are misconceived hence denied. The Petitioner was not work as a driver on the request of petitioner. Petitioner was done only official work as record keeper to kept and maintain the record and work of of driver was done by outsource agency, So there is no good ground in this writ petition and devoid of merit hence this writ is liable to be reject with cost."*

8. Considering the factual situation, it is evident that the petitioner has never demanded any additional salary during his service period from 2010 till his retirement and at belated stage, attempt has been made to get one month additional salary (honorarium) for the work which he did not perform.

9. The order dated 05th July, 2011 passed by the U.P. Power Corporation which provides for the payment of a month's extra salary (honorarium) in every financial year to regular drivers of the Corporation attached to a vehicle is reproduced herein below:

"विषयः- वाहन चालकों को एक माह के मूल वेतन को समतुल्य प्रतिपूर्ति धनराशि (मानदेय) दिये जाने के सम्बन्ध में।

महोदय,

उपरोक्त विषयक उ०प्र० पावर कारपोरेशन लि० के कार्यालय ज्ञप सं० 107-काविनी एवं वे०प्र०-29/पाकालिं/2011-5-पी/90 दिनांक 19.02.2011 द्वारा यह आदेश जारी किये गये है कि उ०प्र० पावर कारपोरेशन लि० एवं उसकी सहयोगी वितरण कम्पनियों तथा उ०प्र० पावर ट्रान्समिशन कारपोरेशन लि० के अन्तर्गत **कार्यरत एवं नियमित वाहन चालकों, जो वास्तव में वाहन से सम्बद्ध हो, को उनकी कठिन सेवाओं के दृष्टिगत प्रत्येक वित्तीय वर्ष में केवलं एक माह के मूल वेतन के समतुल्य प्रतिपूर्ति की धनराशि (मानदेय) तत्काल प्रभाव से अनुमन्य होगा।**

उक्त सन्दर्भित आदेश के क्रियान्वयन के सम्बन्ध में क्षेत्रीय कार्यालयों द्वारा उठायी गई कतिपय पृच्छाओं के सन्दर्भ में मुझे यह सूचित करना है कि सभी कार्यरत एवं नियमित वाहन चालकों को (वाहन आवंटित हो अथवा नहीं) मानदेय अनुमन्य होगा। इसी क्रम में मुझे यह सूचित करने का निदेश प्राप्त है कि वाहन चालकों की उपलब्धता होने पर अन्य किसी द्वारा वाहन चलाया न जाना सुनिश्चित किया जाय, साथ ही उपरोक्त सन्दर्भित आदेश दिनांक 19.02.2011 द्वारा तत्काल प्रभाव से अनुमन्य मानदेय का

आशय चालू वित्तीय वर्ष 2010-2011 है, न कि आदेश के निर्गमन की तिथि से।

उपरोक्त विषय पर प्रकरणानुसार कार्यवाही किया जाना सुनिश्चित करें।"

(Emphasis Supplied)

10. In the matter at hand, it is pertinent to note that the order dated 05th July, 2011 issued by the U.P. Power Corporation was instituted with the explicit objective of compensating drivers for the additional work and hardships they endure, including overtime and other strenuous duties associated with their job. The essence of this order is to provide fair remuneration to those who fulfil the specific functions and responsibilities of a driver, thereby acknowledging and addressing the unique challenges faced by these employees in the course of their duties.

11. However, the application of this order cannot be distorted to extend benefits to individuals who have not performed the requisite duties of a driver. The objective of the compensation order would be undermined if it were used to claim benefits without the corresponding fulfilment of duties. The law, in its intention to provide equitable relief, cannot be utilized to gain unwarranted advantage by defeating the fundamental purpose of recognizing and compensating the additional efforts and hardships of drivers. Consequently, the entitlement to such honorarium is contingent upon the actual performance of driving duties, and any deviation from this principle would be contrary to the legislative intent and the principles of equity and fairness.

12. The Hon'ble Supreme Court in the matter of J.N. Srivastava Vs. Union of India reported in (1998) 9 SCC 559 has dealt with the principle of "no work no pay". The Hon'ble Court has clearly held that the employee would be entitled for the arrears of salary and other emoluments only if he is ready and willing to work and the employer refused to grant him the work. However, in this case, the employee respondent-petitioner was not ready and willing to work as a driver, on the ground of his ill health and on his own accord, he chose to take a much comfortable desk job in which the extra honorarium was not assigned. He worked on the said job for the ten years' and after his retirement, now he is claiming for the emolument of a post on which he even did not worked for.

13. In this case the respondent-petitioner, he himself opted not to work as a driver, and on his request a desk job was assigned. After the change of his job from 2010 till the age of superannuation he did not ask for the honorarium salary which was fixed with the driver job. Though the nature of the job was changed but the nomenclature was not changed, the respondent-petitioner cannot take an advantage of this clerical mistake. It is not a case where the appellant corporation had not assigned him the work for which he was entitled to, on the contrary the corporation had assigned a comfortable job which he had asked for. Since he opted for not doing the job, he cannot demand the pay and that too, after a lapse of almost 12 years and after the superannuation.

14. Hon'ble Supreme Court in the matter of **State of Kerala Vs. E K Bhaskaran Pillai reported in (2007) 6 SCC 524** has held that the principle of "no work no pay" cannot be accepted as a

thumb rule and the matter will have to be considered on a case to case basis.

15. A Constitution Bench considered application of "no work, no pay" in the matter of employees of Bank going on strike in **Syndicate Bank vs. K. Umesh Nayak AIR (1995) SC 319** and observed that whoever, voluntarily refrains from doing work when it is offered to him is not entitled for payment for the work not done. In other words that is the dictum of "no work, no pay".

16. Hon'ble Supreme Court in the matter of **Union Territory Chandigarh Vs. Brijmohan Kaur reported in (2007) 11 SCC 488** has categorically held that the principle of "no work no pay" is based upon a fundamental concept that in case employee did not carry out the work when there is no refusal on behalf of the employer to grant such work then the principle of "no work no pay" would come into force. This principle has been laid down keeping in view public interest and the government servant who did not discharge his duty is not entitled to get pay for the work which they have not done, on the cost of public exchequer.

17. The principle of "no work no pay" would attract when the employee himself does not carry out the work which he is supposed to do. In this case, it is not a case where the employee was ready to work as a driver and the appellant-respondent purposely did not grant him work. On the contrary, in this case the respondent-petitioner opted for not doing the work and wanted a comfortable job, which on a humanitarian ground was assigned to him and after completing his tenure, it is not open for the respondent to ask for the honorarium and other pay which was attached with the job he chose not to do.

18. In this case, the petitioner knowingly accepted lighter duties due to his medical condition and did not demand the honorarium during his service. Granting the honorarium post-retirement, despite his non-performance of driver duties, would be inequitable and unjust, contravening the principles established in cantena of Supreme Court judgements.

19. The approach of the Court should not be rigid or mechanical but should be flexible and realistic and it should also not tilt the equity in favour of a person who on his own accord chose not to carry on the hard work and chose for a comfortable desk job, is not entitled for extra privileges which was attached to the hard work.

20. Further the principle of acquiescence is relevant here, as respondent-petitioner's prolonged inaction and failure to demand the honorarium during his service period, despite being aware that he was not performing the duties of a driver, constitutes acquiescence. This inaction can be seen as a waiver of his right to claim the honorarium later. By not raising the issue during his service, the petitioner effectively accepted the change in his duties and the corresponding absence of the honorarium.

21. Hon'ble Supreme Court in **Union of India v. Tarsem Singh (2008) 8 SCC 648** dealt with the issue of delayed claims and their impact on the employer. In this case, the belated claim by the petitioner, made two years after his superannuation, poses financial and administrative challenges.The court acknowledged that

delayed claims can put a heavy financial strain on the employer, particularly in cases where the employee knew the facts but chose not to pursue the issue promptly. Acknowledging such claims could have unfair financial repercussions for the corporation, which is unjust considering the conscious and sustained inaction of the respondent-petitioner.

22. The learned Single Judge had granted one month additional salary as honorarium from the financial year 2010-2011 until the financial year till he retired along with interest of 6%. We find conversely, if the present claim is accepted in such eventuality, the Corporation may not consider even a genuine medical condition of employee and assign them lighter work on the their request on humanitarian ground, if it will be saddled to pay the honorarium as directed by learned Single Judge.

23. The appellant Corporation cannot be saddled with such a cost just because nomenclature of the driver was not change in the record. If the impugned order passed in Writ -A No. 19152 of 2021 (Israr Ali vs. State of U.P. and others) is not set aside, it will create a wrong precedent, as people will opt for comfortable job and after the retirement would seek honorarium, which is only available to the driver, who were supposed to be working for long hours and in the longer run it will create a huge financial impact for the corporation. Petitioner's protracted inaction and the potential financial and administrative costs on the Corporation is supported by the ratio laid down by Hon'ble Supreme Court in aforementioned judgements cited above, this Court finds that the petitioner's claim for the honorarium is not justified.

24. In view of the observation made above, the judgement passed by the learned Single Judge dated 15.02.2024 is not sustainable and is accordingly set aside.

25. The instant Special Appeal is accordingly **allowed.**

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**(2024) 7 ILRA 52**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.07.2024**

**BEFORE**

**THE HON'BLE MAHESH CHANDRA TRIPATHI, J.**
**THE HON'BLE PRASHANT KUMAR, J.**

Special Appeal No. 557 of 2024

**Ram Sewak ...Appellant**
**Versus**
**Hon'ble High Court of Judicature at Allahabad ...Respondent**

**Counsel for the Appellant:**
Puneet Bhadauria

**Counsel for the Respondents:**
Ashish Mishra, C.S.C.

**A. Service Law – UP St. District Court Service Rules, 2013 – Rule 15 – Termination – Concealment of fact – Fact regarding pendency of criminal case was concealed during selection, though subsequently acquittal order was passed – Effect – Plea of lack of knowledge was taken, though notice u/s 41-A CrPC was served – Permissibility – Held, the petitioner was having full knowledge about the criminal case during document verification and he has concealed the material fact while swearing the affidavit at the time of getting employment – The candidate seeking an appointment in the District Court judgeship should be of**

**impeccable character and high integrity – The employer has the right to consider antecedents and cannot be compelled to appoint the candidate. (Para 16, 18 and 23)**

**Special Appeal dismissed.** (E-1)

**List of Cases cited:**

1. Avtar Singh Vs U.O.I.; 2016) 8 SCC 471

2. Pawan Kumar Vs U.O.I.; (2022) Supreme (SC) 391

3. Nikhilesh Kumar Gautam Vs St. of U.P. & ors.; 2024 (6) ADJ 8 (DB)

4. Imtiyaz Ahmad Malla Vs St. of J. & K.; 2023 AIR (SC) 1308

5. Commissioner of Police Vs Mehar Singh; 2013(7) SCC 685

6. St. of M.P. Vs Parvez Khan; 2015 (2) SCC 591

7. U.O.I. Vs Methu Meda; 2022 (1) SCC 1

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.
&
Hon'ble Prashant Kumar, J.)

1. Heard Sri Puneet Bhadauria, learned counsel for the petitioner-appellant and Sri Fuzail Ahmad Ansari, learned Standing Counsel for the respondents.

2. The instant appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 is directed against the judgment and order dated 22.04.2024 passed in Writ A No.4727 of 2024 (Ram Sewak vs. Hon'ble High Court Judicature at Allahabad and 2 others) whereby learned Single Judge has proceeded to dismiss the writ petition at the admission stage. For ready reference, the said judgment is reproduced as under:-

*"Heard learned counsel for the petitioner and Sri Fuzail Ahmad Ansari, learned counsel appearing for the High Court.*

*Present writ petition has been filed against the order 28.7.2023 passed by the respondent no.3 by which the services of the petitioner has been terminated.*

*Learned counsel for the petitioner submits that in pursuance of the advertisement dated 27.10.2022 issued by the High Court recruitment cell in the year 2020-23 the petitioner applied for the post of Group "D" on 15.12.2022. After completing the selection process appointment letter no. 1245 dated 1.6.2023 was issued to the petitioner. Thereafter the petitioner joined his duties at District Court, Etah on 24.5.2023. The petitioner has submitted an affidavit wherein it has been specifically mentioned that no criminal proceeding is pending against him. During the police verification it has been found that Case Crime No. 392/2022 under section 232, 452, 504, 506, of IPC is pending against the petitioner. He further submits that the petitioner was not aware about the pendency of the aforesaid criminal proceedings before applying for the said post. He prays for allowing the writ petition on the ground that he was not aware about the criminal case being pending against him.*

*Per contra, learned counsel appearing for the High Court submits that the petitioner has full knowledge about criminal case and concealed the same while filing the affidavit. He further submits that it has specifically been mentioned in paragraph no. 7 and 8 of the affidavit that no criminal case is pending against him. He further submits that since the criminal case is pending against the petitioner the impugned order has rightly been passed and the writ petition may be dismissed.*

*After hearing the learned counsel for the parties and going through the materials on record, the Court finds that since the criminal case was pending against the petitioner and in the affidavit the petitioner has concealed the same, no relief can be granted to the petitioner. No interference is called for in the impugned order dated 28.7.2023.*

*The writ petition is accordingly dismissed.”*

3. The brief facts of the case culled out from the record are that in pursuance of the advertisement No.02/Sub Court/Group 'D'/2022 dated 27.10.2022 issued by the High Court Recruitment Cell in the year 2020-23 the petitioner applied online for Group "D" post on 15.12.2022, which was completed successfully. After submitting the online form the petitioner entered in the examination as required by the Recruitment Cell Committee and has been selected for the said post. Consequently, the Chairman, Administrative Committee, District Court Etah had issued information letter no.131 dated 20.05.2023 regarding the appointment. Thereafter, vide letter no.1245 dated 01.06.2023, the respondent no.3 i.e. District Judge, Etah had issued appointment letter to the petitioner. In response thereof, the petitioner joined the Group 'D' post at District Court, Etah and started discharging his duties.

4. It further transpires from the record that as per para-6 of the directions/instructions of the High Court, an undertaking on affidavit was required to be furnished by the selected candidate declaring that neither any criminal case/proceeding is pending against him/her nor he/she has been convicted by any criminal court. Further, if such information is not furnished at the time of joining, the candidature/ appointment of such candidate shall be forfeited/ cancelled by the appointing authority. In the present matter, the petitioner had submitted an undertaking on affidavit, wherein it has been specifically mentioned that no criminal case is pending against him. Later on, during police verification, it had surfaced that Case Crime No.392/2022 under Sections 323, 452, 504, 506 IPC has been registered against the petitioner on 14.12.2022 at Police Station Linepar, District Firozabad. In the said proceeding, after investigation, the Investigating Officer had submitted chargesheet/ police report against the petitioner on 08.01.2023 on which the concerned Magistrate had also taken cognizance on 18.7.2023. Thereafter, case was registered as Criminal Case No.25068 of 2022 (State vs. Anuj @ Ramsevak and others), wherein the trial court had commenced the proceeding against the petitioner and other co-accused. Finally in the said proceeding, the petitioner had been acquitted on 25.9.2023.

5. Once during the police verification it was disclosed that the aforesaid Case Crime No.392 of 2022 was registered against the petitioner, the respondent no.3 had issued a show cause notice to the petitioner on 14.07.2023, which was responded by the petitioner on 19.07.2023. Finally, by the order dated 28.07.2023 the District Judge, Etah had dispensed with the services of the petitioner, which is impugned in the writ petition. Learned Single Judge vide impugned judgement and order dated 22.04.2024 had considered the grounds of challenge in the writ petition and proceeded to dismiss the writ petition with aforequoted judgment.

6. Learned counsel for the petitioner-appellant has vehemently

submitted that learned Single Judge has erred in law while dismissing the writ petition and failed to consider the relevant aspect of the matter that at the time of filling up the form no criminal case was registered against the petitioner. Even the petitioner was having no knowledge of criminal case at the time of swearing of affidavit for appointment. Therefore, the allegation of concealment of information in the declaration form is baseless. Even in the criminal proceeding, later on, he was acquitted. He submits that the seriousness of the allegations levelled against the petitioner-appellant as well as his suitability for his engagement ought to have been examined by the Appointing Authority in view of law laid down by the Apex Court in the case of **Avtar Singh v. Union of India1**. He has also placed reliance on the judgment passed by the Apex Court in **Pawan Kumar v. Union of India2** and the judgment passed by this Court in **Nikhilesh Kumar Gautam vs. State of UP and other3**.

7. Per contra, Sri Ansari, learned counsel appearing on behalf of the respondents has vehemently opposed the appeal and submitted that it is not a case, where the petitioner had concealed the pendency of criminal case at the time of filling up the form. He submitted that at the time of appointment an affidavit was required to be submitted in view of the direction of the High Court as contained in information regarding appointment dated 20.05.2023, wherein, it was specifically required to disclose as to whether any criminal case is registered against him and as to whether he has even been tried in a criminal proceeding or any criminal proceeding is pending against him, or whether he has been convicted or acquitted by any court. If the answer was 'Yes' then details of the case were required to be given. The information also contained the specific stipulation in the form of undertaking that if any of the above facts have been concealed, then the appointment of the applicant be cancelled.

8. Sri Ansari assertively submitted that the affidavit of the petitioner has been admittedly prepared and sworn on 24.5.2023 and much prior to it i.e. on 8.1.2023, in the said criminal case, chargesheet was already submitted to the competent court and even cognizance was also taken by the trial court.

9. Learned counsel for the respondents has further raised objection that as alleged offences are punishable below seven years, hence during the investigation, notice under Section 41-A CrPC was also served upon the petitioner, which he had received. He had not only made endorsement on the said notice but also mentioned his phone number on it. It is submitted that the petitioner had unequivocally declared on oath that no criminal case was pending against him, therefore, present case relates to concealment of fact. The quantum of punishment or acquittal would have no bearing in the present case. He submitted that the notarised affidavit is crucial part of the verification and in case any false information is furnished, the same requires no leniency and the candidature has been rightly rejected. He submitted that the competent authority had accorded opportunity to the petitioner and later on dispensed his services on account of concealment of material fact at the time of furnishing the notarised affidavit in view of the High Court's direction.

10. Learned counsel for the respondents submitted that the judgment heavily relied by learned counsel for the appellant in **Nikhilesh Kumar Gautam**

**(supra)** is distinguishable in the present matter as in the said case, admittedly a closure report was submitted before swearing the affidavit, whereas in the present matter, the petitioner-appellant had duly endorsed on the notice under Section 41-A CrPC, much prior to swearing of affidavit and even chargesheet was also submitted to the competent court in which the trial court has also taken cognizance. Therefore, it cannot be accepted that at the time of swearing of affidavit, the petitioner had no knowledge regarding ongoing criminal proceeding. In support of his submissions, he has placed reliance on Rule 13 (2) of Uttar Pradesh State District Court Service Rules, 2013 (in short "Rules, 2013"), which provides that the inclusion of the name of a candidate in any list published under Rule 12 shall not confer any right of appointment. He has also placed reliance on the judgment passed by the Apex Court in **Imtiyaz Ahmad Malla v. State of Jammu and Kashmir4.**

11. Heard rival submissions, perused the record and respectfully considered the judgments cited at Bar.

12. The facts as emanates from the record are that under the advertisement dated 27.10.2022 the petitioner submitted an application on 15.12.2022 for being considered for appointment on Class-IV post in the District Judgeship. In the examination, he was declared successful and called for document verification. The petitioner was also required to furnish an affidavit disclosing whether any FIR has been lodged or criminal case is pending against him or not. It is apt to have a glance on the letter dated 20.5.2023, which for ready reference, is reproduced as under:-

*"कार्यालयः अध्यक्ष, प्रशासनिक समिति, जनपद न्यायालय, एटा*

*पत्रांकः 131/केंद्रीय नाजिर/2023, एटा दिनांकितः 20/5/23*

*<u>नियुक्ति के संबंध में सूचना</u>*

*श्री रामसेवक पुत्र श्री उदल सिंह*

*ग्राम-गुंदाउ थाना-लाइनपार,*

*जिला-फिरोजाबाद (उ०प्र०)*

*माननीय उच्च न्यायालय इलाहाबाद के पत्रांक संख्या 1334/2023 Recruitment Cell/High Court dated 16.05.2023 के संबंध में आपको सूचित किया जाता है कि आपका चयन "The Uttar Pradesh Civil Court Staff Centralized Recruitment 2022-23 के अन्तर्गत समूह "घ" कैडर पोस्ट (पोस्ट कोड-04) के पद पर माननीय उच्च न्यायालय की रिक्रूटमेंट समिति द्वारा किया गया है, उसके आधार पर आपकी नियुक्ति आवंटित जनपद न्यायालय एटा में होनी जिसकी सूचना आपके रजिस्ट्रेशन फार्म में दी गई ई-मेल, मोबाइल नम्बर व स्पीड पोस्ट द्वारा भेजी जा रही है, आप निम्नलिखित दस्तावेजों के साथ दिनांक 25.05.2023 को समय प्रातः 09:30 बजे केन्द्रीय नजारत जनपद न्यायालय, एटा के कार्यालय में उपस्थित हों।*

*1. मूल अभिलेखों के साथ उन अभिलेखों की कम से कम 3-3 छायाप्रतियां जो स्वतः प्रमाणित हो।*

*2. 05 अद्यतन पासपोर्ट आकार के फोटो।*

*3. तीन लिफाफे कम से कम 42/-रुपये की पोस्टेज टिकट लगे स्पीड पोस्ट।*

*4. उ०प्र० जिला न्यायालय सेवा नियमावली 2013 के अनुपालन में "अपने अन्तिम शिक्षण संस्था से निर्गत किया गया चरित्र प्रमाण पत्र*

*5. दो सम्मानित व्यक्तियों (राजपत्रित अधिकारी) (जो अभ्यर्थी से सम्बन्धित न हों) द्वारा निर्गत चरित्र प्रमाण पत्र जो 06 माह से अधिक के न हों,*

*6. अभ्यर्थी का निवास प्रमाण पत्र व जाति प्रमाण पत्र।*

*7. अभ्यर्थी स्वयं का इस आशय का शपथपत्र भी प्रस्तुत करें कि*

*1. मैं भारत का नागरिक हूँ।*

*2. मैं अविवाहित/विवाहित हूँ तथा मेरी एक ही जीवित पति/पत्नी हैं*

*3. मैं किसी भी असंवैधानिक संस्था से नहीं जुड़ा हूँ।*

*4. मेरा भारत की संप्रभुता और अखंडता या राज्य की सुरक्षा के विपरीत हित नहीं है।*

*5. मैं भारत सरकार, उत्तर प्रदेश सरकार एवं माननीय उच्च न्यायालय के अधीन किसी सेवा से निष्कासित नहीं किया गया हूँ।*

*6. मैं पब्लिक सर्विस कमीशन से प्रतिबंधित नहीं किया गया हूँ।*

***7. क्या कोई आपराधिक प्रकरण आपके विरूद्ध पंजीकृत है?***

***8. क्या आपके विरूद्ध कोई आपराधिक विचारण हुआ है, लम्बित है अथवा न्यायालय द्वारा दोषमुक्त हुए या दोषसिद्ध हुए हैं, उत्तर हाँ है तो उसका विस्तृत विवरण प्रस्तुत करें।***

***9. यदि उपर्युक्त तथ्यों में कोई भी तथ्य छुपाया गया है तो प्रार्थी की नियुक्ति निरस्त कर दी जाए।***

*10. कभी भी पीठासीन अधिकारी द्वारा अपने कैम्प कार्यालय पर बुलाये जाने पर वह उपस्थित रहेगा तथा किसी भी पीठासीन अधिकारी के आदेश की अवहेलना नहीं करेगा।"*

13. We have also occasion to peruse para 7, 8, and 9 of the aforesaid communication. Admittedly, in response to the said communication, the petitioner had prepared an affidavit, which was sworn on 24.5.2023, wherein he has made categorical averment that there is no criminal case registered or pending against him. Thereafter, the petitioner joined his duties at District Court, Etah on 24.05.2023. During the police verification, it was found that Case Crime No.392/2022 under Sections 323, 452, 504, 506 IPC was registered against the petitioner on 14.12.2022 at Police Station Linepar, District Firozabad, wherein the chargesheet was also forwarded to the competent court on 08.01.2023 and cognizance was also taken by the criminal court. During the investigation, notice under Section 41-A CrPC was also served upon the petitioner, which was duly endorsed by the petitioner himself on 8.1.2023.

14. Once during the police verification it was disclosed that the aforesaid Case Crime No.392 of 2022 was registered against the petitioner, the respondent no.3 had issued a show cause notice to the petitioner on 14.07.2023, which was responded by the petitioner on 19.07.2023. For ready reference the notice dated 14.7.2023 is reproduced herein below:-

*"आपको इस आशय की नोटिस दी जाती है कि आपके द्वारा आवेदन करते समय उसमें दिये गये कॉलम 'Whether any criminal complaint case have ever been registered against you?' में 'No' अंकित किया गया था तथा अभिलेख सत्यापन के समय प्रस्तुत शपथपत्र दिनांकित 24.05.2023 में कॉलम सं० 08 में किसी न्यायालय में कोई आपराधिक विचारण लंबित न होना, किसी न्यायालय द्वारा दोष सिद्ध न किया जाना और पूर्व में किसी न्यायालय में कोई आपराधिक मुकदमा विचाराधीन न रहना भी दर्शाया गया है जबकि पुलिस सत्यापन के बाद रिपोर्ट जनपद न्यायालय एटा में प्राप्त हुई है जिसमें आपके विरुद्ध थाना लाईनपार जिला फिरोजाबाद में अपराध संख्या 392/2022 धारा 323/452/504/506 IPC राज्य बनाम् अनुज उर्फ रामसेवक आदि पंजीकृत है जिसमें वाद विवेचना आरोप पत्र संख्या 04/2023 दिनांक 08.01.2023 को माननीय न्यायालय में प्रेषित किया जा चुका है। ऐसा प्रतीत होता है कि यह कृत्य आपके द्वारा जानबूझकर छिपाया गया है। अतः आप इस सम्बन्ध में अपना स्पष्टीकरण दिनांक 15.07.2023 तक इस आशय का प्रस्तुत करना सुनिश्चित करें कि क्यों न आपकी नियुक्ति निरस्त/रद्द कर दी जाये।"*

15. Finally, by the order dated 28.07.2023 the District Judge, Etah had dispensed with the services of the petitioner, which was challenged in the writ petition. Learned Single Judge vide impugned judgement and order dated 22.04.2024 had proceeded to dismiss the writ petition with aforequoted judgment.

16. In view of the aforesaid factual situation, it is apparent that the petitioner was having full knowledge about the criminal case during document verification

and he has concealed the material fact while swearing the affidavit at the time of getting employment. Later on at the time of document verification and at the time of verifying his criminal antecedents, it was found that criminal case was pending against him and the same had been concealed. The verification of character and antecedents of an employee are to be ensured by the employer. The character and integrity of a candidate, who is seeking appointment in the District Judgeship must be impeccable and his/ her antecedents should be clean. If a person, whose integrity is doubtful, and his/ her antecedents are not clean, he cannot claim appointment as the same may adversely affect the institution. Moreover, it is well settled that even the acquittal in a criminal case does not automatically entitle the applicant for appointment to the post. Still, it is open to the employer to consider the antecedents and examine whether he is suitable for appointment to the post. Whereas in the present matter, the dispute relates to furnishing false information at the time of appointment. In a case of deliberate suppression of fact with respect to pending criminal case, such false information by itself will assume significance and an employer may pass appropriate order cancelling the candidature. If the criminal case was pending and known to the candidate at the time of filling up the form or swearing the affidavit, the concealing of the same may have adverse impact in the organisation.

17. Rule 15 of U.P. State District Court Service Rules, 2013 deals with conditions relating to suitability and certificates of characters. According to this Rule**, no person shall be appointed unless the appointing authority is satisfied that he is of good character and is in all respect suitable for appointment to the service.** Every candidate selected for direct recruitment shall furnish to the appointing authority certificates not more than six months prior to the date of selection, by two respectable persons unconnected with his school, college or university, and not related to him, testifying to his character, in addition to the certificate or certificates which may be required to be furnished from the education institution last attended by the candidate**. If any doubt arises regarding the suitability of a candidate for appointment the decision of the High Court shall be final.**

18. At this point, it is pertinent to mention that a candidate seeking an appointment in the District Court judgeship should be of impeccable character and high integrity, and his antecedents should be clean and if a person whose integrity is doubtful or his antecedents are not clean is appointed, that can damage the institution inasmuch as if the Court records are misplaced or tampered which would cause immense prejudice to the litigants and also shake the confidence of the public in the judicial system which would eventually result in serious damage to the prestige of the institution.

19. Hon'ble Supreme Court in the matter of **Commissioner of Police vs. Mehar Singh5**, has observed as under :

*"18. The question before this Court is whether the candidature of the respondents who had made a clean breast of their involvement in a criminal case by mentioning this fact in their application/attestation form while applying for a post of constable in Delhi Police; who were provisionally selected subject to verification of their antecedents and who*

*were subsequently acquitted/discharged in the criminal case, could be cancelled by the Screening Committee of the Delhi Police on the ground that they are not found suitable for appointment to the post of constable.*

*23. A careful perusal of the policy leads us to conclude that the Screening Committee would be entitled to keep persons involved in grave cases of moral turpitude out of the police force even if they are acquitted or discharged if it feels that the acquittal or discharge is on technical grounds or not honourable. The Screening Committee will be within its rights to cancel the candidature of a candidate if it finds that the acquittal is based on some serious flaw in the conduct of the prosecution case or is the result of material witnesses turning hostile. It is only experienced officers of the Screening Committee who will be able to judge whether the acquitted or discharged candidate is likely to revert to similar activities in future with more strength and vigour, if appointed, to the post in a police force. The Screening Committee will have to consider the nature and extent of such person's involvement in the crime and his propensity of becoming a cause for worsening the law and order situation rather than maintaining it. In our opinion, this policy framed by the Delhi Police does not merit any interference from this Court as its object appears to be to ensure that only persons with impeccable character enter the police force.*

*26. In light of above, we are of the opinion that since the purpose of departmental proceedings is to keep persons,who are guilty of serious misconduct or dereliction of duty or who are guilty of grave cases of moral turpitude, out of the department, if found necessary, because they pollute the department, surely the above principles will apply with more vigour at the point of entry of a person in the police department i.e. at the time of recruitment. If it is found by the Screening Committee that the person against whom a serious case involving moral turpitude is registered is discharged on technical grounds or is acquitted of the same charge but the acquittal is not honourable, the Screening Committee would be entitled to cancel his candidature. Stricter norms need to be applied while appointing persons in a disciplinary force because public interest is involved in it."*

20. Hon'ble Supreme Court in the matter of **State of M.P. vs. Parvez Khan6,** has held as follows:

*"13. From the above observations of this Court, it is clear that a candidate to be recruited to the police service must be worthy of Civil Appeal No. of 2014 @ SLP (C) No.36237 of 2012 confidence and must be a person of utmost rectitude and must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged, it cannot be presumed that he was completely exonerated. Persons who are likely to erode the credibility of the police ought not to enter the police force. No doubt the Screening Committee has not been constituted in the case considered by this Court, as rightly pointed out by learned counsel for the Respondent, in the present case, the Superintendent of Police has gone into the matter. The Superintendent of Police is the appointing authority. There is no allegation of mala fides against the person taking the said decision nor the decision is shown to be perverse or irrational. There is no material to show that the appellant was falsely implicated. Basis of impugned judgment is*

*acquittal for want of evidence or discharge based on compounding."*

21. The law with regard to the effect and consequence of the acquittal, concealment of criminal case on appointments etc. has been settled in the case of **Avtar Singh v. Union of India and others (supra),** wherein a three Judges' Bench of the Apex Court decided, as thus:

*"38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the 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 3 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 4 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."*

22. Hon'ble Apex Court in the case of **Imtiyaz Ahamad Malla (supra)** has considered the import of **Avtar Singh's case** and held as under :

*"13. As regards the suppression of relevant information or false information with regard to the criminal prosecution, arrest or pendency of criminal case against the candidate, a three-judge Bench of this Court in Avtar Singh Vs. Union of India and Others has laid down the precise guidelines. Para 38.5 thereof reads as under:*

*"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."*

*14. In all the above cases, the requirement of integrity and high standard of conduct in police force has been highly emphasised. The High Court in the impugned judgement has also elaborately dealt with each and every aspect of the issues involved, while upholding the order of the Single Bench to the effect that the Director General being the highest functionary in the police hierarchy, was the best judge to consider the suitability of the petitioner for induction into the police force. The impugned order being just and proper, we are not inclined to interfere with the same in exercise of our jurisdiction under Article 136 of the Constitution of India."*

23. Hon'ble Apex Court in the case of **Union of India vs. Methu Meda7**, while considering the Avtar Singh's case, has held that even in case truthful declaration regarding concluded trial has been made by the employee, still the employer has the right to consider antecedents and cannot be compelled to appoint the candidate. Paras 18 of the aforesaid judgment is being quoted below:

*"18. In view of the above, in the facts of the present case, as per paras 38.3, 38.4.3 and 38.5, it is clear that the employer is having right to consider the suitability of the candidate as per government orders/instructions/rules at the time of taking the decision for induction of the candidate in employment. Acquittal on technical ground in respect of the offences of heinous/serious nature, which is not a clean acquittal, the employer may have a right to consider all relevant facts available as to the antecedents, and may take appropriate decision as to the*

*continuance of the employee. Even in case, truthful declaration regarding concluded trial has been made by the employee, still the employer has the right to consider antecedents and cannot be compelled to appoint the candidate.*

24. After considering the **Mehar Singh (supra),** the Apex Court in **Methu Meda (supra)** has held as under:-

*22. As discussed hereinabove, the law is well settled. If a person is acquitted giving him the benefit of doubt, from the charge of an offence involving moral turpitude or because the witnesses turned hostile, it would not automatically entitle him for the employment, that too in disciplined force. The employer is having a right to consider his candidature in terms of the circulars issued by the Screening Committee. The mere disclosure of the offences alleged and the result of the trial is not sufficient......."*

25. In all the above cases, the requirement of integrity and high standard of conduct has been highly emphasized. We find that learned Single Judge in the impugned judgement has also elaborately dealt with each and every aspect of the issues involved, while affirming the order dated 28.7.2023 passed by the respondent no.3 by which the services of the petitioner have been terminated. The impugned order being just and proper, we are not inclined to interfere with impugned order.

26. In an Intra-Court Special Appeal, no interference is usually warranted unless palpable infirmities or perversities are noticed on a plain reading of the impugned judgment and order. In the facts and circumstances of the instant case, on a plain reading of the impugned judgment and order, we do not notice any such palpable infirmity or perversity. As such, we are not inclined to interfere with the impugned judgment and order.

27. The appeal fails, and is, accordingly, **dismissed** with no order as to the costs.

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**(2024) 7 ILRA 62**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 23.07.2024**

**BEFORE**

**THE HON'BLE SHREE PRAKASH SINGH, J.**

Writ A No. 1644 of 2024

**Arvind Kumar Pandey ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Ajay Pratap Singh

**Counsel for the Respondents:**
C.S.C., Raj Kumar Upadhyaya (R.K. Upadhyaya)

**A. Service Law – UP Government Service (Discipline and Appeal) Rules, 1999 – Rules 7 & 9 – Disciplinary proceeding – Punishment of withholding two increments permanently and award of censure entry – Charge against petitioner was that he, while acting as DIOS cancelled the stopped order and thereby permitted an Assistant teacher to be paid salary – No date, time and place was fixed and no opportunity of personal hearing was given – Copy of the enquiry report was also not served upon the petitioner – Effect – Held, it is always incumbent upon the enquiry officer to fix a date, time and place for personal hearing to the delinquent employee and in case of violation, the enquiry proceeding shall**

**vitiate – Whole enquiry proceeding, including the final punishment order vitiates in the eyes of law. (Para 9, 10 and 15)**

**Writ petition allowed.** (E-1)

**List of Cases cited:**

1. St. of U.P. & ors.Vs Saroj Kumar Sinha; (2010) 2 SCC 772

2. Subhash Chandra Sharma Vs Managing Director & anr.; 1999 SCC OnLine All 1331

3. Shafat Ullah Vs Commissioner, Varanasi & ors.; 2002 SCC OnLine All 218

4. Sahngoo Ram Arya Vs Chief Secretary, St. of U.P, Lucknow & ors.; 2002 SCC OnLine All 1566

5. Ambika Prasad Srivastava Vs St. Public Services Tribunal & ors.; 2005 (4) L.L.N 84

6. Yog Narain Dubey Vs Managing Director & ors.; 2011 SCC OnLine All 2414

7. Chamoli District Cooperative Bank Limited Vs Raghunath Singh Rana & ors.; (2016) 12 SCC 204

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

1. Heard Sri Ajay Pratap Singh, learned counsel for the petitioner, Sri Ravi Shankar Tiwari, learned counsel for the opposite party no. 3 and Sri Vivek Shukla, learned Additional Chief Standing Counsel for the State.

2. By means of the present writ petition the petitioner has assailed the impugned order dated 19 September 2023 passed by opposite party no. 1, whereby, the petitioner has been punished while withholding two increments permanently and further awarded censure entry and the recovery of ₹1,06,661/- was also imposed upon him. The approval order dated 4 August 2023 passed by the Public Service Commission, opposite party no. 3 is also under challenge.

3. It is the case of the petitioner that the petitioner was initially appointed on the post of District Basic Education Officer and subsequently, was promoted as Joint Director of Education and also held the post of Incharge, Joint Director of Education at Azamgarh Region, Azamgarh with effect from 27 June 2008 to 16 October 2008 and 12 January 2009 to 19 June 2009. Fact remains that one Tarkeshwar Rai who was appointed as adhoc Principal and once the vacancy arose, Sri Umesh Kumar Rai was appointed on the said post of Assistant Teacher (Physical Education) by the Committee of Management and that was approved by the then, District Inspector of Schools, Ballia on 17 January 1991. Later on, against the requisition sent to the UP Secondary Education Service Selection Board, one Kushmakar Mishra joined on the post of Assistant Teacher (Physical Education) in the institution in question on 6 January 2004, but on place of ceasing the continuance of Umesh Kumar Rai on the post of Assistant Teacher (Physical Education), he was allowed to continue and the salary was also being paid. Subsequently, on 18.10.2007, the District Inspector of School stopped the salary, but, just after four days, it was again released. Thereafter, on 29 September 2008 his salary was stopped, but on 13 October 2008 Joint Director Education cancelled the order dated 29 September 2008 and called report from the District Inspector of Schools regarding the status of appointment of Umesh Kumar Rai, but despite submitting any report, the District Inspector of Schools, Ballia, neither submitted the

report nor stopped the salary and the salary was being paid to Umesh Kumar Rai, up to the year 2011.

4. Charges against the petitioner is that the petitioner cancelled the stopped order dated 29 September 2008, on 13 October 2008 and by virtue of the said order, Umesh Kumar Rai was being paid salary and therefore, the present petitioner is accountable for unlawful payment of salary to Umesh Kumar Rai.

5. The ground of challenge to the impugned orders is of two folds; one that the petitioner after passing the order on 13 October 2008 while calling a report from the District Inspector of Schools, transferred on 16 October 2008, and therefore, it was incumbent upon the then District Inspector of Schools, Ballia to take further course of action or to submit a report to the Joint Director of Education, but he failed to do so for the reasons best known to him and therefore, no liability can be fasten upon the present petitioner. Further submission is that, enquiry report of the subsequent order of approval as well as the punishment order dated 19 September 2023 are arbitrary and unlawful as the enquiry officer is appointed on 13 October 2017 and on the same day, the chargesheet was issued and without affording any opportunity of hearing and without fixing date, time and place, the enquiry officer submitted the report on 19 December 2017. Further contention is that the averments made in paragraph 20, 21 and 23, have not been denied in the counter affidavit and therefore, the whole enquiry proceeding vitiates in the eyes of law and the punishment order itself is also against the settled proposition of law and suffers from illegality and infirmity.

6. On the other hand learned counsel appearing for the State has opposed the contention aforesaid and submitted that it is an admitted fact on behest of the petitioner, he was working as Joint Director of Education on 27 June 2008 to 16 October 2008, and the order dated 13 October 2008 was passed by the present petitioner, wherein, the order of the District Inspector of Schools dated 29 September 2008, by which the salary of Umesh Kumar Rai was stopped had been cancelled and a result, thereof, Mr Rai was unlawfully receiving payment of salary till 2011. He added that there was no occasion to the petitioner to cancel the order of the District Inspector of Schools dated 29 September 2008, unless the reports are received and the petitioner reaches to the conclusion that there is any ground to interfere. He also submits that the charge-sheet, enquiry report and the final punishment order do not suffer any illegality as after the appointment of the enquiry officer, he has framed the charges and after due approval, the same was served upom the petitioner and the enquiry report was submitted before the disciplinary authority. Further, the disciplinary authority on the basis of the enquiry report has passed the final punishment order coupled with the fact that the approval from Public Service Commission was also accorded. Therefore, the submission of the counsel for opposite parties is that there is no merit in the writ petition.

7. Having heard the learner counsel for the parties and after perusal of the material placed on record, it transpires that the charges against the petitioner was that he unlawfully passed the order dated 30 October 2008, while cancelling the order of District Inspector of Schools, while favouring Mr. Umesh Kumar Rai.

The petitioner was holding the charge of Joint Director of Education at Azamgarh Region, Azamgarh with effect from 27.06.2008 to 16.10.2008. In the meantime, the payment of salary to Umesh Kumar Rai was stopped by an order dated 29 September 2008 by the District Inspector of Schools, as a regular selected candidate appointed by the UP Secondary Education Service Selection Board had joinded, whereafter, a report was called from the District Inspector of Schools by the petitioner and after three days he was transferred and it seems that he could not further look into the matter.

8. This court has also taken the note of the fact that the chargesheet was issued by the enquiry officer on 13 October 2017, and the enquiry report is submitted on 19 December 2017. From perusal of the enquiry report, it transpires that no date, time and place was fixed and even opportunity of personal hearing was not accorded. In paragraph 23 of the petition,q it has specifically been stated that the enquiry report has never been served to the petitioner, wherein, in reply to the same, in the counter affidavit in paragraph 19, it has been stated that the 'same needs no comments', which amounts to admission on the part of the State. Further in paragraph 17 and 18 of the supplementary affidavit filed in support of the petition, it has been stated that no proper opportunity of hearing was ever accorded to the petitioner and at the same time, it has also been stated that the provisions of Rule 7 and Rule 9 of the UP Government Service (Discipline and Appeal) Rules 1999 (hereinafter referred as 'Rules 1999') has also been violated but this fact has not been rebutted by the opposite parties. Since, the petitioner is a government servant and therefore, the Rules 1999 would prevail in the present matter. The relevant extract of the 'Rules 1999' are reproduced here in under :-

*"(vii) Where the charged Government servant denies the charges, the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence :*

*Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.*

*(viii) The Inquiry Officer may summon any witness to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1976.*

*(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.*

*(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding inspite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant."*

9. The aforesaid rules provides that the opportunity of hearing including opportunity of personal hearing shall be accorded to the delinquent employee, but in the present matter, after serving the chargesheet, no date, time and place is fixed and opportunity of personal hearing has not been given and further, admittedly, copy of the enquiry report was also not served upon the petitioner, which is also against the settled proposition of law.

10. It has long been settled that it is always incumbent upon the enquiry officer to fix a date, time and place for personal hearing to the delinquent employee and in case of violation, the enquiry proceeding shall vitiate.

11. The abovesaid principal is reiterated in the case of **State of U.P. and Others Vs. Saroj Kumar Sinha, (2010) 2 SCC 772**. Paragraph 25 and 26 of the judgement are quoted hereinunder:-

*"25. A bare perusal of the aforesaid charges shows that the three charges were based on official documents/official communications. We have earlier noticed the relentless efforts made by the respondent to secure copies of the documents, which was sought to be relied upon, to prove the charges. These were denied by the Department in flagrant disregard of the mandate of Rule 7 sub-rule (v). Therefore the inquiry proceedings are clearly vitiated having been held in breach of the mandatory sub-rule (v) of Rule 7 of the 1999 Rules.*

*26. The first inquiry report is vitiated also on the ground that the inquiry officers failed to fix any date for the appearance of the respondent to answer the charges. Rule 7(x) clearly provides as under:*

*"7. (x) Where the charged government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the inquiry officer shall proceed with the inquiry ex parte. In such a case the inquiry officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged government servant.""*

12. In the judgement and order rendered by the the coordinate Division Bench of this Court, Smt. Karuna Jaiswal Vs. State of U.P. (Writ Petition No. 1516 (SB) of 2003), it has been held as follows:-

*"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."*

13. In the above said matter, the Division Bench is of the considered opinion that the enquiry proceeding would vitiate if no date, time or place is fixed by issuing notice to the delinquent, for getting recorded his statement, as an opportunity of personal hearing.

14. Apart from above, this Court is also not unmindful to the judgement and orders rendered in case of **Subhash Chandra Sharma Vs. Managing Director and another (1999 SCC OnLine All 1331), Shafat Ullah Vs. Commissioner, Varanasi and others (2002 SCC OnLine All 218), Sahngoo Ram Arya Vs. Chief Secretary, State of U.P, Lucknow and others (2002 SCC OnLine All 1566), Ambika Prasad Srivastava Vs. State Public Services Tribunal and others (2005 (4) L.L.N 84), Yog Narain Dubey Vs. Managing Director and Others (2011 SCC OnLine All 2414) and Chamoli District Cooperative Bank Limited Vs. Raghunath Singh Rana and Others ((2016) 12 SCC 204).**

15. In view of the aforesaid submissions and discussions, this Court is of considered opinion that the whole enquiry proceeding, including the final punishment order vitiates in the eyes of law.

16. Consequently, the writ petition is hereby **allowed.**

17. The impugned orders dated 19.09.2023 and 04.08.2023 are hereby **quashed.**

18. Further, liberty is also accorded to the State-respondent to hold a fresh enquiry, if so desires.

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**(2024) 7 ILRA 67**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 09.07.2024**

**BEFORE**

**THE HON'BLE AJIT KUMAR, J.**

Writ A No. 3143 of 2021

**Mohd. Jamil ...Petitioner**
**Versus**
**Managing Director Kanpur Electricity Supply Co. (KESCO), Kanpur Nagar & Ors. ...Respondents**

**Counsel for the Petitioner:**
Ms. Usha Devi Singh

**Counsel for the Respondents:**
Sri Rajendra Kumar Misra, Sri Rajendra Kumar Pandey, Ms. Usha Kiran

**A. Service Law – Family pension – Entitlement of disable children of ex-employee – Disability, determination thereof – C.M.O. issued the certificate showing the petitioner 60% disable – However, Committee did not treat the petitioner as disable person on the basis of some St.ment, wherein he admitted to have run some PCO in past for his survival, on the basis of which claim was rejected – Validity challenged – Committee, having no medical officer in it, how far is competence to question on certificate – GO dated 20.05.1997 relied upon – Held, certificate issued by a Chief Medical Officer could have been questioned only by the penal of medical officers in the field of orthopaedics, otherwise one could not say that merely because someone ran a business in the past, may be he was a disabled, he would not be entitled for family pension – 60% physical disability is sufficient enough for a person to hold him entitled for family pension as a disabled who had been dependent of his parents who later died on 21.04.2013. (Para 8, 9, 10 and 11)**

**Writ petition allowed.** (E-1)

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

1. Heard Ms. Usha Devi Singh, learned counsel for the petitioner, Ms. Usha

Kiran, learned counsel appearing for respondents.

2. Petitioner who claims to be a disabled person and totally dependent upon the parents is aggrieved by the decision taken by the Senior Accounts Officer, Pension of the Kanpur Electricity Supply Company Ltd. dated 12.11.2020 whereby his claim for dependent/ family pension has been rejected.

3. Learned counsel for the petitioner has argued that under the relevant Government Order issued by the state government on 20.05.1997, disabled persons have been made entitled to family pension. Such disability can be physical or mental but it should be of the nature that it is difficult for the dependent to earn livelihood for survival. It is submitted that such disability pension to the dependents for physical or mental disability is in the nature of family pension and this is how the erstwhile Government Order dated 06.08.1981 has been amended to facilitate this family pension.

4. It is submitted by learned counsel for the petitioner that father of the petitioner who was an ex-employee of the respondent retired upon attaining age of superannuation on 31.05.1975 and thereafter he died in the year 2003 and so consequently the mother of the petitioner started getting pension. Mother according to the petitioner died later on 21.04.2013 and resultantly the petitioner being dependent upon his mother made an application for family pension, to respondent on 07.05.2013. After petitioner moved an application, he received a letter from Senior Accounts Officer, Pension, asking him to furnish medical certificate of Chief Medical Officer or of an equivalent medical officer regarding his physical disability. After this letter was received by the petitioner he obtained physical disability certificate from the Chief Medical Officer, Kanpur Nagar on 11.10.2013 and submitted the same before the concerned respondent, namely, Senior Accounts Officer on 14.10.2013.

5. Ms. Usha Singh Devi, learned Advocate submitted that despite medical certificate of the Chief Medical officer submitted before the authority, the matter was referred to a four member committee constituted to examine the claim of the petitioner and whereas the committee was not equipped with any medical skill, nor committee consisted of any medical officer, it rejected the claim of the petitioner only on the ground that at some point of time he was running public call office (PCO) and so he was able to earn and that the petitioner was found to be physically disabled up to some extent. Thus, according to her committee rejected the petitioner's claim of disability and so his claim for pension wholly illegally. As a consequence to the decision taken by the committee the Accounts Officer who was one of the members of the committee passed an order dated 12.11.2020 impugned in the petition rejecting claim of the petitioner.

6. Learned counsel for the petitioner has argued that merely because at the some point of time the petitioner ran a PCO, petitioner was not a disabled person and such a decision was bad for the reason that none of the members of the committee was qualified enough to reject the certificate of the Chief Medical officer. It is submitted that as per the rules and the relevant government orders, in every government service and also for the

purposes of pension etc, it is the certificate of the Chief Medical Officer or medical officer of an officer of equivalent rank which would weigh and not the decision of unskilled persons or the committee which has no medical officer on its panel. It is argued that medical certificate issued by an authorized officer can only be questioned by a medical board or medical officer of higher rank and not by administrative officer like Deputy General Manager, Senior Accounts Officer, Account Officer or Assistant Accountant.

7. *Per contra*, defending the decision taken by the authority, learned counsel appearing for the respondents Ms. Usha Kiran has sought to argue that if the petitioner could have survived for so many years if was able to run a PCO, such person cannot be said to be a disabled person to become entitled to family pension under the relevant Government Order. However, Ms. Ushan Kiran would not dispute that none of the officers on the panel of the committee had the requisite skill or knowledge of the medical field so as to dislodge the medical certificate issued by the Chief Medical Officer. She would also not dispute the argument advanced by the learned counsel for the petitioner that in government service and for all the official purposes also so far the disability part is concerned, medical certificate issued by the Chief Medical Officer would matter and not of any other officer. She would also not dispute that no medical board was constituted to look into the correctness of medical certificate issued by the Chief Medical Officer, Kanpur Nagar certifying the petitioner to be suffering from physical disability due to Polio disease.

8. Having heard learned counsel for the respective parties, having perused the record and the order impugned, I find it to be admitted position in the pleadings of the parties that there is government order issued on 20.05.1997 amending the earlier government order dated 06.08.1981 making disabled son and daughter of an ex-government employee to be entitled to family pension. This government order is applicable to be department concerned and therein also an admitted position to the parties that petitioner upon been asked by the Senior Accounts Officer, had furnished disability certificate of Chief Medical Officer, copy whereof has been brought on record as annexure-8 to the petition. The certificate showing the petitioner to be suffering from 60% disability issued by the Chief Medical Officer, Kanpur Nagar has been brought on record as annexure-2.

9. These above documents have not been disputed as such to have been obtained either by fraud or forgery or have been procured by the petitioner misleading the Chief Medical Officer concerned. The order impugned only records that petitioner was directed to appear before the committee and that he admitted to have run some PCO in past for his survival. It is on account of this statement made that committee came to conclude that petitioner was able to survive and, therefore, would not be treated to be a disabled person. The provisions of circular latter of the Corporation dated 20.05.1999 has been cited in which it had been provided that if a person was not able to survive for his disability, he would be entitled to family pension. In my considered view, even if the circular letter of the corporation is taken to mean that a disable person should be such that he would not be able to survive but for family pension, the committee has not returned any finding as to how the petitioner would be surviving with 60%

disability. He might have operated some PCO in the past but failed to continue with the business and will be taken to be so only on account of this disability. Disability if disqualifies him to run a business, in my considered view, is sufficient enough to prove that such a disabled person deserves family pension.

10. I find merit in the submissions advanced by learned counsel for the petitioner that the committee constituted with four persons had no medical officer on its panel to question the disability certificate issued by the Chief Medical Officer. Even in the counter affidavit, there is no such pleading that certificate was obtained by fraud or forgery or procured for the purpose of obtaining the family pension. Certificate issued by a Chief Medical Officer could have been questioned only by the penal of medical officers in the field of orthopaedics, otherwise one could not say that merely because someone ran a business in the past, maybe he was a disabled, he would not be entitled for family pension. This analogy given and findings arrived at by the committee constituted for the said purpose and the order of Senior Account Officer is clearly unsustainable.

11. The matter could have been remanded, had the respondent questioned the medical certificate by appointing a medical officer or medical board having knowledge of the field concerned. This respondent having not done, I do not find there to be any reason not to believe the physical disability certificate issued by the Chief Medical Officer. The Government Order is very clear on the point and 60% physical disability is sufficient enough for a person to hold him entitled for family pension as a disabled who had been dependent of his parents who later died on 21.04.2013.

12. In view of the above the writ petition succeeds and is allowed. The order dated 12.11.2020 whereby his claim for dependent/ family pension has been rejected is hereby set aside.

13. Respondents are directed to accord family pension to the petitioner. Appropriate orders be passed by the competent authority within a period of one month from the date of presentation of certified copy of the order.

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**(2024) 7 ILRA 70**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 04.07.2024**

**BEFORE**

**THE HON'BLE MANISH MATHUR, J.**

Writ A No. 4763 of 2024

**Purushottam Yadav ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Ravindra Kumar Yadava, Ram Suphal

**Counsel for the Respondents:**
C.S.C., Dilip Kumar Pandey

**A. Service Law – Post of Panchayat Sahayak – GO dated 25.07.2021 – Paragraph no. 10 (vii) and 16 – Engagement on contractual basis by Gao Sabha – After about two and half years, the petitioner was restrained from functioning – Validity challenged – No show cause notice as required under Para 16 was issued – Effect – Paragraph no. 10 (vii) provides for service up to a maximum period of two years and paragraph no. 16**

**provide for show cause notice before dispensing with service – Applicability – Held, paragraph 16 of the Government Order would, in fact, applicable only in cases where services of the contractual employee are being dispensed with mid term, which is not the present case – Since condition enumerated in paragraph 16 are inapplicable and there does not appear to be any right vested in the petitioner for continuation of contractual period, the petition fails. (Para 8 and 9)**

**Writ petition dismissed.** (E-1)

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

1. Heard Mr. Ravindra Kumar Yadava, learned counsel for petitioner, Dr. Uday Veer Singh, learned State Counsel for opposite parties no.1 to 7 and Mr. Dilip Kumar Pandey, learned counsel for opposite party no.8.

2. Petition has been filed challenging resolution of the Gaon Sabha dated 04.11.2022, letter dated 30.04.2024 by Gaon Sabha and advertisement dated 07.06.2024 issued for recruitment on the post of Panchayat Sahayak/ Account-Cum-Data Entry Operators.

3. It has been submitted that petitioner was initially engaged on service on the aforesaid post on contractual basis on 30.10.2021 on a fixed honorarium of Rs.6000/- per month whereafter he has been continued in service till May 2024 but has been restrained from functioning and a fresh advertisement as impugned has been issued.

4. Learned counsel for petitioner has drawn attention to paragraph 16 of the Government Order dated 25.07.2021 to submit that in case of unsatisfactory work, it was incumbent upon opposite parties to have followed the procedure indicated therein and to have issued a show cause notice and provided an opportunity of hearing to petitioner prior to dispensing with his service. He has also adverted to the resolution dated 04.11.2022 to submit that the contract of service of petitioner was not extended impliedly due to unsatisfactory service, which clearly indicates a violation of Government Order. He further submits that ever since November 2022 till May 2024, opposite parties have been taking work from petitioner without payment of honorarium.

5. Learned counsel for opposite parties have refuted submissions advanced by learned counsel for petitioner with the submission that petitioner was initially appointed on 30.10.2021 on contract basis on a fixed honorarium and as per Government Order dated 25.07.2021, the term of such contract was one year as per paragraph 10 (vii) thereof which also provides for extension of contract services in case the Gaon Sabha deems so fit. It is submitted that in the resolution of Goan Sabha dated 04.11.2022, an open meeting was held and no necessity was found for continuation or extension of petitioner's contractual services. It is therefore submitted that since petitioner's contract came to an end by efflux of time, there is no vested right accrued for continuation of services and that paragraph 16 is also inapplicable since the contractual period had ended.

6. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it is quite evident and admitted by the petitioner in paragraph no.5 of writ petition that he was initially engaged on the said post on contractual basis on

30.10.2021 on a fixed honorarium. Paragraph 10 (vii) of the Government Order dated 25.07.2021 clearly indicates that such contractual services would be for a period of one year only whereafter it shall be discretion of the Gaon Sabha to extend the contractual services in case of satisfactory work but only subject to a maximum period of two years.

7. Once it is admitted by the petitioner that he was appointed on 30.10.2021, then in terms of paragraph 10 (vii) of the aforesaid Government Order dated 25.07.2021, such contractual services were only for a period of one year subject to continuation in terms of resolution of the Gaon Sabha. In such circumstances, it is clear that petitioner's contractual service came to an end by efflux of time on 30.10.2021and vide resolution dated 04.11.2022, Gaon Sabha declined to extend the period of contract merely indicating the fact that all the members declined to extend contractual services of petitioner. The impugned resolution has thereafter been approved on 30.04.2024 by the District Panchayat Raj Officer. It is quite evident that there is no discussion with regard satisfactory or dis-satisfactory service of petitioner.

8. In the considered opinion of this Court, conditions indicated in paragraph 10 of Government Order dated 25.07.2021 would be inapplicable in the present facts and circumstances where the contractual period has ended by efflux of time. The said paragraph 16 of the Government Order would in fact the applicable only in cases where services of the contractual employee are being dispensed with mid term, which is not the present case.

9. In view of aforesaid, since condition enumerated in paragraph 16 of the Government Order dated 25.07.2021 are inapplicable and there does not appear to be any right vested in the petitioner for continuation of contractual period, the petition fails and is **dismissed at the admission stage itself**. Parties to bear their own costs.

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**(2024) 7 ILRA 72**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 08.07.2024**

**BEFORE**

**THE HON'BLE RAJESH SINGH CHAUHAN, J.**

Writ A No. 4825 of 2024

**Manjeet Singh** ...**Petitioner**
**Versus**
**State of U.P. & Ors.** ...**Respondents**

**Counsel for the Petitioner:**
Ram Raj, Rishabh Raj

**Counsel for the Respondents:**
C.S.C., Aditya Mohan, Naresh Chandra

Service Law – Departmental Inquiry – Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 – Contrary to provisions - Certiorari – Quashing of entire departmental proceedings – Principles of natural justice - Impugned order challenged, in absence of legal formality petitioner was asked to appear before disciplinary authority for personal hearing and submit his explanation to inquiry report – Held, for conducting departmental inquiry, proper opportunity of hearing should be afforded to an delinquent employee - Copy of demanded documents / relevant / relied upon documents should be provided to him / her so that proper defense reply could be filed before inquiry officer - Oral inquiry is mandatory if charges are serious , if charges are proved, incumbent may be awarded major punishment - For conducting oral inquiry, date, time and place should be fixed - Inquiry report should be submitted before disciplinary authority - Disciplinary

authority should provide copy of inquiry report to employee seeking explanation by providing an opportunity of hearing - Then, disciplinary authority may conclude departmental inquiry finally - Procedure has not been followed by inquiry officer nor by disciplinary authority as he has not verified fact as to whether inquiry officer has conducted inquiry in accordance with law or not – Matter remanded back to conclude inquiry by affording an opportunity of personal hearing and to examine witnesses. (Para 3, 11, 14)

**Allowed.** (E-13)

**List of Cases cited**:

1. State of U.P. & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772

2. The St. of U. P. & ors. Vs Rajit Singh, (2022) 15 SCC 254

3. United Bank of India Vs Biswanath Bhattacharjee, (2022) 13 SCC 329

4. State of U.P. Vs State Public Service Tribunal and others (2022) 3 UPLBEC 1865

5. Union of India Vs P Gunasekaran, (2015) 2 SCC 610

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ram Raj, learned counsel for the petitioner, Sri Sudhir Kumar Singh, learned Standing Counsel for the State and Sri Aditya Mohan, learned counsel for the opposite parties no. 2 to 5.

2. By means of this petition the petitioner has prayed following relief :

*"i. Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 15.06.2024, passed by the opposite party no. 4/Additional Director, Rajya Krishi Utpadan Mandi Parishad, Uttar Pradesh, Lucknow, contained in Annexure No. 1 to this writ petition.*

*ii. Issue a writ, order or direction in the nature of Certiorari quashing the impugned inquiry report dated 06.06.2024, submitted by the opposite party no. 5/Inquiry Officer / Deputy Director (Administration/Marketing), Rajya Krishi Utapadan Mandi Parishad, Kanpur, contained in ANNEXURE No.2 to this writ petition.*

*iii. Issue a writ, order or direction in the nature of Certiorari quashing the entire departmental proceeding initiated against the petitioner by the opposite party no.4 vide its order dated 14.09.2023 as they were conducted contrary to provisions contained In the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 and the principles of natural justice.*

*iv. Issue a writ, order or direction in the nature of Mandamus commanding the opposite parties not to give effect to the operation and implementation of the impugned order dated 15.06.2024, passed by the opposite party no.4/Additional Director, Rajya Krishi Utapadan Mandi Parishad, Uttar Pradesh, Lucknow and the impugned inquiry report dated 06.06.2024, submitted by the opposite party no.5/Inquiry Officer/Deputy Director (Administration/Marketing), Rajya Krishi Utapadan Mandi Parishad, Kanpur, contained in Annexure Nos.1 and 2 respectively to this writ petition.*

3. The precise contention of the learned counsel for the petitioner is that before passing the impugned order dated 15.6.2024 by the disciplinary authority the relevant aspect has not been verified as to whether during the course of departmental inquiry the petitioner has been afforded the opportunity of hearing strictly in

accordance with law and as to whether he has been supplied all important and relied upon documents which have been demanded by the petitioner time and again. The disciplinary authority has also not examined the relevant fact that under compelling circumstances the petitioner submitted his tentative defense reply indicating therein that he has not been provided the demanded documents but if the inquiry officer is willing to conclude the inquiry without affording an opportunity of hearing to the petitioner and without supplying the demanded documents at least he should have given an opportunity of personal hearing and the opportunity to examine some witnesses whose names have been categorically indicated in para 11 of the tentative defense reply of the petitioner dated 6.6.2024 (Annexure no. 13). The disciplinary authority has also not perused the relevant document which has been enclosed as Annexure no. 2 which is the findings of the inquiry officer dated 6.6.2024 in the light of the fact that on 6.6.2024 the petitioner submitted his tentative defense reply and on the same date the inquiry officer has submitted his inquiry report before the disciplinary authority ignoring the specific and categorical demand of the petitioner to supply the documents and to provide the opportunity of hearing and opportunity to examine the witnesses. In the absence of aforesaid legal formality which is in conformity with the principles of natural justice the impugned order dated 15.6.2024 has been issued by the disciplinary authority to the petitioner saying him to appear before him for personal hearing and to submit his explanation to the inquiry report.

4. Sri Ram Raj has submitted that if the entire departmental inquiry including the findings are farce and an eye-wash and the same has been completed without following the basic tenets and requirements to conduct and conclude the departmental inquiry as to what sort of personal hearing has been given by the disciplinary authority and this fact makes it crystal clear that both the inquiry officer as well as disciplinary authority are adamant to punish the petitioner without following the due procedure of law.

5. On being confronted the learned counsel for the opposite party nos. 2 to 5 on the aforesaid submission of learned counsel for the petitioner, he tried to justify the aforesaid impugned order by saying that the disciplinary authority has given opportunity of personal hearing then whatever grievance the petitioner is having may be submitted before the disciplinary authority and may submit the explanation and before taking any decision the disciplinary authority may look into this aspect.

6. Learned State Counsel has stated that at this stage the matter is between the petitioner and opposite party no. 2 to 5, therefore, he has no locus to say anything.

7. On being confronted the learned counsel for the opposite parties no. 2 to 5 on the point that when the petitioner has, admittedly, not been provided the demanded documents and he has not been afforded an opportunity of personal hearing by the inquiry officer and he has not been given opportunity to examine the witnesses whose specific name and post has been indicated in his tentative defense reply as to how any charge can be proved against the petitioner and also as to how the disciplinary authority may take any

appropriate decision finalizing the departmental inquiry, no proper explanation can be given.

8. Sri Ram Raj, in support of his aforesaid contention, has placed reliance on the judgments of Apex Court in re: ***(2010) 2 SCC 772: State of U.P. and others vs. Saroj Kumar Sinha, (2022) 15 SCC 254 : The State of Uttar Pradesh and others vs. Rajit Singh, (2022) 13 SCC 329 : United Bank of India vs. Biswanath Bhattacharjee, (2022) 3 UPLBEC 1865 : State of U.P. vs. State Public Service Tribunal and others and (2015) 2 SCC 610 : Union of India vs. P Gunasekaran,*** more particularly ***Saroj Kumar Sinha (supra)*** whereby the Apex Court has explained the manner under which the departmental inquiry is conducted and concluded and also as to how the disciplinary authority may pass appropriate order finalizing the departmental proceedings.

9. I have perused the judgments of Apex Court and I find that the guidelines and directions, so issued by the Apex Court time and again, particularly in re: ***Saroj Kumar Sinha (supra)*** has not been followed in the present case.

10. At this stage learned counsel for the opposite parties no. 2 to. 5 has stated that if this Hon'ble Court may find it appropriate to interfere in the aforesaid impugned orders may provide an opportunity to department to pass appropriate order strictly in accordance with law and for the reason that serious allegations have been levelled against the petitioner for which he may not left scot-free.

11. Having heard learned counsel for the parties and perused the material available on record, I am of the considered opinion that while conducting the departmental inquiry against an employee the proper opportunity of hearing should be afforded to him at particular stages. The copy of the demanded documents / the relevant / relied upon documents should be provided to him / her so that proper defense reply could be filed before the inquiry officer. After receiving the defense reply the oral inquiry is mandatory if the charges are serious and the department is of the view that if those charges are proved the incumbent may be awarded major punishment. For conducting the oral inquiry the date, time and place should be fixed. Thereafter the inquiry report should be submitted before the disciplinary authority. The disciplinary authority should provide the copy of inquiry report to the incumbent / delinquent employee seeking explanation from him by providing an opportunity of personal hearing. After following the aforesaid procedure of law the disciplinary authority may conclude the departmental inquiry finally.

12. In the present case what I find is that the aforesaid procedure has not been followed by the inquiry officer nor by the disciplinary authority as he has not verified the fact as to whether the inquiry officer has conducted the inquiry strictly in accordance with law or not.

13. Therefore, I hereby **quash** the impugned order dated 15.6.2024 (Annexure no. 1), passed by the opposite party no. 4 and the inquiry report dated 6.6.2024 (Annexure no. 2) submitted by the opposite party no. 5.

14. The issue is remanded back to the inquiry officer to conduct and conclude the departmental inquiry strictly in accordance with law by affording an opportunity of hearing to the petitioner and to supply the copy of the demanded documents and also to provide him an opportunity to examine the witnesses whose names have been indicted in para 11 of the defense reply dated 6.6.2024. The aforesaid departmental inquiry may be conducted and concluded with expedition as the departmental inquiry may not be kept pending against the petitioner for unlimited period but it should be concluded within a reasonable time. Thereafter, the disciplinary authority may pass an appropriate order by affording an opportunity of personal hearing to the petitioner seeking his explanation providing him copy of inquiry report, if any and after considering the explanation of the petitioner the disciplinary authority may pass final order concluding the departmental inquiry finally. For doing the aforesaid entire exercise no unnecessary time may be consumed by both the authorities i.e the inquiry officer and the disciplinary authority.

15. It is made clear that while conducting and concluding the departmental inquiry the inquiry officer may not be influenced from any observation of this Court inasmuch these observations are limited to the extent that the inquiry officer has not conducted or concluded the inquiry strictly in accordance with law, therefore, while conducting and concluding the departmental inquiry the inquiry officer shall conclude the same independently without being influenced from any observation made in this order. At the same time the disciplinary authority may pass a final order without being influenced from any observation made by this Court.

16. In view of the aforesaid, the writ petition is allowed on the aforesaid limited points.

17. No order as to costs.

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**(2024) 7 ILRA 76**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 03.07.2024**
**BEFORE**

**THE HON'BLE AJIT KUMAR, J.**

Writ A No. 4833 of 2024

**Harish Verma ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Shailesh Mani Tripathi, Shriprakash Mishra

**Counsel for the Respondents:**
C.S.C., Krishna Mohan Asthana

**Service Law – Compassionate Appointment – Constitution of India, 1950 – Article 226 - Petitioner challenged impugned order, by which competent authority of bank rejecting claim of petitioner for compassionate appointment only on the ground that his financial condition was satisfactory – Held, while passing the order denying a claim means that right at least a substantive right which as per bank own policy vests in dependents of deceased - Well reasoned order should have been passed - Consideration should be objective enough so as to apprise aggrieved party about valid reasons for denial of claim for compassionate appointment - Law is well settled, no amount of defence taken in reply or pleading can substitute lacuna as to reasoning in the order if the order is cryptic – Impugned order quashed by**

**remitting to pass a fresh order. (Para 2, 6, 7, 8, 9, 10)**

**Allowed.** (E-13)

**List of Cases cited:**

1. U.O.i. Vs M.L. Capoor & ors., AIR 1974 SC 87

2. S.N. Mukherjee Vs U.O.I. AIR 1990 SC 1984

3. State of Himachal Pradesh & ors. Vs Shashi Kumar, 2019 (3) SCC 653

4. S.B.I. Vs Somvir Singh, 2007 4 SCC 778

5. Mohinder Singh Gill Vs Chief Election Commissioner (1978) 1 Supreme Court Cases 405

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

1. Heard Shri Shailesh Mani Tripathi, learned Advocate appearing for the petitioner, Shri Krishna Mohan Asthana, learned Advocate appearing for respondent Bank, learned Standing Counsel for the State.

2. By means of this petition filed under Article 226 of the Constitution, the petitioner has challenged the order dated 05.01.2024 passed by the respondent competent authority of the bank rejecting the claim of the petitioner for compassionate appointment only on the ground that his financial condition was satisfactory.

3. The argument advanced by learned counsel for the petitioner is that merely recording a fact that the financial condition was satisfactory was not sufficient enough to be taken as good ground or reason to reject the claim of the petitioner for compassionate appointment. It is argued that in view of settled legal position, the competent authority ought to have discussed financial aspect that was involved in the matter which according to the competent authority was sufficient enough to deny the claim of the petitioner for compassionate appointment in view of the bank's policy laid down in that regard and the circular letter issued also at the end of the bank.

4. In support of his argument, learned counsel for the petitioner has relied upon various authorities like one in ***Union of India Vs. M.L. Capoor and others AIR 1974 SC 87 and S.N. Mukherjee Vs. Union of India AIR 1990 SC 1984.***

5. Meeting the arguments, learned Advocate for the respondent bank has placed reliance upon the avernments made in paragraph-5 of the counter affidavit in which details of terminal dues and other financial status of the petitioner has been discussed in detail and submits that this itself discloses that the financial background of the petitioner was sound enough to take him out of the zone of consideration as per the policy of the bank and circular letter issued. He has also placed reliance upon the authorities cited in the case of ***State of Himachal Pradesh and others Vs. Shashi Kumar 2019 (3) SCC 653*** and also ***State Bank of India Vs. Somvir Singh 2007 4 SCC 778*** and the ratio laid down in these judgment

6. Having heard learned counsel for the respective parties and having perused the record particularly the order impugned, I find that the order simply records in one line that *"It was found that financial condition of dependent of the deceased was satisfactory and, therefore, no circumstances were found sound enough to offer him compassionate appointment."* In my considered view this one line

satisfaction seems to be based upon some material that ought to have been discussed as has been discussed in paragraph-5 of the counter affidavit. There is no quarrel upon the legal position and that the bank can make its own circular and compassionate appointment cannot be claimed as a matter of vested right. However, while passing the order denying a claim means that right at least a substantive right which as per the bank own policy vests in the dependents of the deceased, a well reasoned order should have been passed. Thus, consideration should be objective enough so as to apprise the concerned aggrieved party about valid reasons for denial of claim for compassionate appointment.

7. The law is well settled, no amount of defence taken in the reply or pleading can substitute the lacuna as to reasoning in the order if the order is cryptic and, accordingly. In the case of ***Mohinder Singh Gill Vs. Chief Election Commissioner (1978) 1 Supreme Court Cases 405*** vide paragraph-8 Court has observed 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.".*

8. In view of the above, the order dated 05.01.2024, impugned herein this petition is held unsustainable. The order dated 05.01.2024 Annexure No.1 to the writ petition, passed by the Assistant General Manager, Canara Bank (respondent No. 3) is hereby quashed.

9. The matter is remitted to the Assistant General Manager, Canara Bank (respondent No. 3) to pass fresh order, this time reasoned and speaking one.

10. It is clarified that merely because certain details have not been found to be placed in the order regarding financial condition or background of the petitioner should not itself become a ground to deny the claim again and there has to be an objective consideration of the material available before the authority while passing the order and the order should be reasoned and speaking one. Appropriate decision should be taken by the competent authority within a period of two months from the date of production of certified copy of this order.

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**(2024) 7 ILRA 78**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 15.07.2024**

**BEFORE**

**THE HON'BLE RAJESH SINGH CHAUHAN, J.**

Writ A No. 4891 of 2024

**Uma Shanker Prasad ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Arun Kumar Pandey, I.M. Pandey Ist

**Counsel for the Respondents:**
C.S.C.

**A. Service Law – UP Government Servants (Disciple and Appeal) Rules, 1999 – Rule 7 – Disciplinary proceeding – Major penalty**

**– No copy of the inquiry report was supplied – Disciplinary authority failed to verify the relevant aspect as to whether the Inquiry Officer had fixed date, time and place for conducting the oral inquiry – Effect – Disciplinary authority imposed major punishment only on the basis of inquiry report – Validity challenged – Held, this is a settled law that for conducting the departmental inquiry, the Inquiry Officer shall fix date, time and place for conducting oral enquiry and after the conclusion of the inquiry by the Inquiry Officer, the copy thereof shall be furnished/submitted before the disciplinary authority, thereafter, the disciplinary authority shall provide the copy of the inquiry report to the delinquent employee seeking explanation thereon – Departmental inquiry is conducted in a violation of Rule 7 of Rules, 1999. (Para 6, 9 and 10)**

**Writ petition allowed.** (E-1)

**<u>List of Cases cited</u>:**

1. St. of U.P. Vs Saroj Kumar Sinha; (2010) 2 SCC 772

2. Writ A No. 26819 of 2019; Eklavya Kumar Vs St. of U.P. & ors. decided on 07.02.2023

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard.

2. This Court has passed the order dated 2.7.2024 which reads as under:-

*"1. Heard Shri I.M. Pandey, learned counsel for the petitioner and Ms. Deepshikha, learned Chief Standing Counsel-II.*

*2. By means of this petition, the petitioner has assailed the impugned punishment order dated 07.03.2024 passed by Settlement Officer, Consolidation, Barabanki withholding two increments of salary of the petitioner permanently and censure entry. The main ground to assail the aforesaid impugned order of punishment is that the Inquiry Officer has not conducted the oral inquiry by fixing date, time and place; the disciplinary authority issued a show cause notice without providing the copy of the inquiry report and despite the specific demand made by the petitioner to supply the copy of inquiry report and to direct the Inquiry Officer to make oral inquiry, the punishment order have been passed.*

*3. Attention has been drawn towards Annexure No.11, which is a show cause notice being issued by the disciplinary authority, wherein there is no indication of supply of the copy of the inquiry report, therefore, prima facie, it convinces the Court that the show cause notice have been issued to the petitioner without providing the inquiry report.*

*4. The aforesaid ground may be liable to quash the impugned order of punishment but on the request of learned Chief Standing Counsel-II, the case is listed on 08.07.2024. Therefore, list/ put up this matter on 08.07.2024 as fresh in the additional cause list.*

*5. This matter shall be taken up immediately after fresh.*

*6. By the next date of listing, learned Chief Standing Counsel-II may seek complete written instructions in this matter."*

3. In compliance of the aforesaid order, learned Standing Counsel has produced a copy of the detailed instructions/letter dated 4.7.2024 along with some documents, the same is taken on record.

4. The precise query of this Court was that as to whether the disciplinary

authority has provided a copy of the inquiry report to the delinquent employee seeking explanation on the basis of the inquiry report inasmuch as there was no recital to this effect in the explanation being sought by the disciplinary authority. The aforesaid instructions categorically reveals that the copy of the inquiry report was not provided to the delinquent employee seeking explanation on the basis of inquiry report before passing the impugned order of punishment dated 7.3.2024. However, as per aforesaid instructions, the copy of the inquiry report has been provided to the petitioner on 30.5.2024. Besides, no specific instructions have been provided on the other query regarding fixing date, time and place for conducting oral inquiry by the Inquiry Officer.

5. Notably, a proper and complete mechanism has been given in Rule 7 of the U.P. Government Servants (Disciple and Appeal) Rules, 1999 (hereinafter referred as 'Rules, 1999') for imposing major penalties. Rule 9 provides 'Action on Inquiry Report'. Rule 7 (i, ii, iv, v, vii, viii and ix) and Rule 9 (4) read as under:

***"7-Procedure for imposing major penalties***- *Before imposing any major penalty on a Government Servant, an inquiry shall be held in the following manner:*

*(i) The Disciplinary Authority may himself inquiry into the charges or appoint an Authority Subordinate to him as Inquiry Officer to inquire into the charges.*

*(ii) The Facts constituting the misconduct on which it is proposed to take action shall be reduced in the from of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the Disciplinary Authority. Provided that where the Appointing Authority is Governor, the charge-sheet may be approved by the Principal Secretary or the Secretary, as the case may be, of the concerned department.*

...

*(iv) The charge Government Servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence He shall also be informed that in case he does not appear or file written statement on the specified date, it will be presumed that he has none to furnish and inquiry officer shall proceed to complete the inquiry ex-parte.*

*(v) The charge-sheet, along with the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government Servant personally or by registered post at the address mentioned in the official records in case the charge-sheet could not be served in aforesaid manner, the charge- sheet shall be served by publication in a daily newspaper having wide circulation:*

*Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charge Government servant shall be permitted to inspect the same before the Inquiry Officer.*

...

*(vii) Where the charged Government Servant denies the charge the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charge Government Servant who shall be given opportunity to cross- examine*

*such witnesses. After recording the aforesaid evidences, the Inquiry officer shall call and record the oral evidence which the charged Government Servant desired in his written statement to be produced in his defence:*

*Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.*

*(viii) The inquiry officer may summon any witnesses to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental inquiries (Enforcement of Attendance of witnesses and production of documents) Act 1976.*

*(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.*

***9(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."*

6. This is a settled law that for conduting the departmental inquiry, the Inquiry Officer shall fix date, time and place for conducting oral enquiry and after the conclusion of the inquiry by the Inquiry Officer, the copy thereof shall be furnished/submitted before the disciplinary authority, thereafter, the disciplinary authority shall provide the copy of the inquiry report to the delinquent employee seeking explanation thereon. The aforesaid exercise has been indicated in the Rules, 1999 and the same is in conformity with the principles of natural justice. Without providing the copy of the inquiry report, the delinquent employee may not submit his explanation. Even if he is called for personal hearing, that would not suffice the purpose inasmuch as unless and until the delinquent employee receives the copy of the inquiry report, he would not be able to defend himself properly.

7. The aforesaid position of law is a trite position of the law and the Hon'ble Apex Court in a catena of cases has held that the disciplinary authority shall furnish/supply the copy of inquiry report to the delinquent employee seeking explanation but in the present case, this settled position of law is not known to the disciplinary authority, i.e., Settlement Officer Consolidation, Barabanki and in the absence of supply of inquiry report, the impugned punishment order dated 7.3.2024 has been passed. However, after passing the aforesaid impugned punishment order, the copy of the inquiry report has been supplied to the petitioner on 30.5.2024, as has been indicated in the instructions/letter which was of no avail.

8. The Apex Court in re: **State of U.P. vs. Saroj Kumar Sinha** reported in **(2010) 2 SCC 7**72 has held as under:

*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.*

*...*

*37. We are of the considered opinion that the aforesaid observations are fully applicable in the facts and circumstances of this case. Non-disclosure of documents having a potential to cause prejudice to a government servant in the enquiry proceedings would clearly be denial of a reasonable opportunity to submit a plausible and effective rebuttal to the charges being enquired into against the government servant.*

*...*

*39. The proposition of law that a government employee facing a departmental enquiry is entitled to all the relevant statements, documents and other materials to enable him to have a reasonable opportunity to defend himself in the departmental enquiry against the charges is too well established to need any further reiteration. Nevertheless given the facts of this case we may re-emphasise the law as stated by this Court in State of Punjab v. Bhagat Ram [(1975) 1 SCC 155 : 1975 SCC (L&S) 18] : (SCC p. 156, paras 6-8)*

*"6. The State contended that the respondent was not entitled to get copies of statements. The reasoning of the State was that the respondent was given the opportunity to cross-examine the witnesses and during the cross-examination the respondent would have the opportunity of confronting the witnesses with the statements. It is contended that the synopsis was adequate to acquaint the respondent with the gist of the evidence.*

*7. The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the government servant is afforded a reasonable opportunity to defend himself against charges on which inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. He can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the government servant. Unless the statements are given to the government servant he will not be able to have an effective and useful cross-examination.*

*8. It is unjust and unfair to deny the government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the government servant. A synopsis does not satisfy the requirements of giving the government servant a reasonable opportunity of showing cause against the action proposed to be taken."*

9. This is really a sorry state of affairs that the Settlement Officer Consolidation has punished the petitioner by means of the impugned order dated 7.3.2024 (Annexure-1) without supplying the copy of the inquiry report and the copy thereof has been supplied to the petitioner on 30.5.2024, therefore, the aforesaid fact makes it crystal clear that the disciplinary

authority i.e., Settlement Officer Consolidation, Barabanki is not aware about the settled position of law. Even the disciplinary authority did not verify the relevant aspect of the departmental inquiry as to whether the Inquiry Officer had fixed date, time and place for conducting the oral inquiry inasmuch as it is neither clear from the inquiry report nor from the instructions letter so produced today, therefore, the impugned punishment order vitiates on both the courts, i.e., at the stage of inquiry and at the time of seeking explanation from the petitioner by the disciplinary authority on the basis of inquiry report which has admittedly been not supplied to the petitioner before imposing major punishment.

10. Looking into the manner of administrative officers of the State of U.P. who are made inquiry officer to conduct the departmental inquiry against the employees and noticing the fact that the departmental inquiry is conducted in a violation of Rule 7 of Rules, 1999, this Court has expressed its concern and anguish, vide judgement and order dated 7.2.2023, in a bunch of writ petitions, leading writ petition bearing **Writ-A No. 26819 of 2019 : Eklavya Kumar vs. State of U.P. and others**, the relevant extract thereof reads as under:

*"...The seriousness of the situation resulted in repeated orders passed by the Supreme Court, by this Court as well as Government Orders issued. Relevant amongst these read as follows:-*

*This Court in the case of Prakash Chandra Agrawal vs. State of U.P. and another (Writ-A No.2555 of 2022, decided on 7.5.2022, passed the following order:*

*"1. Present writ petition is filed by the petitioner challenging his punishment order dated 11.04.2022 passed by Additional Chief Secretary/Principal Secretary, Secretariat Administration Department, Lucknow (respondent no.2).*

*2. By the impugned order, petitioner is given a punishment of censure entry and reversion to the post of Section Officer from the post of Under-Secretary.*

*3. At the very outset, learned counsel for petitioner submits that the inquiry was conducted by the Special Secretary, Medical Education Services, U.P., who submitted her report on 25.08.2021. He submits that in the present case, the inquiry officer was never provided the documents to which she had relied upon in the inquiry. The said documents were summoned by the inquiry officer during the conduct of the inquiry and were also perused by her. However, neither copy of the said documents were provided to the petitioner nor the same were permitted to be perused by the petitioner. Learned counsel for petitioner further submits that a bare perusal of the report shows that the inquiry was conducted in violation of Rule-7 of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 (hereinafter referred to as 'Rules of 1999'), as no date, time and place was fixed in the inquiry.*

*4. I have perused the inquiry report as well as the impugned punishment order. A bare perusal of the same shows that the inquiry officer has, in fact, not merely failed to follow the procedure provided by Rule-7 of Rules of 1999 but has also placed burden upon the delinquent employee to prove that he is not guilty. In the first line of discussion, the inquiry officer states, that, delinquent employee through his reply to the charge-sheet/statements could not submit any evidence which would prove that the delinquent employee is wrongly charged.*

*5. In the present case, the Additional Chief Secretary was summoned along with the record. Today he is present in Court along with the record and with his assistance as well as assistance of the counsels for parties, record is perused. Learned Standing Counsel also could not show from the record of the case that the procedure as prescribed under Rule-7 of Rules of 1999 is followed in conducting the inquiry and any date, time and place was fixed for evidence or evidence relied upon/summoned was provided to the petitioner.*

*6. Though the matter is simple as it is to be remanded back, but, in large number of cases filed before this Court, it is found that the inquiry with regard to major penalty is conducted in violation of Rule-7 of Rules of 1999. The present case is a glaring example of the same. Inquiry officer is a Special Secretary and the punishing authority is a Principal Secretary. Still a glaring error is committed in conduct of the inquiry by the inquiry officer and in failure to check the same by the punishing authority before punishment order was issued. It is not merely the duty of the inquiry officer to comply with the Rule-7 but also the duty of the punishing authority, while passing order of punishment, to ensure that the inquiry is conducted as per the procedure prescribed.*

*7. Such mistakes in large numbers are occurring for quite some time now in the State. The State Government as far back as on 22.04.2015 issued a detailed government order explaining at length the manner in which inquiry with regard to minor punishment or major punishment should be conducted. The government order explains at length what is already prescribed in Rule-7. When the inquiries were still not being conducted in proper manner, again under order of this Court dated 13.01.2021 passed in Writ-A No.12110 of 2020; 'State of U.P. & Others Vs. Vijay Anand Tiwari', a Government Order dated 10.02.2021 was issued by the State Government for compliance of Rule-7. Despite two aforesaid government orders, the inquiries are still not conducted in a proper manner. It is sad to note that the both the aforesaid government orders are also not being complied with by the officials. It is also noted that in large number of cases, after remand when the inquiry is re-conducted, the same procedural error is again made and again the inquiry report is submitted without following the due procedure as per Rule-7. This is also putting burden of unnecessary litigation upon this Court. It is the duty of the inquiry officer as well as the punishing authority to ensure compliance of Rule-7.*

*8. Since these incidences are abundant in number, therefore, this Court finds it necessary now to ensure that every inquiry officer, who at present is conducting an inquiry or appointed to conduct any inquiry in future, is provided proper training with regard to the manner and procedure for conducting the inquiry. Similarly the disciplinary authorities are also required to go through a training with regard to the manner in which the inquiries are to be conducted and, thereafter, punishment orders are to be passed. It goes without saying that the power exercised by the inquiry officers are quasi judicial in nature and for the same a judicially trained mind is required. The State Government is already having a Judicial Training and Research Institute (J.T.R.I.) which trains/educates the officers of the State Government on the legal compliances/procedures.*

*9. Therefore, Director, J.T.R.I., Lucknow is directed to forthwith prepare an appropriate program for training of the*

*inquiry officers as well as for training of the disciplinary authorities so that such mistakes are not repeated. The J.T.R.I shall also issue an appropriate identifiable certificate to every officer after he/she completes the training session. The relevant details of the said training session/certificates shall be referred by the officer concerned in every inquiry report submitted by him/her or punishment order passed. All the officers who are conducting any inquiry at present in the State shall attend the training without any delay and such inquiry officers shall conclude their inquiries only after their training is completed. Similarly the punishing authority shall also go through the required training before passing any punishment order and also refer to their session/certificate. It is further directed that no inquiry officer in future shall be appointed for departmental inquiry who has not received the training from the J.T.R.I. The State government shall bear the cost of the aforesaid training at J.T.R.I. at its own cost.*

*10. Senior Registrar of this Court shall forthwith send a copy of this order to the Chief Secretary of the State of U.P. as well as Director, J.T.R.I., Lucknow for its compliance.*

*11. Since, in the present case, admittedly, there is violation of Rule-7 as the documents relied upon by the inquiry officer were never provided to the petitioner nor the inquiry is conducted following the procedure prescribed under Rule-7, i.e., by summoning the witnesses of the department, giving chance of cross examination, providing opportunity to the delinquent employee/petitioner to call his witnesses, therefore, impugned order dated 11.04.2022 cannot stand and is set aside.*

*12. The matter is remanded back to respondent no.2 for conducting fresh inquiry after following proper procedure as prescribed under Rule-7.*

*13. With the aforesaid, the writ petition is allowed."*

***Supreme Court in the case of State of U.P. and others vs. Vijaya Nand Tiwari: Special Leave to Appeal No.10331 of 2022***, has passed following comments on 13.7.2022 with regard to working of the State Government:

*"As the inquiry was found to be in breach of Rule 7 (vii) of the U.P. Government Servant (Discipline and Appeal), Rules, 1999 (for short of 1999"), as such the learned Tribunal rightly set aside the order of punishment. In fact, the learned Tribunal allowed the back wages to the extent of 50% only. The same is rightly confirmed by the High Court. Therefore, there is no merit in the Special Leave Petition and the same deserves to be dismissed and is accordingly dismissed.*

*At this stage, it is required to be noted that while passing the impugned order, the High Court has shown its displeasure and observed and issued directions to the Chief Secretary, State of U.P. to look into the matter and appropriately direct the Secretaries of concerned departments to ensure that inquiry is conducted after observing Rule 7 of the Rules of 1999 in strict terms and more specially to lead oral evidence to prove the charges. The High Court has passed the following order –*

*"Before parting with the judgment, it is necessary to indicate that time and again Tribunal is causing interference in the order of punishment finding violation of Rule 7(vii) of the Rules of 1999.*

*Rule 7(vii) of the Rules of 1999 provides for oral evidence and invariably not followed in the enquiry despite catena of judgments of this Court causing*

*interference the order of punishment. The violation of the Rule 7(vii) of the Rules of 1999 results not only interference of order of punishment but financial burden on the Government in shape of back wages.*

*The Chief Secretary, State of U.P. is directed to look into the matter and appropriately direct the Secretaries of concerned departments to ensure that enquiry is conducted after observing Rule 7 of the Rules of 1999 in strict terms and more specially to lead oral evidence to prove the charges.*

*Necessary direction in compliance of this order would be issued by office of Chief Secretary, State of U.P. with an information to this Court in reference to the present order.*

*The registry is directed to send the copy of this order to Chief Secretary, State of U.P. for compliance within a period of one month from the date of its receipt."*

*Nothing is on the record to show any further steps taken by the Chief Secretary, State of U.P. in furtherance of the aforesaid directions issued by the High Court. Only for that purpose, the Registry is directed to notify the matter before this Bench on 18.07.2022 so as to enable the learned counsel for the petitioners. to place on record what steps are taken by the Chief Secretary, State of U.P. in compliance with the directions issued by this Court, as above.*

*Pending applications shall stand disposed of."*

*Further, the Supreme Court in the aforesaid case of* ***Vijaya Nand Tiwari (supra) passed the following order on 18.7.2022.***

*"Pursuant to our earlier Order dated 13.07.2022, an Affidavit is filed on behalf of the State of U.P. The affidavit is filed by one Chintan, posted as Prabhagiya Nirdeshak, Van Vibagh, Mau, U.P. which ought to have been filed either by the Chief Secretary or from the office of the Chief Secretary. In the affidavit, it is pointed out that, pursuant to the impugned judgment and order passed by the High Court, the Chief Secretary has issued the Circular dated 10.02.2021, directing that in all the departmental enquiry proceedings in the State, Rule 7(vii) of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 shall have to be followed.*

*When a pointed question was asked to the learned Senior Counsel appearing on behalf of the State that whether the Circular dated 10.02.2021 has been scrupulously thereafter followed or not. in the subsequent departmental enquires, he has stated that he has no further instructions in the matter and he cannot make any statement on that. Mere issuance of a Circular by the Chief Secretary to follow the rules is not sufficient. When the Chief Secretary has issued the Circular, it is his duty to see that his own Circular is followed.*

*Therefore, we direct the Chief Secretary to see that his own Circular dated 10.02.2021 to follow Rule 7 (vii) of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 shall be followed by all concerned Officers in the departmental enquiries so that the order of punishment on conclusion of the departmental enquiry is not set aside on the technical ground of not following the procedure as required under Rule 7 (vii) of the Rules, 1999. The Chief Secretary, State of Uttar Pradesh is directed to act accordingly. He must also ensure that if his own Circular is not followed, in that case, a further departmental enquiry be initiated against the erring officers, which may be including the insubordination and not*

*following the Circular issued by the Chief Secretary.*

*With this, we close the present proceedings."*

***The Government Order dated 10.8.2022 issued by the State Government*** *reads as under:*

*सर्वोच्च प्राथमिकता*
*संख्या–10/2022/738रिट/का–1–2022/13(9)1998*
*प्रेषक,*
*दुर्गा शंकर मिश्र,*
*मुख्य सचिव*
*उत्तर प्रदेश शासन।*
*सेवा में,*
*समस्त अपर मुख्य सचिव/प्रमुख सचिव/सचिव,*
*उत्तर प्रदेश शासन।*
*कार्मिक अनुभाग–1 लखनऊः दिनांक 10 अगस्त, 2022*

*विषय– विभागीय कार्यवाहियों (Departmental enquiries) में सम्बन्धित अधिकारियों द्वारा उत्तर प्रदेश सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 के नियम–7 ;अपपद्ध का अनुपालन न किये जाने के संबंध में।*

*महोदय,*

*मा0 उच्चतम न्यायालय के समक्ष दायर एस0एल0पी0 (सिविल) संख्या–10331/2022 उत्तर प्रदेश राज्य व अन्य बनाम विजयानन्द तिवारी में मा0 उच्चतम न्यायालय द्वारा पारित आदेश दिनांक 13.07.2022 सपठित आदेश दिनांक 18.07.2022 के मुख्य क्रियात्मक अंश निम्नवत् है–*

*"...... Mere issuance of a circular by the Chief Secretary to follow the rules is not sufficient. When the Chief Secretary has issued the circular, it is his duty to see that his own Circular is followed.*

*Therefore, we direct the Chief Secretary to see that his own circular dated 10.02.2021 to follow rule 7(vii) of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 shall be followed by all concerned officers in the departmental enquiries so that the order of punishment on conclusion of the departmental enquiry is not set aside on the technical ground of not following the procedure as required under Rule 7 (vii) of the Rules, 1999. The Chief Secretary, State of Uttar Pradesh is directed to act accordingly. He must also ensure that if his own Circular is not followed, in that case, a further departmental enquiry be initiated against the erring officers, which may be including the insubordination and not following the circular issued by the Chief Secretary.*

*With this, we close the present proceedings."*

*2- मा0 उच्चतम न्यायालय के उपर्युक्त आदेशों के समादर में आपका ध्यान शासनादेश संख्या–01/2021/13(9)1998–20रिट/का–1–2021 दिनांक–10.02.2021 की ओर आकृष्ट करते हुए मुझे आपसे यह कहने का निदेश हुआ है कि प्रत्येक विभागीय जांच के प्रकरण में उ0प्र0 सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 के नियम–7 ;अपपद्ध का अनिवार्य रूप से अनुपालन सुनिश्चित कराया जाय, यदि उक्त का अनुपालन सुनिश्चित नहीं किया जाता हैं तो दोषी ;मततपदहद्ध अधिकारियो के विरूद्ध विभागीय जांच संस्थित करने की कार्यवाही भी की जाये।*

***The State Government issued Government Order dated 16.8.2022****, which reads as under:*

*"संख्या–11/2022/सैतालिस–का–1/2022/13;3द्ध/2022*
*प्रेषक,*
*दुर्गा शंकर मिश्र,*
*मुख्य सचिव,*
*उत्तर प्रदेश शासन।*
*सेवा में,*
*समस्त अपर मुख्य सचिव/प्रमुख सचिव/सचिव,*
*उत्तर प्रदेश शासन।*
*कार्मिक अनुभाग–1 लखनऊ : दिनांक 16 अगस्त, 2022*

*विषयः उत्तर प्रदेश सरकारी सेवक के अन्तर्गत विभागीय कार्यवाहियों का नियमानुसार निस्तारण के संबंध में जाँच अधिकारियों को प्रशिक्षण दिए जाने के संबंध में।*

*कृपया रिट याचिका संख्या–2555/2022 रिट–ए प्रकाश चन्द्र अग्रवाल बनाम उत्तर प्रदेश राज्य व अन्य में मा0 उच्च न्यायालय द्वारा पारित आदेश दिनांक 07 मई 2022 के विरूद्ध राज्य सरकार द्वारा योजित विशेष अपील संख्या–97/2022 में मा0 उच्च न्यायालय द्वारा दिनांक–22.07.2022 को पारित किये गए आदेश*

*का सन्दर्भ ग्रहण करने का कष्ट करें, जिसका कार्यकारी अंश निम्नवत् है:*

*"............At this stage, we are only examining the issue regarding training part of Enquiry Officers in the State. Learned Single Judge vide order dated May 7, 2022 issued direction that no Enquiry Officer in future shall be appointed for departmental inquiry, who has not received training from the Judicial Training & Research Institute (hereinafter referred to as "JTRI"). We find 2 Special Appeal Defective No.97 of 2022 that this sweeping direction will withhold number of inquires, which are pending in the different departments in the State keeping in view the infrastructure available in the JTRI. For conducting such inquiries, the importance of training to the officers, who have to hold the departmental inquiry, may not be lost sight of keeping in view the repeated violation of principles of natural justice and the rules governing such inquiries.*

*5. In the affidavit filed today, certain communications have been annexed and figures have been provided regarding training programs conducted after passing of the aforesaid order and from April 1, 2022 onwards. It is claimed that departmental inquiry is one of the subject in the training programme of the Officers but what we find prima facie is that the training being imparted is not yielding the results as required, as still the rules and principles of natural justice are found to be violated. The training programme for such Officers has to be more robust and specialised, for which the State is directed to place before the Court a comprehensive plan.*

*6. As the sweeping directions issued by the learned Signle Judge will withhold all the departmental inquiries, we stay those directions to the extent - "that no Officer in future shall be appointed for departmental inquiry unless he has received training from JTRI'. However, we expect that in the pending inquiries, the Officers holding such inquiries shall be sensitised without any delay and further the training programs of the Officers shall be regular exercise."*

*2- मा0 उच्च न्यायालय के आदेश दिनांक–22.07.2022 के क्रम में अवगत कराना है कि उत्तर प्रदेश राज्य के सरकारी सेवकों के विरूद्ध अनुशासनिक कार्यवाहियाँ किए जाने के संबंध में उत्तर प्रदेश सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 प्रथम संशोधन नियमावली, 2014, शासनादेश क्रमशः दिनांक 22.04.2015, दिनांक– 11.08.2015, दिनांक 10.02.2021 और दिनांक 19.07.2022 मुख्य रूप से निर्गत किए गए हैं।*

*3. उत्तर प्रदेश सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 के नियम–7 के अधीन संस्थित अनुशासनिक जाँच के प्रकरण में नियुक्त जाँच अधिकारियों के मार्गदर्शन हेतु मुख्य रूप से निम्नांकित दिशा निर्देश शासनादेश दिनांक 19.07.2022 के माध्यम से निर्गत किए गए है:*

*(अ)–जिसका अनुपालन आवश्यक है ;Do's)-*

*;पद्ध अपचारी कार्मिक द्वारा यदि अभिलेखों के निरीक्षण की अपेक्षा की जाती हो तो उसे निरीक्षण का अवसर अवश्य प्रदान किया जाये।*

*;पपद्ध अपचारी कार्मिक से अपना लिखित स्पष्टीकरण 15 दिन से 01 माह के अन्दर प्रस्तुत करने को कहा जाये।*

*;पपपद्ध यदि जांच, पूर्व नियुक्ति के स्थान से संबंधित है तो अपचारी सरकारी सेवक को उस स्थान पर जाने की अनुमति दे दी जाये, जहाँ उसे अभिलेख आदि देखने है।*

*;पटद्ध जाँच अधिकारी द्वारा अपचारी कार्मिक को साक्ष्य के अन्तर्गत दिये गये अभिलेखों की स्वीकार्यता के संबंध में आपत्ति प्रकट करने का अवसर भी दिया जाये।*

*;टद्ध आरोपित सरकारी सेवक को अपना पक्ष प्रस्तुत करने का युक्तियुक्त अवसर दिया जाना चाहिए। यदि आरोपित सरकारी सेवक आरोपों से इन्कार करता हैं, वहां जांच अधिकारी आरोप पत्र में प्रस्तावित साक्षियों ;ॅपजदमेमेद्ध को प्रतिपरीक्षण ;ब्तवे. म्गंउपदंजपवदद्ध हेतु बुला सकता है। जांच अधिकारी द्वारा उनके मौखिक साक्ष्यों को आरोपित अधिकारी की उपस्थिति में अभिलिखित किया जाये। उपर्युक्त साक्ष्यों को अभिलिखित करने के पश्चात जाँच अधिकारी उस मौखिक साक्ष्य को माँगेगा और उसे अभिलिखित करेगा*

*जिसे आरोपित सरकारी सेवक ने अपनी प्रतिरक्षा में अपने लिखित कथन में प्रस्तुत करना चाहा था।*

*प्रतिबन्ध यह है कि जाँच अधिकारी ऐसे कारणों से जो लिखित रूप से अभिलिखित किए जाएगें, किसी साक्षी को बुलाने से इन्कार कर सकेगा।*

*;टप्द्ध जाँच अधिकारी द्वारा जाँच के दौरान गवाहों के बयान आरोपित सरकारी सेवक के समक्ष तथा विधिवत शपथ दिलवाने के उपरान्त लिया जाये।*

*;टप्पद्ध जाँच अधिकारी द्वारा संपूर्ण जांच की कार्यवाही में कृत कार्यवाहियों का आदेश पत्रक ;वतकमत ैममजद्ध तैयार किये जाये जिस पर यथासमय आरोपित अधिकारी एवं अन्य साक्षियों के हस्ताक्षर कराया जाये। जाँच आख्या प्रस्तुत करते समय जाँच आख्या के साथ उक्त ओदश पत्रक को संलग्नक के रूप में अनुशासनिक प्राधिकारी को प्रेषित किया जाये।*

*(ब)–निषेधात्मक निर्देश ;क्वदश्जेद्ध.*

*;प्द्ध सामान्यतया अपचारी कार्मिक को अपना स्पष्टीकरण दिये जाने हेतु 02 माह से अधिक का समय न दिया जाये। किन्तु अपरिहार्य परिस्थितियों में उक्त समय सीमा में युक्ति–युक्त ;त्मेंवदइसमद्ध वृद्धि की जा सकती है।*

*;प्पद्ध जाँच अधिकारी को जाँच आख्या में प्रस्तावित दण्ड के विषय में कोई मंतव्य अथवा संस्तुति अंकित नही की जाये।*

*;प्पप्द्ध बिना उचित कारण के जांच कार्यवाही लम्बित नही रखी जाये।*

*;प्टद्ध सुनवाई, साक्ष्य अथवा अन्य कार्यवाही हेतु नियत तिथियों को आगे न टाला जाये। यदि ऐसा करना अपरिहार्य हो तो उसे सकारण आदेश पत्रक में उल्लिखित किया जाये।*

*4. वर्तमान में प्रचलित अनुशासनिक कार्यवाहियों से सम्बन्धित जांच अधिकारियों को प्रस्तर–3 में उल्लिखित निर्देशों को उपलब्ध, कराते हुए उनसे इस आशय का प्रमाण पत्र प्राप्त कर लिया जाये कि उनके द्वारा उक्त निर्देशों को पढ़कर भली–भांति समझ लिया गया है। भविष्य में भी जितनी अनुशासनिक कार्यवाहियां संस्थित की जाएं उनके जांच अधिकारियों को भी उनकी नियुक्ति पत्र के साथ ही इसकी प्रति संलग्न करते हुए इस आशय का प्रमाण–पत्र प्राप्त कर लिया जाये कि उनके द्वारा इन निर्देशों को पढ़कर भली–भांति समझ लिया गया है।*

*5. उपर्युक्त के आलोक में अनुरोध है कि अपने विभाग के नियंत्रणाधीन समस्त प्रशिक्षण संस्थाओं को उपर्युक्त प्रस्तर–2 में उल्लिखित नियमावलियों/शासनादेशों की व्यवस्थाओं का संज्ञान लेते हुए आधार भूत प्रशिक्षण ;प्दकनबजपवद ज्तंपदपदहद्ध कार्यक्रमों में पांच/छः सत्र ;च्मतपवकद्ध एवं सेवा कालीन प्रशिक्षण ;प्द ैमतअपबम ज्तंपदपदहद्ध के कार्यक्रमों में एक/दो सत्र ;च्मतपवकद्ध अनुशासनिक जाँच कार्यवाही/प्रक्रिया के संबंध में रखा जाये। इसके साथ ही शीर्ष प्राथमिकता के आधार पर, अधिक से अधिक संख्या में प्रभावी प्रशिक्षण कराये जाने हेतु व्यापक योजना ;ब्वउचतमीमदेपअम चसंदद्ध तथा प्रस्तर–4 मे उल्लिखित बिन्दु के सम्बन्ध में की गई कार्यवाही की सूचना कार्मिक विभाग को दिनांक 15.09.2022 तक उपलब्ध कराने का कष्ट करें।*

*6. उपर्युक्त प्रशिक्षण कार्यक्रमों में उन अधिकारियों को वरीयता प्रदान की जाये जिन्हें संप्रति प्रचलित किसी अनुशासनिक कार्यवाही में जाँच अधिकारी नामित किया गया हो।*

A ***Division Bench of this Court in the case of State of U.P. and another vs. Prakash Chandra Agrawal (Special Appeal Defective No.97 of 2022) passed an order on 22.7.2022***, *relevant portion of the same reads:*

*"........4. At this stage, we are only examining the issue regarding training part of Enquiry Officers in the State. Learned Single Judge vide order dated May 7, 2022 issued direction that no Enquiry Officer in future shall be appointed for departmental inquiry, who has not received training from the Judicial Training & Research Institute (hereinafter referred to as "JTRI"). We find that this sweeping direction will withhold number of inquires, which are pending in the different departments in the State keeping in view the infrastructure available in the JTRI. For conducting such inquiries, the importance of training to the officers, who have to hold the departmental inquiry, may not be lost sight of keeping in view the repeated violation of principles of natural justice and the rules governing such inquiries.*

*5. In the affidavit filed today, certain communications have been annexed and figures have been provided regarding training programs conducted after passing of the aforesaid order and from April 1, 2022 onwards. It is claimed that departmental inquiry is one of the subject in the training programme of the Officers but what we find prima facie is that the*

*training being imparted is not yielding the results as required, as still the rules and principles of natural justice are found to be violated. The training programme for such Officers has to be more robust and specialised, for which the State is directed to place before the Court a comprehensive plan.*

*6. As the sweeping directions issued by the learned Signle Judge will withhold all the departmental inquiries, we stay those directions to the extent - "that no Officer in future shall be appointed for departmental inquiry unless he has received training from JTRI'. However, we expect that in the pending inquiries, the Officers holding such inquiries shall be sensitised without any delay and further the training programs of the Officers shall be regular exercise.*

*7. Adjourned to August 24, 2022."*

*Thereafter, another **Division Bench of this Court has also passed a detailed order on 5.9.2022 in the case of State of U.P. and another vs. Prakash Chandra Agarwal: Special Appeal No.351 of 2022**. The order dated 5.9.2022 reads as under:*

*"This Court by means of an order dated 22.07.2022 had directed the State to place before the Court a comprehensive plan for training of officers of the State Government who are entrusted with conducting inquiries in the departmental proceedings and also those who are to take final decision in the matter in their capacity as appointing authorities/disciplinary authorities. On 02.09.2022 the Court again required the State to file the said affidavit.*

*In compliance of the said orders dated 22.07.2022 and 02.09.2022, an affidavit has been filed by the learned State Counsel sworn in by the Special Secretary, Secretariat Administration Department. The said affidavit is taken on record.*

*In the affidavit filed today, it has been stated that the Chief Secretary of the State of Uttar Pradesh has issued directions by means of his letter/order dated 16.08.2022 for continuing various training programmes in all the departments. The letter/order has been circulated by the Additional Chief Secretary in the Department of Karmik. According to the said letter/order, the departments have required to prepare a comprehensive plan for effective training of the officers in good numbers on priority basis and necessary information has also been directed to be furnished to the Karmik Department till 15.09.2022.*

*Learned State Counsel has submitted that the said information is to be received by the Karmik Department by 15.09.2022, as such once the necessary information is received, the affidavit as ordered vide order of the Court, dated 22.07.2022 shall be filed.*

*For the said purpose, we direct that after collecting the information as mentioned in the order dated 16.08.2022 of the chief Secretary of the State of U.P., an affidavit shall be filed before this Court by the next date of listing giving therein the details of the comprehensive plan for training.*

*Learned State Counsel has also submitted that as a result of the order passed by the learned Single Judge, which is under appeal herein, the departmental proceedings in the entire State of U.P. have been put to halt though the Court by means of the order dated 22.07.2022 had stayed certain direction issued by the learned Single Judge to the extent, "that no Officer in future shall be appointed for departmental inquiry unless he has received training from JTRI". However, it*

*has further been stated that after the said stay order dated 22.07.2022 though now enquiry officers are being appointed for conducting the departmental enquiries without receiving the training from JTRI but so far as the appointing/disciplinary authorities are concerned, they are unable to take final decision in the matters where the enquiries have been taken to final stages.*

*Accordingly, we provide that the directions issued by the learned Single Judge to the extent "punishing authority shall go through the required training before passing any punishment order and also refer to their session/certificate" shall remain stayed. However, this order whereby a part of the order passed by learned Single Judge has been stayed, does not mean that the appointing/punishing authorities in the State of U.P. shall not undergo the requisite training as directed by learned Single Judge at JTRI.*

*We make it clear that directions issued by learned Single Judge are an expression of concerns of the Court relating to various irregularities which are noticed by the Court almost on everyday basis in the matters relating to departmental proceedings where on account of un-acquaintance with the exact procedure for conducting departmental proceedings and thereafter for passing the appropriate punishment orders, the erring officers many times go scot-free."*

*Since 2.1.2023 till date, more or less all the petitions which have come before this Court as fresh or for hearing, where order imposing major punishment is under challenge, are part of this bunch. The argument in each of these is with regard to violation of both Rule 7 (iii) and (vii) of the Rules of 1999. Thus, these all writ petitions can be decided on the same ground. However, learned Chief Standing Counsel-III requested the Court to decide each and every case separately.*

*On request of Sri Ravi Singh Sisodia, learned Chief Standing Counsel-III, this Court has taken up each and every case separately."*

11. Let a copy of this order be provided to the Additional Chief Secretary, Department of Revenue, U.P. to see as to how the subordinate officers are conducting and concluding inquiry against an employee. All those officers are required the proper training so that they could know the procedure for conducting and concluding the departmental inquiry.

12. The copy of this order be also provided to the Consolidation Commissioner, U.P. to take appropriate steps against the Inquiry Officer and disciplinary officer of the present case as per law so that other alike officers could know that if they do not follow the settled proposition of law while conducting the departmental inquiry or providing major punishment, they will have to face the music. In the present case, admittedly, neither the Inquiry Officer knows how to conduct the departmental inquiry nor the disciplinary officer knows how to impose the major punishment.

13. Therefore, in view of the above, the writ petition is **allowed.** Consequently, the impugned punishment order dated 07.03.2024 passed by Settlement Officer Consolidation, Barabanki (Annexure-1) is hereby set aside/quashed.

14. Since the disciplinary inquiry has not been conducted strictly, in accordance with law by the Inquiry Officer, therefore, if the competent authority is

willing to conduct any departmental inquiry against the petitioner, the same may be conducted and concluded strictly, in accordance with law but with expedition. Such inquiry may be conducted, if it is so required, from the stage of issuance of charge-sheet.

15. There will be no order as to costs.

16. The Senior Registrar of this Court shall intimate this order to the Additional Chief Secretary, Revenue, U.P. and Consolidation Commissioner within 3 working days of its compliance.

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**(2024) 7 ILRA 92**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 08.07.2024**

**BEFORE**

**THE HON'BLE MANISH MATHUR, J.**

Writ A No. 5019 of 2024

**Ram Kumar & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Jitendra Singh, Abhinav Singh

**Counsel for the Respondents:**
C.S.C., Naresh Chandra Mehrotra

**A. Service Law – Provident Funds Act, 1925 – Section 4 – UP Rajya Krishi Utpadan Mandi Parishad Contributory Provident Fund Regulations, 1978 – Reg. 6(4) & 17 – Reg. 6(4) restrict payment of interest on the Provident Fund Scheme only for a period of one year – Validity challenged – Doctrine of unjust enrichment – Applicability – Held, Reg. 6(4) of the Regulations of 1978 is contrary not only to Regulation 17 of the Regulations of 1978 but also appears to be ultra vires to Section 4 of the Act of 1925 – No such restriction can be made for payment of interest only up to a period of one year from the date of superannuation to a depositor with regard to payment of interest on the amount due to be paid to the subscriber/depositor – The prohibition for grant of interest on subscriptions by an employee beyond the period of one year from the date of superannuation also amounts to unjust enrichment. (Para 13 and 14)**

**Writ petition allowed.** (E-1)

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

1. Heard learned counsel for petitioners, learned State Counsel for opposite party no.1 and Mr. N. C. Mehrotra, learned counsel for opposite parties 2 to 4.

2. Petition has been filed challenging orders dated 14.09.2021 and 18.12.2021 whereby payment of interest due upon petitioners' contribution to Provident Fund has been restricted to a period of one year only from the date of superannuation.

3. Learned counsel for petitioners has submitted that petitioners superannuated from service on 31.12.2015 and 30.09.2016 respectively whereafter in terms of Section 4 of Provident Funds Act, 1925(hereinafter referred to as the Act of 1925), it was incumbent upon the authorities concerned to have made payment along with due interest on the contribution under Provident Fund Scheme. It is submitted that impugned orders have placed reliance on Regulation 6(4) of U.P. Rajya Krishi Utpadan Mandi Parishad Contributory Provident Fund

Regulations, 1978 (hereinafter referred to as the Regulations of 1978) to restrict payment of interest on the aforesaid Scheme only for a period of one year. Learned counsel for petitioners has thereafter adverted to the fact that Regulation 6(4) of the Regulations of 1978 itself places reliance on Regulation 17 of the Regulations of 1978, which in turn places reliance on Section 4 of the Act of 1925.

4. He has also placed reliance on judgment and order dated 01.10.2021 rendered by a coordinate Bench of this Court in Writ Petition no.14528(S/S) of 2021, Raghuvir Sharma v. State of U.P. and others to submit that aforesaid judgment clearly indicates that it is unjustified and inequitable to keep the earned interest on the deposits by the Mandi Parishad. It is submitted that the aforesaid judgment was challenged in Special Appeal No. 359 of 2022 which was dismissed vide judgment and order dated 16.12.2023, which has attained finality. It is therefore submitted that restriction of payment of interest to only one year is contrary to Section 4 of the Act of 1925 read with Regulation 17 of the Regulations of 1978.

5. Learned counsel appearing for opposite parties 2 to 4 has refuted the submissions advanced by learned counsel for petitioners with the submission that in terms of the specific provisions of Regulation 6(4) of the Regulations of 1978, opposite parties were entitled to restrict payment of interest for a period of one year from the date of petitioners' retirement as delay in payment occasioned on their account since they made applications for payment of Provident Fund only on 06.04.2017 and 15.01.2019 respectively although they had superannuated on 31.12.2015 and 28.09.2016 respectively. It is therefore submitted that it is in view of specific provisions in the Regulations of 1978 that the impugned order has been passed.

6. Upon consideration of submissions advanced by learned counsel for the parties and perusal of material on record particularly the impugned order, it is evident that payment of interest to petitioners has been restricted for the period of one year only from the date of superannuation placing reliance on Regulation 6(4) of the Regulations of 1978 while holding that delay in payment was only on account of the petitioners.

7. It is quite evident that Regulation 6(4) of the Regulations of 1978 is subject to Regulation 17 of the said Regulations, which in turn is subject to Section 4 of the Act of 1925. It is therefore the statutory provisions of the Act of 1925 which would prevail in such circumstances.

8. The provisions of Section 4 of the Act of 1925 pertains to repayments and mandates that when the sum standing to the credit of any subscriber or depositor, or balance thereof after making authorised deduction, has become payable, the officer whose duty it is to make the payment shall pay the sum or balance to the subscriber or depositor.

9. Relevant provisions of Section 4 of the Act of 1925 reads as follows:-

*" 4. **Provisions regarding repayments**. - (1) When under the rules of any Government or Railway Provident Fund the sum standing to the credit of any subscriber or depositor, or the balance thereof after the making of any deduction*

*authorised by this Act, has become payable, the officer whose duty it is to make the payment shall pay the sum or balance, as the case may be, to the subscriber, or depositor, or, if he is dead, shall-*

*(a) ......*
*(b) ......*
*(c) ......*
*(2) ......"*

10. Regulations 6(4) and 17 respectively of Regulations of 1978 reads as follows:-

"6 – (1) – – – – –
(2) – – – – –
(3) – – – – –

(4) किसी व्यक्ति को, जिसे विनियम 17 के अधीन देय धनराशि का भुगतान किया जाता है, उस धनराशि पर भुगतान प्राधिकृत किये जाने वाले माह के पूर्ववर्ती माह के अन्त तक ब्याज भी दिया जायेगाः प्रतिबन्ध यह है कि यदि विनियम 17 के अधीन अपेक्षित सब प्रकार से पूर्ण आवेदन पत्र अभ्यर्थित धनराशि के देय होने के दिनांक से 6 माह के बाद प्रस्तुत की जाती है तो ब्याज भुगतान प्राधिकृत किये जाने वाले माह के पूर्ववर्ती माह के अन्त का, अथवा धनराशि देय होने के माह के अनुवर्ती माह से 12 माह तक का, जो भी अवधि कम हो, दिया जायेगा सिवाय ऐसे मामलों के जिनमें निदेशक का समाधान कर दिया जाय कि उक्त आवेदन पत्र प्रस्तुत करने मे विलम्ब उन परिस्थितियों मे हुआ जिन पर आवेदनकर्ता का कोई नियंत्रण नहीं था तो ऐसे मामलों में इस प्रतिबन्धात्मक खण्ड के प्राविधान लागू नहीं होंगे।"

"17 – **भुगतान** – (1) जब अभिदाता के नाम निधि मे जमा धनराशि अथवा विनियम 16 के अधीन किसी कटौती के पश्चात्, उसका अवशेष देय हो जाय तो लेखा अधिकारी का यह कर्तव्य होगा कि, अपना समाधान कर लेने पर कि उक्त विनियम के अधीन कोई कटौती करने के निर्देश नही दिये गये है, प्राविडेण्ट फण्डस् एक्ट, 1925 की धारा 4 के प्राविधानों के अनुसार भुगतान करें।

(2) यदि कोई व्यक्ति जिसे इन विनियमों के अधीन कोई धनराशि देय है, पागल हो जिसकी सम्पत्ति के लिए इण्डियन लूनेसी एक्ट, 1912 के अन्तर्गत प्रबन्धक नियुक्त किया गया हो, तो भुगतान ऐसे प्रबन्धक को किया जायेगा, न कि पागल को।

(3) कोई व्यक्ति जो इस विनियम के अन्तर्गत भुगतान के लिए दावा करना चाहे, निदेशक को इस हेतु लिखित आवेदन पत्र देगा। भुगतान केवल भारत में किया जायेगा। जिन व्यक्तियों को धनराशि देय हो, भारत में भुगतान प्राप्त करने लिये अपना स्वयं प्रबन्ध करेंगे।

टिप्पणी – 1 – निधि में अभिदाता के नाम जमा धनराशि विनियम 15 के अन्तर्गत देय हो जाने पर लेखा अधिकारी अभिदाता के नाम निधि मे जमा उस धनराशि का शीघ्र भुगतान प्राधिकृत करेगा जिसके सम्बन्ध में कोई विवाद या सन्देह न हो तथा शेष धनराशि का समायोजन भी यथाशक्य शीघ्र करेगा।

(2) धनराशि के भुगतान के लिये उपयुक्त निर्धारित प्रपत्र 2 में आवेदन पत्र दिया जायेगा।

(3) धनराशि के देय हो जाने की तिथि से ब्याज के सम्बन्ध में कुछ प्रतिबन्ध लागू होते है जिनके सम्बन्ध में विनियम 6 अवलोकनीय है।"

11. A conjoint reading of Section 4 of the Act of 1925 and Regulation 17 of the Regulations of 1978 makes it evident that there is no duty cast upon the subscriber or depositor of the Scheme to make an application for payment of the credit to him whereafter only such payment is required to be made. On the contrary, Section 4 of the Act of 1925 imposes a mandatory duty upon the officer concerned to make payment of the sum standing to the credit of the subscriber when it has become payable.

12. Regulation 17 also makes a specific provision while casting a duty upon the officer concerned to make payment of the deposit of a subscriber as soon as it has become due.

13. It therefore appears that Regulation 6(4) of the Regulations of 1978 is contrary not only to Regulation 17 of the Regulations of 1978 but also appears to be ultra vires to Section 4 of the Act of 1925. It is quite evident that no such restriction can be made for payment of interest only up to a period of one year from the date of superannuation to a depositor with regard

to payment of interest on the amount due to be paid to the subscriber/depositor.

14. The prohibition for grant of interest on subscriptions by an employee beyond the period of one year from the date of superannuation also amounts to unjust enrichment since the opposite parties have definitely earned interest on such subscriptions ever since it was made and continued to earn such interest on that deposit till the date of actual payment. Therefore it is unreasonable on part of opposite parties to restrict payment of such interest to depositors.

15. The aforesaid reasoning has also been indicated by a coordinate Bench of this Court in Raghuvir Sharma(supra), which has been upheld in Special Appeal.

16. In view thereof, the impugned orders dated 14.09.2021 and 18.12.2021 being against the mandatory conditions of Section 4 of the Act of 1925 read with Regulation 17 of the Regulations of 1978, are hereby quashed by issuance of a writ in the nature of Certiorari. A further writ in the nature of Mandamus is issued commanding opposite party no.2, i.e. Director, Rajya Krishi Utpadan Mandi Parishad, Kisan Bhawan, Vibhuti Khand, Gomti Nagar, Lucknow to ensure payment of interest to petitioners on subscriptions to the contributory Provident Fund at the admissible rates from the date of superannuation till the date the sum standing to the credit of the petitioners was actually paid to them.

17. Aforesaid payment shall be ensured to petitioners within a period of six weeks from the date a certified copy of this order is served upon opposite party no.2.

18. Resultantly, the petition succeeds and is **allowed** at the admission stage itself. The parties to bear their own costs.

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**(2024) 7 ILRA 95**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 16.07.2024**

**BEFORE**

**THE HON'BLE SALIL KUMAR RAI, J.**

Writ A No. 5033 of 2024

**Dinesh Prasad** ...**Petitioner**
**Versus**
**State of U.P. & Ors.** ...**Respondents**

**Counsel for the Petitioner:**
Sri Shyam Lal

**Counsel for the Respondents:**
C.S.C.

**A. Service Law – Financial Handbook – Volume II, Part II-IV - Rule 54 (2), 54 (3), 54 (4) & 73 – ReinStatement after dismissal – Principle of 'No work No pay' – Applicability – Petitioner was dismissed from service by disciplinary authority on 09.01.2020, but was subsequently exonerated by appellate authority on 04.09.2020 holding the petitioner innocent – Applying the principle of 'No work no pay', the petitioner was refused to pay salary from 09.01.2020 to 29.09.2020 – Validity challenged – No delay was caused by the petitioner in submitting explanation or in filing appeal – Effect – Held, it is not the case of the respondents that the petitioner was earning through any employment elsewhere for the period he was out of service. Thus, the petitioner can not be denied his salary by invoking Rule 54(8) – By virtue of Rules 54(2) and 54(3), the petitioner is entitled to full pay and allowances for the period between**

**09.01.2020 to 29.09.2020 and his absence from service during the said period has to be treated as a period spent on duty for all purposes. (Para 18, 19 and 20)**

**Writ petition allowed.** (E-1)

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. The petition involves a question of law and is being decided on the facts stated in the orders passed by the state officers impleaded as respondents in the present petition, therefore, no purpose would be served calling for a counter affidavit.

2. The petitioner is employed as Follower with the U.P Police. Disciplinary proceedings were instituted against the petitioner under Rule 14 of the Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules 1991 (hereinafter referred to as, 'Rules, 1991') and a charge sheet dated 29.8.2018 was served on the petitioner. The charge against the petitioner was that the petitioner, without informing his Officers and without any leave, absented from duty between 24.6.2018 and 26.6.2018. Another charge against the petitioner was that after joining the petitioner went on a hunger strike and refused to resume his mess duty which adversely affected the reputation of the police force.

3. The petitioner submitted his reply denying the charges. The inquiry report was submitted on 5.9.2018 holding the petitioner guilty of the charges levelled against him. A show cause notice dated 11.7.2019 was issued to the petitioner to show cause as to why he should not be dismissed from service. After considering the reply of the petitioner to the show cause notice, the disciplinary authority i.e., the Superintendent of Police, District Deoria (respondent no.3) vide his order dated 9.1.2020 dismissed the petitioner from service.

4. The petitioner challenged the order dated 9.1.2020 through an appeal filed under Rule 20 of the Rules 1991. The said appeal was allowed by the Deputy Inspector General of Police, Gorakhpur Region, Gorakhpur vide his order dated 4.9.2020. Through his order dated 4.9.2020, the appellate authority exonerated the petitioner of the charges levelled against him. Consequently, by order dated 29.9.2020 passed by the Superintendent of Police, District Deoria, the petitioner was reinstated in service.

5. The Superintendent of Police, District Deoria issued notice dated 18.1.2024 to the petitioner to show cause as to why his services for the period the petitioner was out of service i.e., between 9.1.2020 to 29.9.2020, be not regularised without payment of salary on the principle of 'no work no pay'. The notice was ostensibly issued under Rule 73 of the Financial Handbook Volume-II Part II to IV.

6. The petitioner submitted his reply to the aforesaid show cause notice stating that the petitioner was out of service between 9.1.2020 to 29.9.2020 because of the order dated 9.1.2020 which had been set aside in appeal, therefore, the petitioner was entitled to his salary and other benefits for the aforesaid period.

7. By his order dated 11.2.2024, the Superintendent of Police, District Deoria has directed that the petitioner shall not be paid his salary for the period during which he was out of service because of the dismissal order, i.e., for the period between

9.1.2020 to 29.9.2020. The order has been passed on the principle of 'no work no pay'. In his order dated 11.2.2024, the Superintendent of Police, District Deoria has denied salary to the petitioner for the period he was out of service on the ground that the acts of the petitioner for which he had been charged were acts of gross negligence and amounted to dereliction of duty and therefore, the petitioner was not entitled to salary for the period he was out of service. The order dated 11.2.2024 has been challenged in the present petition.

8. There is nothing on record and a reading of the dismissal order dated 9.1.2020 as well as the order dated 11.2.2024 do not show that the petitioner was any time under suspension during the pendency of disciplinary proceedings.

9. For reasons to be stated subsequently the order dated 11.2.2024 is contrary to law and liable to be quashed.

10. A reading of the appellate order dated 4.9.2020 passed by the appellate authority shows that the petitioner had been fully exonerated from the charges levelled against him in the charge sheet. In his order dated 4.9.2020, the appellate authority has held that the petitioner was ill and had not gone on a hunger strike and had joined mess duty after returning. The petitioner did his duties on the dates mentioned in the charge sheet. In his order dated 4.9.2020, the appellate authority held that the evidence produced by the petitioner proved his innocence. Apparently, the petitioner had been fully exonerated of the charges by the appellate authority vide its order dated 4.9.2020.

11. The appellate authority in its order dated 4.9.2020 had accepted the explanation of the petitioner that he was not guilty of the charges and had not remanded back the matter to the disciplinary authority for further inquiry. The opinion/findings recorded by the competent authority in his order dated 11.2.2024 that the conduct of the petitioner for which he had been charged in the disciplinary proceedings were acts of gross negligence and amounted to dereliction of duty, are evidently without jurisdiction.

12. Further, the conduct of the petitioner for which he was subjected to disciplinary proceedings was not relevant to decide as to whether the petitioner was entitled to his salary for the period he was not in service because of the dismissal order. Thus, the order dated 11.2.2024 is also vitiated due to consideration of irrelevant material and factors.

13. The Superintendent of Police, District Deoria has passed the order dated 11.2.2024 ostensibly exercising his powers under Rule 73 of the Financial Hand Book Volume-II Part II to IV which is reproduced below:

*"73. A Government servant* ***who remains absent after the end of his leave is entitled to no leave salary*** *for the period of such absence, and that period will be debited against his leave account as though it were leave on half average pay, unless his leave is extended by the Government. Wilful absence from duty after the expiry of leave may be treated as misbehaviour for the purpose of Rule 15."*

*Rule 73 is invoked where the government servant is absent after the end of his leave, i.e., the government servant overstays his leave. The petitioner was not on leave between 9.1.2020 to 29.9.2020 but stood dismissed for the said period because*

*of the dismissal order passed against him by the disciplinary authority. Thus Rule 73 was not applicable in the present case.*

14. The issue as to whether the petitioner was entitled to his salary for the period between 9.1.2020 to 29.9.2020, i.e., the period during which the petitioner was not in service had to be considered and decided under Rule 54 of the Financial Hand Book Volume-II (Part II to IV). Rule 54 is reproduced below:

*"54. (1)* ***When a Government servant who has been dismissed, removed or compulsorily retired is reinstated as a result of appeal or review or would have been so reinstated but for his retirement on superannuation while under suspension or not, the authority competent to order reinstatement shall consider and make specific order—***

***(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal, or compulsory retirement, as the case be; and***

*(b) whether or not the said period shall be treated as a period spent on duty."*

***(2) When the authority competent to order reinstatement is of opinion that the Government servant who had been dismissed, removed or compulsorily retired, has been fully exonerated the Government servant shall, subject to the provisions of sub-rule (6), be paid the full pay allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be:***

*Provided that where such authority is of opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing, that the Government servant shall, subject to the provisions of sub-rule (7), be paid for the period of such delay, only such amount (not being the whole) of such pay and allowances as it may determine.*

***(3) In a case falling under sub-rule (2), the period of absence from duty including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be, shall be treated as a period spent on duty for all purposes.***

*[(4) In cases other than those covered by sub-rule (2) [including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the 14 ground of non-compliance with the requirements of clause (1) or clause (2) of article 311 of the Constitution and no further inquiry is proposed to be held], the Government servant shall, subject to the provision of sub-rules (6) and (7) be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine after giving notice to the Government servant of the quantum proposed and after considering the*

*representation, if any, submitted by him in that connection, within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.]*

*(5) In a case falling under sub-rule (4), the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specified purpose: Provided that if the Government servant so desires such authority may direct that the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement as the case may be, shall be converted into leave of any kind due and admissible to the Government servant. Note-The order of the competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary for the grant of-*

*(a) extraordinary leave in excess of three months in the case of temporary Government servant; and*

*(b) leave of any kind in excess of five years in the case of permanent Government servant.*

*(6) The payment of allowances under sub-rule (2) of sub-rule (4) shall be subject to all other conditions under which such allowances are admissible.*

*(7) The amount determined under the proviso to subrule (2) or under sub-rule (4), shall not be less than the subsistence allowance and other allowance admissible under Rule 53.*

*(8)* ***Any payment made under this rule to Government servant on his reinstatement shall be subject to adjustment of the amount, if any, earned by him through an employment during the period between the date of his removal, dismissal or compulsory retirement, as the case may be, and the date of reinstatement. Where the emoluments admissible under this rule are equal to or less than the amounts earned during the employment elsewhere, nothing shall be paid to the Government servant.***

*Note—Where the Government servant does not report for duty within reasonable time after the issue of the orders of the reinstatement after dismissal, removal or compulsory retirement, no pay and allowances will be paid to him for such period till he actually takes over charge."*

15. A reading of Rules 54(2) and 54(4) shows that, in Uttar Pradesh, the principle 'no work-no pay' is not applicable while considering the entitlement of State Government employees for pay and allowances for the period they were not in service if the order dismissing, removing or compulsory retiring them from service is set aside either in appeal or review and the government servant is reinstated in service and no further inquiry is proposed to be held. Rule 54 provides that if the government servant who has been reinstated in service after the order dismissing or removing him from service has been set aside in appeal or review and he has been fully exonerated of the charges, the government servant shall be entitled to full pay and allowances that he would have been entitled had he not been removed or dismissed from service and the period of absence from service shall be treated as period spent on duty for all purposes. However, where the government servant is not exonerated of the charges but is still reinstated in service or the order dismissing or removing a government servant is set aside in appeal or review solely on the

ground of non-compliance with the requirements of Article 311(1) and (2) of the Constitution and no further enquiry is proposed to be held, the government servant shall not be entitled to full pay and allowances but will be entitled to be paid such amount (not being the whole) of the pay and allowances as the competent authority may decide after giving the employee notice of the quantum proposed and after considering his representation but it shall not be less than the subsistence allowance and other allowances admissible under Rule 53. **It is apparent that, on his reinstatement after the order of dismissal or removal is set aside, a government servant can not be denied his entire pay and allowances for the period he was out of service.** The amount which the government servant would be entitled to get would depend on whether the case of the government servant is covered by Rule 54(2) or by Rule 54 (4).

16. The only circumstance in which the government servant can be denied his pay and allowances or part of the same for the period he was out of service is specified in Rule 54 (8). The rule provides that any payment made to a government servant on his reinstatement shall be subject to adjustment of the amount earned by the employee through an employment during the period he was out of service and nothing shall be paid to the government servant where the emoluments payable to him are equal to or less than those earned by him during employment elsewhere.

17. The order dismissing the petitioner has been set aside in appeal and the petitioner has been fully exonerated by the appellate authority vide its order dated 4.9.2020, therefore, the case of the petitioner is covered by Rule 54(2).

18. It is not the case of the respondents that the inquiry proceedings against the petitioner had been delayed by any act of the petitioner. The charge sheet was issued to the petitioner on 29.8.2018 and the inquiry report was submitted on 5.9.2018. However, the show cause notice was issued to the petitioner on 11.7.2019 to which the petitioner submitted his reply on 31.7.2019. The dismissal order was passed on 9.1.2020. During this period, the petitioner was not under suspension. The petitioner filed the appeal within time which was decided on 4.9.2020. Apparently, the proviso to Rule 54(2) is not applicable in the present case.

19. It is also not the case of the respondents that the petitioner was earning through any employment elsewhere for the period he was out of service. Thus, the petitioner can not be denied his salary by invoking Rule 54(8).

20. Thus, by virtue of Rules 54(2) and 54(3), the petitioner is entitled to full pay and allowances for the period between 9.1.2020 to 29.9.2020 and his absence from service during the said period has to be treated as a period spent on duty for all purposes.

21. For the aforesaid reasons, the order dated 11.2.2024 passed by the Superintendent of Police, District Deoria is illegal and contrary to law and is, hereby, quashed.

22. The petitioner had been wrongly denied his salary for the period between 9.1.2020 to 29.9.2020, therefore, he is entitled to the cost of the writ petition which is quantified as Rs.25,000/- and is also entitled to interest on the pay and allowances payable to him for the period

the petitioner was out of service, i.e., for the period between 9.1.2020 to 29.9.2020.

23. The Superintendent of Police, District Deoria is directed to pay to the petitioner his full pay and allowances for the period 9.1.2020 to 29.9.2020 along with simple interest calculated at the rate of 6% per annum and also the cost of the writ petition within a period of one month from today.

24. The petition is **allowed** with the aforesaid directions.

25. The Registrar (Compliance) shall send a copy of this order to the Superintendent of Police, District Deoria within one week from today.

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**(2024) 7 ILRA 101**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 23.07.2024**

**BEFORE**

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

Writ A No. 5519 of 2023

**Pawan Kumar ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Mr. Ram Bali Tiwari, Advocate

**Counsel for the Respondents:**
C.S.C.

**A. Service Law – UP Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 – Rule 2(a)(iii) – UP Regularization of Daily Wages Appointments on Group 'D' Posts Rules, 2001 – Compassionate appointment – Petitioner's mother was engaged as Sweeper on daily-wages and worked for 39 years – Though she was entitled for regularization, but could not be regularized and died during service – Petitioner's claim was rejected on the ground that mother was not regular employee – Validity challenged – Held, the case of petitioner's mother ought to have been considered in the first instance under the Rules 2001, and then, under the Rules of 2016, if not decided under the Rules of 2001. But, there is little scope for the statutory Selection Committee constituted under the Rules to think against regularization of her services in the face of a period of time as long as 39 years of daily-wage service – *Kuldeep Thakur's case* relied upon – High Court issued *mandamus* for regularization of the petitioner's mother's services notionally and for compassionate appointment of the petitioner on the basis of his mother's re-determined status. (Para 16, 18, 19 and 20)**

**Writ petition allowed.** (E-1)

**List of Cases cited:**

1. Secretary, St. of Karn. & ors.Vs Umadevi (3) & ors.; (2006) 4 SCC 1

2. Pawan Kumar Yadav Vs St. of U.P. & ors.; 2011 (1) AWC 1028 (FB)

3. St. of U.P. & ors.Vs Kuldeep Thakur; 2017 (2) AWC 1523 (LB)

4. Nikhil Bharadwaj Vs St. of U.P. & ors.; 2021:AHC:118710

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

1. This writ petition is directed against an order of the Divisional Forest Officer, Social Forestry & Wildlife Division, Pratapgarh dated 05.06.2023, rejecting the petitioner's claim for compassionate appointment.

2. The petitioner's mother was engaged on daily-wages as a Sweeper by the Establishment of the Divisional Forest Officer, Social Forestry & Wildlife Division, Pratapgarh, respondent No.4 (for short, 'the Divisional Forest Officer') in the month of November, 1984. She served as a daily-wager continuously since the month of November, 1984 and pursuant to a judgment of the Supreme Court in S.L.P. No.28317-28321 of 2010 dated 02.02.2016 placed on the minimum salary admissible to a Class-IV employee vide order dated 06.03.2016 passed by the Divisional Forest Officer. She was in receipt of a monthly salary of Rs.7000/-. It appears that the State Government on 12.09.2016 issued a Government Order regarding regularization of services of daily-wage employees working in various departments of the Government. According to the Government Order dated 12.09.2016, the petitioner's mother was also entitled to be regularized in service. Acting in furtherance of the Government Order above mentioned, the Divisional Forest Officer took proceedings for regularization of daily-wagers employed in his Establishment at Pratapgarh. He directed a medical examination of the daily-wagers to be undertaken. The medical examination was conducted, because the daily-wagers did not have any proof of their age on 08.07.2022. The name of such daily-wagers, who had to undergo medical examination to determine their age, figures in an order of 08.07.2022 passed by the Divisional Forest Officer, which is on record. The name of the petitioner’s mother in the said order. Before the petitioner's mother's case for regularization could come to fruition, she died on 27.01.2023. After her demise, the petitioner approached the Divisional Forest Officer requesting for an appointment under the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (for short, 'the Rules of 1974'). The basis of the petitioner's claim was the penurious condition in which the deceased employee's family were placed, after her demise. The petitioner moved an application for the purpose to the Divisional Forest Officer on 22.05.2023. The deceased employee has left behind six members in her family, including the petitioner, all of whom are her dependents.

3. It is the petitioner's case that he is educationally qualified for appointment under the Rules of 1974 as he has earned his matriculation certificate from the U.P. Board of High School and Intermediate Education in the examination of 2005. The petitioner's father put in an affidavit of 'No Objection' about the petitioner's candidature for compassionate appointment. The petitioner says that his mother was working regularly as a daily-wager since the year 1984 until her demise on 27.01.2023 and had repeatedly requested for regularization of her services in accordance with different Government Orders, that were issued on the subject, directing regularization of daily-wagers, who had worked for a very long period of time. The petitioner's mother worked for as long as a period of 39 years, serving as a daily-wager and by all standards under the Government Orders issued from time to time she was entitled to be regularized as the petitioner says. It is the petitioner's case that going by the principle in **Secretary, State of Karnataka and others v. Umadevi (3) and others, (2006) 4 SCC 1**, as a one-time measure, daily-wagers, working for a period of 10 years or more, were held entitled to be regularized. The petitioner's mother's case was eminently fit for consideration.

4. The petitioner prays that there is no other breadwinner in the family and after his mother's demise, they are plunged in penury. He, therefore, had a case for consideration under the Rules of 1974. By the impugned order, the petitioner's claim was rejected solely on the ground that under the Rules of 1974, it is only the dependents of regular employees, who could be considered for appointment and not the dependents of daily-wagers. They were not ineligible.

5. Aggrieved, this writ petition has been instituted.

6. A notice of motion was issued on 01.08.2023. A counter affidavit was filed on behalf of the respondents, to which a rejoinder was also put in. When the matter came up before this Court on 25.01.2024, parties having exchanged affidavits, it was admitted to hearing, which proceeded forthwith to conclusion. Judgment was reserved.

7. Heard Mr. Ram Bali Tiwari, learned Counsel for the petitioner and Mr. Prakhar Mishra, learned Additional Chief Standing Counsel appearing on behalf of the respondents.

8. It is argued by Mr. Ram Bali Tiwari, learned Counsel for the petitioner that on 08.07.2022, the Divisional Forest Officer issued a letter regarding the absence of age certification for the petitioner's mother and directing her medical examination for the purpose, along with ten other similarly circumstanced daily-wagers. It is submitted that the letter dated 08.07.2022 clearly says that the process of regularization for the petitioner's mother and the ten other employees, whose names figure in the said letter, is proposed against vacant posts of Class-IV. It is also submitted by the learned Counsel for the petitioner that others like her in the list of daily-wagers, to wit, Sheetla Prasad Singh and Ram Sewak had been regularized by the respondents while the petitioner's mother's case was ignored. After implementation of the 7th Pay Commission, the petitioner's mother approached this Court praying that the minimum salary that she was drawing be ordered to be paid in accordance with the 7th Pay Commission's recommendations. For the purpose, she instituted Writ-A No.335 of 2023, which was disposed of by this Court at Lucknow with a direction that for the purpose of being granted the minimum pay according to the 7th Pay Commission's recommendations, or whatever grievance she has, the petitioner's mother may make a representation to the Divisional Forest Officer, who would pass a reasoned and speaking order within a period of two months from the date of production of a copy of the order along with a representation. It is submitted by the learned Counsel that before the order dated 16.01.2023 could be complied with by the Divisional Forest Officer, the petitioner's mother passed away. After her demise, the petitioner's father, Phool Chand moved this Court by means of Writ-A No.5717 of 2023, seeking a mandamus directing the Divisional Forest Officer to pay him arrears of salary determined in accordance with minimum pay due to his deceased wife w.e.f. 1st April, 2018 till 27th January, 2023. This Court disposed of the said writ petition vide order dated 08.08.2023 with a direction to the petitioner's father to file a fresh representation before the Divisional Forest Officer, who was ordered to consider and decide it within a period of eight months from the date of production of a certified copy of the order made in the

last mentioned writ petition. It is pointed out that in compliance, the petitioner's father was paid arrears of salary on account of revision of the minimum salary payable to the petitioner's mother, revised in terms of the 7th Pay Commission. He was paid a sum of Rs.6,36,551/- on this account by an order of the Divisional Forest Officer dated 02.12.2023.

9. The thrust of the submission of the learned Counsel for the petitioner is that though similarly circumstanced daily-wagers have been regularized in the year 2011 in accordance with the Uttar Pradesh Regularization of Daily Wages Appointments on Group 'D' Posts Rules, 2001 (for short, 'the Rules of 2001'), but the petitioner's mother was denied that right, to which she was legally entitled. It is also emphasized that on 13th August, 2015, a Government Order was issued directing regularization of services of daily-wagers, who were working as such and appointed after 31st March, 1996, but the respondents ignored the petitioner's mother's claim. In assailing the order impugned, learned Counsel for the petitioner submits that the petitioner's mother being clearly entitled to regularization and the process for her regularization being underway when she passed away, it is a case where the petitioner's mother's case should, in the first instance, be considered for regularization with appropriate orders made and then the petitioner's claim for compassionate appointment considered.

10. Mr. Prakhar Mishra, learned Additional Chief Standing Counsel, on the other hand, submits that this is an arithmetically closed case, where on the date of her demise, the petitioner's mother was neither a government employee nor appointed on a regular basis though temporary. He further submits, relying on Rule 2(a)(iii) of the Rules of 1974 that even a person not regularly appointed, who has put in three years' continuous service in a regular vacancy, can be considered, but the petitioner's mother was not retained against a regular vacancy or sanctioned post, even if it was dehors the rules. Therefore, the petitioner's mother never qualified as a government servant defined under Rule 2 of the Rules 1974, entitling the petitioner to claim compassionate appointment. The submission, therefore, is that there is absolutely no scope for the petitioner's case to be considered under the Rules of 1974 and the impugned order is infallible.

11. Upon hearing learned Counsel for the parties, this Court finds that it is true that a daily-wager, who is not appointed against a sanctioned post and retained *dehors* the rules, cannot qualify as a government servant within the meaning of Rule 2(a)(iii) of the Rules of 1974. This position of the law is no longer in the realm of doubt after the holding of the Full Bench in **Pawan Kumar Yadav v. State of U.P. and others, 2011 (1) AWC 1028 (FB).**

12. Notwithstanding the fact that the petitioner's mother would not qualify as a government servant going by the provisions of Rule 2 of the Rules of 1974, there is a clear *niche* carved out by a Bench decision of this Court in **State of U.P. and others v. Kuldeep Thakur, 2017 (2) AWC 1523 (LB)**. The Division Bench had before their Lordships the claim for compassionate appointment by the son of a deceased daily-wager, whose case for regularization was under consideration in accordance with the Government Order dated 13.08.2015, but he died before a decision could be taken. Their Lordships of the Division Bench were of opinion that in

a situation where the right to be regularized had crystallized under a Government Order and under consideration, but could not fructify on account of the employee's untimely demise, the right of the employee to be declared regular would not get eclipsed, abandoned or defeated. The right of the deceased employee to be regularized would have to be considered in the first instance by the respondents, who would then be obliged to take an appropriate decision with regard to the claim of the deceased employee's/ daily-wager's son in the case of regularization. In **Kuldeep Thakur** *(supra)* the remarks of the Division Bench, which are relevant, read:

"9. However, in the present case, this claim has to be looked into from the point of view that the father of the respondent-petitioner was entitled for being regularized in view of the terms and conditions of the Government order dated 13.8.2015. This consideration process had already commenced and the name of the father of the respondent-petitioner had already been forwarded but no decision had been taken, and in between in October, 2015, the father of the respondent-petitioner died.

10. Learned counsel for the respondent therefore, has pressed into service the judgment in the case of Prem Ram v. Managing Director, Uttarakhand Pay Jal and Nirman Nigam, Dehradun and others, (2015) 3 UPLBEC 1766, to urge that the termination of the employment or the death of the employee would not make any difference with regard to consideration of regularization in the above circumstances. We have examined paragraph-9 of the said judgment where also the employee had already retired from service yet the Apex Court came to the conclusion that since the tenure of the person who was claiming such benefit had to be regularized, then in that event the Apex Court in view of the Articles 14 and 16 of the Constitution of India having been violated, ruled that such benefit would also accrue to the said claimant and consequently, issued direction for his consideration though he had retired from service. In that case similarly placed junior employees had been regularized.

11. Applying the said analogy, the claim of the father of the respondent-petitioner had already been forwarded and he was very much alive when the Government order dated 13.8.2015 was issued. In such a situation the State Government or its concerned department ought to have considered the claim of the respondent-petitioner for regularization and then could have proceeded to determine as to whether the respondent-petitioner was entitled to any benefit or not. In our opinion, the fortuitous circumstance of the death of the father of the respondent-petitioner does not absolve the State Government of its obligation to consider the claim of regularization of the father of the respondent-petitioner. There can be a case where the consideration has been made and the regularization accepted but before the order reaches a man dies or his death takes place in the near vicinity or simultaneously with regularization. In this situation, the claim of regularization of the deceased-employee does not remain an option to be ignored by the State Government. The State Government or its authorities are under an obligation to consider such a claim and to award any consequential benefits if the process has been set into motion as has happened in the present case. Once the father of the respondent-petitioner is found entitled to be regularized as on the date of the Government order dated 13.8.2015, on

which date he was admittedly alive, then in that event the claim of the respondent-petitioner can also be considered.

12. The consideration of the right of being regularized by operation of law while in force had already accrued in favour of the father of the respondent-petitioner, and his death in between further gave rise to the expected consequential claim of compassionate appointment of the petitioner, provided his father's services were declared regular. The consideration of such right, whether had accrued, does not get eclipsed nor could it be abandoned. If the consideration results in the services of the petitioner's-father becoming regular, then the Full Bench judgment in the case of Pawan Kumar Yadav (supra) would not be an impediment for the respondent-petitioner to be considered for compassionate appointment. The appellant-State and it's authorities therefore, cannot escape this exercise and defeat the right of consideration by their inaction or the absence of timely and prompt action. Such exercise of consideration will not evaporate because of untimely death which is a fortuitous circumstance so as to result in any advantage to the State.

13. Apart from this, in the present case those who were at par with the father of the respondents had been extended the benefit of regularization. This distinguishing feature therefore, is in addition to the issues involved in the case of Pawan Kumar Yadav (supra) and consequently, the claim of the respondent-petitioner was at least entitled for consideration by the State Government in the light of the observations made hereinabove.

14. Learned counsel for the appellant-State submits that the services of the father of the respondent-petitioner could not be straight away treated to have been regularized and the learned single Judge erred in issuing directions for consideration of appointment on compassionate basis of the petitioner. We agree with the submissions of the learned standing counsel for the appellant and to that extent, the judgment cannot be sustained. Learned single Judge also does not appear to have noted the judgment of Pawan Kumar (supra).

15. Consequently, we modify the judgment dated 22.11.2016 to the extent that it shall be open to the appellant-State to consider the status of regularization of the father of the respondent and then proceed to take an appropriate decision with regard to the claim of the respondent-petitioner for compassionate appointment in the light of the observations made hereinabove."

13. In the present case what we find from a perusal of the order dated 08.07.2022 is that the petitioner's mother's case was under consideration for the regularization of service and she was directed to undergo medical examination for the determination of her age because she did not produce or did not have any educational certificate about it. The petitioner's mother had a right to be considered for regularization much earlier than what is reflected from the memo dated 08.07.2022 issued by the Divisional Forest Officer. Her case ought to have been considered, as already said, in accordance with the decision of the Supreme Court in **Umadevi** *(supra)* and decidedly in terms of the Rules of 2001 made by the Governor in the exercise of powers under the proviso to Article 309 of the Constitution. Rule 4 of the Rules of 2001 reads:

***"4. Regularisation of daily wages appointments on Group 'D' Posts.–***

(1) Any person who.—

(a) was directly appointed on daily wage basis on a Group 'D' post in the Government service before June 29, 1991 and is continuing in service as such on the date of commencement of these rules; and

(b) possessed requisite qualification prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, shall be considered for regular appointment in permanent or temporary vacancy, as may be available in Group 'D' post, on the date of commencement of these rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders.

(2) In making regular appointments under these rules, reservations for the candidates belonging to the Scheduled Castes, Scheduled Tribes, Other Backward Classes of citizens and other categories shall be made in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, and the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 as amended from time to time and the orders of the Government in force at the time of regularisation under these rules.

(3) For the purpose of sub-rule (1) the appointing authority shall constitute a Selection Committee in accordance with the relevant provisions of the service rules.

(4) The appointing authority shall, having regard to the provisions of sub-rule (1), prepare an eligibility list of the candidates, arranged in order of seniority as determined from the date of order of appointment on daily wage basis and if two or more persons were appointed together, from the order in which their names are arranged in the said appointment order. The list shall be placed before the Selection Committee along with such relevant records pertaining to the candidates, as may be considered necessary, to assess their suitability.

(5) The Selection Committee shall consider the cases of the candidates on the basis of their records referred to in sub-rule (4), and if it considers necessary, it may interview the candidates also.

(6) The Selection Committee shall prepare a list of selected candidates in order of seniority, and forward the same to the appointing authority."

14. There is nothing to show that the petitioner's mother, who was appointed on daily-wage basis way back in the year 1984, was ever considered for regularization in accordance with Rule of the Rules of 2001 by a Selection Committee constituted for the purpose. The Rules of 2001 were repealed and replaced by the Uttar Pradesh Regularisation of Persons Working on Daily Wages or On Work Charge or On Contract in Government Departments on Group "C" and Group "D" Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 2016 (for short, 'the Rules of 2016'). Under Rule 4(d) of the Rules 2016, a daily-wager is defined as follows:

***"4. Definitions.***–Unless there is anything repugnant in the subject or context:

(d) "Daily Wages" means a person who is engaged or employed or deployed on a casual work on day to day basis and whose wages/remuneration is

calculated on the basis of the days he has worked;"

15. Rule 6 of the Rules of 2016 provide:

"6. Regularisation.—

(1) Any person who—

(i) was directly engaged or employed or deployed or working on daily wages or on work charge or on contract in a Government Department on Group 'C or Group 'D' post (outside the purview of the Uttar Pradesh Public Service Commission) on or before December 31, 2001 and is still engaged or employed or deployed or working as such on the date of the commencement of these rules; and

(ii) possessed requisite qualifications prescribed for regular appointment for that post at the time of such engagement or employment or deployment on daily wages or on work charge or on contract, under the relevant service rules and, subject to the provisions of above mentioned Rules 2 and 5. shall be considered for regular appointment on Group 'C' or Group 'D' post (outside the purview of the Uttar Pradesh Public Service Commission) in permanent or temporary vacancy as may be available on the date of the commencement of these rules, on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders.

(2) In making regular appointments under these rules, reservations for the candidates belonging to the Scheduled Castes, Scheduled Tribes, Other Backward Classes and other categories, shall be made in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, and the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993, as amended from time to time, and the orders of the Government in force at the time of regularisation under these rules.

(3) For the purpose of sub-rule (1), the appointing authority shall constitute a Selection Committee in accordance with the relevant provisions of service rules.

(4) The appointing authority shall, having regard to the provisions of sub-rule (1), prepare an eligibility list of the candidates, arranged in order of seniority as determined from the date of engagement or employment or deployment on daily wages, on work charge or on contract and, if two or more persons are engaged or employed or deployed together, from the order in which their names are arranged in the said engagement or employment or deployment order. The list shall be placed before the Selection Committee along with their character rolls and such other relevant records pertaining to them, as may be considered necessary to assess their suitability.

(5) The Selection Committee shall consider the cases of the candidates on the basis of their records, referred to in sub-rule (4), and if it considers necessary, it may interview the candidates also to assess their suitability.

(6) The Selection Committee shall prepare a list of selected candidates arranging their names in order of seniority and forward the same to the appointing authority."

16. It must be remarked that the petitioner's mother was all through treated as a daily-wager though under orders of the Supreme Court, she was placed on a minimum salary that was subsequently

revised in accordance with the 7th Pay Commission. Nevertheless, her status as a daily-wager was not in issue and her claim for regularization under the Rules of 2016 was under consideration when she passed away. The petitioner's mother was clearly eligible to be considered for regularization under the Rules of 2016 as well. This Court may dare say that though it has almost become a sacrilege by a consensus of judicial opinion to issue a mandamus to any employer, even a State employer, to regularize the services of an employee, the proposition may require a rationalized understanding in case of exceptionally long retention in service on daily-wages like the present case. Here, the petitioner's mother was retained as a daily-wager for as long a period as 39 years. No doubt, her case ought to have been considered in the first instance under the Rules 2001, and then, under the Rules of 2016, if not decided under the Rules of 2001. But, there is little scope for the statutory Selection Committee constituted under the Rules to think against regularization of her services in the face of a period of time as long as 39 years of daily-wage service. It is nowhere said in the counter affidavit as well that the petitioner's mother's services were at any time considered substandard or determined. She was in continuous employ.

17. In the circumstances, we think that the ratio of the Bench decision in Kuldeep Thakur is squarely attracted to the facts of the petitioner's case. This Court takes notice of the decision of a learned Single Judge in **Nikhil Bharadwaj v. State of U.P. and others, 2021:AHC:118710**, where long retention in service and inaction to regularize after enforcement of the Rules of 2001 and the Rules of 2016 of an employee's services was regarded as violation of a vested right to be regularized. It was held in **Nikhil Bharadwaj** *(supra)* that notwithstanding the non-regularization of services of the petitioner's father, a daily-wager, his services would be deemed to be regularized as the right to regularization was an accrued right of the petitioner's father in that case. This Court would not venture to expand the principle to that extent. Nevertheless, it is true that it is almost an inescapable conclusion that the petitioner's mother's services ought to have been regularized during the long period of 39 years that she was rendering her services to the respondents, either under the Rules of 2001 or the Rules of 2016.

18. Also, the petitioner's mother was entitled to be considered for regularization in terms of the Government Order dated 13.08.2015, a copy of which has been annexed to the rejoinder affidavit. That too was not done and though under consideration, the case for regularization of the petitioner's mother's services, solely on account of the respondents' inaction and lethargy, remained inchoate.

19. In the circumstances, we are of opinion, following the directions made by the Division Bench in **Kuldeep Thakur,** that this writ petition deserves to be allowed.

20. In the result, this writ petition succeeds and is **allowed**. The impugned order dated 05.06.2023 passed by the Divisional Forest Officer is hereby **quashed.** A *mandamus* is issued to the Divisional Forest Officer aforesaid, as well as the other respondents, to consider amongst themselves, regularization of the petitioner's mother's services notionally and then proceed to pass the necessary orders with regard to the petitioner's claim for compassionate appointment on the basis of

the petitioner's mother's re-determined status. The necessary orders shall be passed by the fourth respondent as well as the other respondents, whoever be concerned, within a period of one month of receipt of a copy of this judgment.

21. There shall be no orders as to costs.

22. Let a copy of this order be communicated to the Principal Chief Conservator of Forest, Rana Pratap Marg, Lucknow, the Conservator of Forest, Prayagraj Circle, Prayagraj and the Divisional Forest Officer, Social Forestry & Wildlife Division, Pratapgarh by the Senior Registrar.

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**(2024) 7 ILRA 110**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 30.07.2024**

**BEFORE**

**THE HON'BLE RAJESH SINGH CHAUHAN, J.**

Writ A No. 5911 of 2024

**Naresh Kumar Mishra, Pno No. 822590316 ...Petitioner**

**Versus**

**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Ram Charitra Pandey, Shashank Pandey

**Counsel for the Respondents:**
C.S.C.

**A. Service Law- Constitution of India, 1950-Article 226-retrospective revision of salary- the petitioner, a retired Sub-Inspector, challenged the retrospective revision of his salary and recovery of Rs. 5,38,781 from his commuted pension by the State of U.P.-No specific undertaking was provided at the time of receiving the excess payment, and the retrospective salary revision violated a Government Order dated 16.01.2007 limiting recovery to the last 34 months prior to retirement – The court relied the precedents set in Sushil Kumar Singhal case and Rafiq Masih Case which restricted recovery of excess payments in the absence of an explicit undertaking-The court quashed the impugned orders, directing the refund of the recovered amount and ordered the fixation of the petitioner's pension based on his last drawn salary at the time of retirement.(Para 1 to 12)**

**The petition is allowed.** (E-6)

**List of Cases cited:**

1. Sushil Kumar Singhal Vs Pramukh Sachiv Irrgn. Deptt. & ors., Civil Appeal No. 5262 of 2008,

2. St. of U.P. & ors. Vs Suresh Kumar Tripathi Writ-A No.3194 of 2022

3. St. of Punj. & ors. Vs Rafiq Masih (White Washer ) & ors. (2015) 4 SCC 334

4. HC of Punj. & Hary. & ors. Vs Jagdev Singh (2016) 14 SCC 267,

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Shashank Pandey, learned counsel for the petitioner and Sri Amarnath Singh Baghel, learned Standing Counsel for the State-opposite parties.

2. By means of this petition, the petitioner has prayed following main reliefs:-

*"(i) Issue a writ, order or direction in the nature of certiorari to quash the impugned order dated 20.02.2024 passed by Opposite Party No.2 after summoning the same by which*

*petitioner's salary has been revised since 20.12.2006 as mentioned in letter dated 07.03.2024 contained in Annexure No.1 & order dated 14.05.2024 passed by Opposite Party No.3 after summoning the same in pursuance of the order dated 20.02.2024 whereby the recovery of Rs.5,38,781/- has been done as mentioned in letter dated 29.05.2024 contained in Annexure No.2 and further be pleased to quash PPO, GPO & CPO dated 18.04.2024 as contained in Annexure No.3 & 4 respectively to this writ petition.*

*(ii) Issue a writ, order or direction in the nature of mandamus directing Opposite Parties to repay/refund the deducted/recovered amount Rs.5,38,781 /- along with interest at the rate of 12% per annum deducted from commuted pension payable to the petitioner and further be pleased to direct the Opposite Parties to fix the pension of the petitioner on the basis of last basic pay Rs.64,100/- drawn by the petitioner at the time of retirement."*

3. Learned Standing Counsel has submitted that he has received complete instructions from the Superintendent of Police, Rampur, therefore, those instructions may be perused, the same are taken on record.

4. As per the aforesaid instructions itself, the petitioner retired from the post of Sub Inspector, which is a Class-III post, on 30.04.2023 and one undertaking has been received from him on 21.03.2023, which is before his retirement. As per the aforesaid undertaking, no specific undertaking has been taken from the petitioner in respect of any particular payment if that has been given in excess to its admissibility would be recoverable. Besides, on typed proforma, general undertaking has been taken from the petitioner and on one typed proforma, one indemnity bond has been taken from the petitioner without filling the detail of the petitioner properly. The aforesaid fact makes it crystal clear that as an eyewash, the undertaking was taken from the petitioner without indicating specifically that if any excess amount is paid to the petitioner at particular time, the same may be recovered from him. Perusal of the impugned order clearly reveals that the benefit of pay scale was provided to the petitioner w.e.f. 01.12.2008 and at the time of making such payment, admittedly, no undertaking was taken from the petitioner by the Department and the impugned amount, which has been recovered from the petitioner at the time of his retirement, is relating to the year 2008.

5. Learned counsel for the petitioner has drawn attention of this Court towards Annexure No.7 of the writ petition, which is a Government Order dated 16.01.2007 passed by the Principal Secretary of Finance addressing to all the Head of Departments of the State of U.P. wherein vide para-4 (1), it has been categorically indicated that at the time of retirement or after the retirement, record of the employee of last 34 months may be examined, not beyond that, but in the present case, record of the petitioner is being examined from the year 2008, which is much beyond the period of 34 months. Attention has been drawn towards the judgment and order dated 17.04.2014 passed by the Apex Court in re; **Sushil Kumar Singhal Vs. Pramukh Sachiv Irrigation Department & Others, Civil appeal No.5262 of 2008**, referring paras 7, 10 & 11, which read as under:-

*"7. Upon perusal of the aforestated G.O. and the submission made*

*by the learned counsel appearing for the appellant, it is not in dispute that the appellant had retired on 31st December, 2003 and at the time of his retirement his salary was Rs.11,625/- and on the basis of the said salary his pension had been fixed as Rs.9000/-. Admittedly, if any mistake had been committed in pay fixation, the mistake had been committed in 1986, i.e. much prior to the retirement of the appellant and therefore, by virtue of the aforestated G.O. dated 16th January, 2007, neither any salary paid by mistake to the appellant could have been recovered nor pension of the appellant could have been reduced.*

*10. For the aforestated reasons, we quash the impugned judgment delivered by the High Court and direct the respondents not to recover any amount of salary which had been paid to the appellant in pursuance of some mistake committed in pay fixation in 1986. The amount of pension shall also not be reduced and the appellant shall be paid pension as fixed earlier at the time of his retirement. It is pertinent to note that the Government had framed such a policy under its G.O. dated 16th January, 2007 and therefore, the respondent authorities could not have taken a different view in the matter of re-fixing pension of the appellant.*

*11. The submission made on behalf of the learned counsel appearing for the respondent that the appellant would be getting more amount than what he was entitled to cannot be accepted in view of the policy laid down by the Government in G.O. dated 16th January, 2007. If the Government feels that mistakes are committed very often, it would be open to the Government to change its policy but as far as the G.O. dated 16th January, 2007 is in force, the respondent-employer could not have passed any order for recovery of the excess salary paid to the appellant or for reducing pension of the appellant."*

6. The Apex Court has interpreted the purport and intent of Government Order dated 16.01.2007 and has observed that the respondent-employer could not have passed any order for recovery of excess salary paid to the appellant or for reducing the pension of the appellant beyond such period.

7. Learned counsel for the petitioner has also drawn attention of this Court towards the judgment and order dated 16.07.2024 passed by the Division Bench of this Court in **Writ-A No.3194 of 2022, State of U.P. and Others Vs. Suresh Kumar Tripathi,** whereby the judgment of the Apex Court in re; **Sushil Kumar Singhal** (supra) has been followed dismissing the writ petition filed by the State holding that if any recovery has been proposed or executed against the employee after his retirement or at the time of his retirement in derogation of the dictum of the Apex Court in re; **Sushil Kumar Singhal** (supra) and **State of Punjab and others v. Rafiq Masih (White Washer) and others, (2015) 4 SCC 334**, such recovery may not be permissible. Besides, the judgment of **Rafiq Masih** (supra) has been clarified by the Apex Court in re; **High Court of Punjab and Haryana and others v. Jagdev Singh, (2016) 14 SCC 267**, wherein it has been held by the Apex Court that if at the time of making excess payment, if any, any specific and categoric undertaking is received from the employee, such amount may be recovered but in absence of such undertaking at the time of making excess payment, the benefit of the judgment in re; Rafiq Masih (supra) would be provided to the employee concerned.

8. Learned Standing Counsel has tried to defend the impugned order dated 20.02.2024 passed by opposite party no.2

and the order dated 14.05.2024 passed by opposite party no.3 but could not defend those orders particularly in the light of the dictum of the Apex Court in re; **Sushil Kumar Singhal** (supra) whereby the Apex Court has interpreted the Government Order dated 16.01.2007 (supra) as well as in the light of the dictum of **Rafiq Masih** (supra) and **Jagdev Singh** (supra).

9. Having heard learned counsel for the parties and having perused the material available on record, since the impugned recovery is not only in violation of Government Order dated 16.01.2007 (supra), which has been interpreted and affirmed by the Apex Court in re; **Sushil Kumar Singhal (supra)** and such recovery has been executed in absence of any specific undertaking of the present petitioner at the time of making payment of such amount, if any, and the undertaking at the time of retirement is meaningless, therefore, the petitioner would be entitled for the benefit of the dictum of the Apex Court in re; **Rafiq Masih** (supra) and in the light of the dictum of the Apex Court in re; **Jagdev Singh** (supra).

10. Accordingly, the writ petition is **allowed.**

11. The impugned orders dated 20.02.2024 & 14.05.2024 passed by opposite parties no.2 & 3 respectively are hereby set aside/ quashed.

12. The opposite parties are directed to refund/ repay the deducted/ recovered amount of Rs.5,38,781/- to the petitioner forthwith, preferably within a period of one month from the date of receipt of certified copy of this order, failing which the petitioner would be entitled for the interest on the delayed payment at the rate of 8% p.a.

13. The opposite parties are further directed to fix the pension of the petitioner on the basis of last basic pay Rs.64,100/- drawn by the petitioner at the time of retirement since the pension of the petitioner may not be reduced by making exercise of re-fixation of last pay drawn in the light of the dictum of the Apex Court in re; **Sushil Kumar Singhal** (supra).

14. No order as to costs.

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**(2024) 7 ILRA 113**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 30.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ A No. 8688 of 2024

**Jakir Husain** ...**Petitioner**
**Versus**
**State of U.P. & Ors.** ...**Respondents**

**Counsel for the Petitioner:**
Mahendra Singh, Sr. Advocate

**Counsel for the Respondents:**
C.S.C., Pranav Mishra

क. सेवा विधि – प्राकृतिक न्याय का सिद्धान्त – मदरसा में सहायक अध्यापक तहतानिया का पद – नियुक्ति निरस्तीकरण – कूटरचित अंकपत्र के आधार पर नियुक्ति पाने का आरोप – बिना सुनवाई का अवसर दिये निरस्तीकरण का आदे ा पारित किया गया – वैधता को चुनौती दी गई – पूर्व में अल्पसंख्यक कल्याण अधिकारी के आदे ा पर उत्तर प्रदे ा मदरसा ि ाक्षा परिशद के रजिस्ट्रार द्वारा कराये गये जांच में भौक्षणिक अभिलेख सत्य पाये गये – प्रभाव – अभिनिर्धारित किया गया, यदि किसी जांच में कोई अन्य तथ्य सामने आया, तो

**याचिकाकर्ता को उसके विरूद्ध कोई भी आदे ा पारित करने के पूर्व सुनवाई का समुचित अवसर दिया जाना अनिवार्य है – आलोच्य आदे ा प्राकृतिक न्याय का सिद्धान्तों का पालन करते हुए नहीं पारित किये गये हैं, इस कारण से निरस्त किये जाने योग्य हैं। (पैरा 8 एवं 10)**

रिट याचिका स्वीकृत (E-1)

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

1. याचिकाकर्ता की ओर से उपस्थित विद्वान वरिष्ठ अधिवक्ता श्री अशोक खरे तथा विद्वान अधिवक्ता श्री महेन्द्र सिंह, विपक्षी सं० 01, 02, तथा 04 की ओर से उपस्थित विद्वान अपर स्थायी अधिवक्ता श्री प्रदीप्त कुमार शाही तथा विपक्षी सं० 03 की ओर से कुलसचिव/ निरीक्षक, उत्तर प्रदेश मदरसा शिक्षा परिषद के विद्वान अधिवक्ता श्री प्रणव मिश्रा को सुना तथा पत्रावली का परिशीलन किया।

2. भारतीय संविधान के अनुच्छेद 226 के अंतर्गत प्रस्तुत इस रिट याचिका द्वारा याचिकाकर्ता ने रजिस्ट्रार / निरीक्षक, उत्तर प्रदेश मदरसा शिक्षा परिषद द्वारा पारित कार्यालय ज्ञाप दिनांक 15.05.2024 एवं प्रबंधक मदरसा तेगिया शरीफिया नुरूल उलूम शाहपुर उचकी पट्टी दुदही, कुशीनगर द्वारा पारित आदेश दिनांक 22.05.2024 की वैधता को चुनौती दी है, जिसके द्वारा याचिकाकर्ता की मदरसा तेगिया शरीफिया नुरूल उलूम शाहपुर उचकी पट्टी दुदही, कुशीनगर में सहायक अध्यापक तहतानिया के पद पर नियुक्ति के अनुक्रम में वेतन भुगतान की सहमति को निरस्त कर दिया गया है।

3. याचिका में संशोधन के द्वारा याचिकाकर्ता ने विपक्षी सं० 04 प्रबंधक मदरसा तेगिया शरीफिया नुरूल उलूम शाहपुर उचकी पट्टी दुदही, कुशीनगर द्वारा पारित आदेश दिनांक 22.05.2024 की वैधता को चुनौती दी गयी है, जिसके द्वारा याचिकाकर्ता के उपरोक्त पद पर दिनांक 12.11.2014 को हुई नियुक्ति को निरस्त कर दिया गया।

4. याचिकाकर्ता के विद्वान वरिष्ठ अधिवक्ता ने प्रारम्भ में ही कहा कि उक्त आदेश से याचिकाकर्ता के साथ एक अन्य सहायक अध्यापक श्री साबिर अली अंसारी के संबंध में भी वही आदेश पारित किया गया था, जिसको साबिर अली अंसारी ने रिट-ए सं० 8726/2024 के माध्यम से चुनौती दी थी तथा उक्त रिट याचिका में इस न्यायालय ने दिनांक 02.07.2024 को एक अंतरिम आदेश के आधार पर पारित किया कि आयुक्त बस्ती मण्डल को जांच करने का कोई अधिकार प्राप्त नहीं था।

5. विपक्षी सं० 03 के विद्वान अधिवक्ता श्री प्रणव मिश्रा ने याचिका का घोर विरोध करते हुए कहा कि उपरोक्त आदेश दिनांक 02.07.2024 पारित करते समय यह तथ्य इस न्यायालय के समक्ष नहीं रखा जा सका था कि उत्तर प्रदेश मदरसा शिक्षा परिषद द्वारा वर्ष 2014 के परीक्षा परिणाम में याचिकाकर्ता 02 प्रशनपत्रों में अनुपस्थित दिखाया गया है तथा उसका परीक्षा परिणाम "अनुत्तीर्ण" का है। जिससे यह स्पष्ट हुआ कि याचिकाकर्ता ने एक कूटरचित अंकपत्र के आधार पर नियुक्ति प्राप्त की थी।

6. याचिकाकर्ता के विद्वान अधिवक्ता ने उक्त तर्कों का उत्तर देते हुए यह कहा कि प्रकरण में जिला अल्पसंख्यक कल्याण अधिकारी कुशीनगर ने याचिकाकर्ता तथा एक अन्य अध्यापक साबिर अली को नोटिस दिनांक 16.10.2023 को जारी की जिसमें निम्नलिखित कथन है-

*"विषय- जनपद-कुशीनगर में मदरसा लेगिया शरीफिया नुरुल उलूम शाहपुर उचकी पट्टी, दुदही में मदरसा बोर्ड से साठगाँठ कर फर्जी अंकपत्र बनाकर नौकरी करने वालों एवं इस अपराध में संलिप्त व्यक्तियों के विरूद्ध कार्यवाही किये जाने विषयक सुनवाई दिनांक-21.10.2023 को अपरान्ह 03:00 बजे उपस्थित होने के सम्बन्ध में।*

*उपर्युक्त विषयक आयुक्त महोदय, बस्ती मण्डल, बस्ती के पत्र संख्या-2723/पी०ए०/जी-64/2023- दिनांक 16 अक्टूबर 2023 (छायाप्रति संलग्न) का सन्दर्भ लें, जिसके माध्यम से उपरोक्त प्रकरण में दिनांक-21.10.2023 को अपरान्ह 03:00 बजे सुनवाई निर्धारित की गयी है।*

*तत्क्रम में आपको निर्देशित किया जाता है कि प्रकरण से सम्बन्धित समस्त मूल अभिलेखो के साथ दिनांक-21.10.2023 को अपरान्ह 03:00 बजे आयुक्त महोदय, बस्ती मण्डल, बस्ती के समक्ष उपस्थित होना सुनिश्चित करें।"*

7. उपरोक्त नोटिस में यह कथन नहीं है कि याचिकाकर्ता ने कूटरचित अंकपत्र प्रस्तुत करके उसके आधार पर नियुक्ति प्राप्त की है तथा याचिकाकर्ता को स्पष्ट रूप से यह सूचित नहीं किया गया है कि किस बिन्दु पर उसको अपना पक्ष रखना है।

8. याचिकाकर्ता के शैक्षिक अभिलेखों का सत्यापन पहले भी जिला अल्पसंख्यक कल्याण अधिकारी कुशीनगर ने रजिस्ट्रार/निरीक्षक उत्तर प्रदेश मदरसा शिक्षा परिषद से करवाया था, जिस संबंध में रजिस्ट्रार/निरीक्षक अपने पत्र दिनांक 26.07.2022 द्वारा जिला अल्पसंख्यक कल्याण अधिकारी को सूचित किया था कि याचिकाकर्ता की, तृतीय वर्ष परीक्षा वर्ष 2014 के शैक्षणिक अभिलेखों का मिलान मुख्य परीक्षा अभिलेख से किया गया और सत्य पाया गया। रजिस्ट्रार/निरीक्षक उत्तर प्रदेश मदरसा शिक्षा परिषद के उपरोक्त कथन को जिला अल्पसंख्यक कल्याण अधिकारी ने अपने पत्र दिनांक 28.07.2022 द्वारा प्रबन्धक / प्रधानाचार्य मदरसा तेगिया शरीफिया नुरूल उलूम शाहपुर उचकी पट्टी दुदही, कुशीनगर को सूचित किया। इसके पश्चात यदि किसी जांच में कोई अन्य तथ्य सामने आया तो याचिकाकर्ता को उसके विरूद्ध कोई भी आदेश पारित करने के सुनवाई का समुचित अवसर दिया जाना अनिवार्य है। सुनवाई के समुचित अवसर से तात्पर्य यह है कि याचिकाकर्ता को सूचित किया जाये की उसके विरूद्ध आरोप क्या तथा उक्त आरोपों के संबंध में क्या साक्ष्य विचार में लिया जायेगा।

9. विपक्षीगण के विद्वान अधिवक्ता ने उनको प्राप्त अनुदेशों के आधार पर कहा कि याचिकाकर्ता के विरुद्ध उत्तर प्रदेश मदरसा शिक्षा परिषद द्वारा परीक्षा वर्ष 2014 में उनके संबंध में तैयार किया गया सारणीकरण रजिस्टर

(टैबुलेशन रजिस्टर) साक्ष्य के रूप में पढ़ा गया है, किन्तु इसकी प्रति याचिकाकर्ता को नहीं प्रदान की गयी।

10. तद्नुसार आलोच्य आदेश प्राकृतिक न्याय के सिद्धांतों का पालन करते हुए नहीं पारित किये गये हैं, इस कारण से निरस्त किये जाने योग्य है।

11. उक्त समीक्षा के आलोक में यह रिट याचिका स्वीकार की जाती है।

12. प्रकरण में विपक्षीगण को विधि अनुसार उचित प्रक्रिया अपनाकर याचिकाकर्ता के सेवा के संबंध में एक नवीन आदेश पारित करने की छूट रहेगी।

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**(2024) 7 ILRA 116**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 30.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ A No. 8716 of 2024

**C/M Roop Kishor Chaturvedi Inter College ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Kushmondeya Shahi, Pankaj Srivastava

**Counsel for the Respondents:**
C.S.C., Yogesh Kumar Saxena

**Service Law -** Resolution recommended payment of selection grade pay to opposite party no.4 and order declining to approve the suspension and termination of opposite party no.4 from post of Principal-impugned-F.I.R. lodged against the opposite party no.4 by a teacher of the college alleging rape and cheating-disciplinary enquiry held-allegations could not be substantiated-the copies of the enquiry report and other related documents not provided to the opposite party no.4-recorded in the impugned order-Final report is filed in the said F.I.R.-order passed by the committee goes on to held the informant of the F.I.R. and the police personnel guilty of having acted in connivance of the opposite party –without jurisdiction-Managing committee has examined all the documents and passed resolution for payment of selection grade pay to opposite party on completing 10 years' service-no illegality in the impugned order.

**W.P. dismissed.** (E-9)

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

1. Heard Sri Kushmondeya Shahi, the learned counsel for the petitioner, Sri Gaya Prasad Singh, the learned Standing Counsel appearing on behalf of the State-opposite parties no.1 to 3, Sri Yogesh Kumar Saxena, the learned counsel for the opposite party no.4-Om Pal Singh Raghuvanshi and perused the records.

2. By means of the instant writ petition filed under Article 226 of the Constitution of India the petitioner-Committee of Management, Roop Kishore Chaturvedi Inter College has challenged the validity of a resolution dated 18.02.2022, passed by the Regional Level Committee whereby it had recommended the selection grade pay to the opposite party no.4, an order dated 13.02.2024, passed by the District Inspector of Schools, Farrukhabad directing the Manager/Principal, Roop Kishore Chaturvedi Inter College to sign the requisite documents for payment of selection grade pay to the opposite party no.4 in furtherance of the aforesaid resolution dated 18.02.2022 and an order

dated 24.04.2024, passed by the District Inspector of Schools, Farrukhabad declining to approve the suspension and termination of opposite party no.4 from the post of Principal, Roop Kishore Chaturvedi Inter College.

3. The learned counsel for the petitioner has submitted that an F.I.R. No.45 of 2022, under Sections 420, 376-B, 323, 506, 323, 120-B I.P.C. was lodged against the opposite party no.4 in Police Station Kampil, District Fatehgarh by a teacher of the college stating that under an allurement of getting her some benefit the opposite party no.4 had raped and cheated her and that when she got pregnant the opposite party no.4 got her pregnancy aborted and he threatened her.

4. After lodging of the F.I.R. the opposite party no.4 was placed under suspension by means of an order dated 06.04.2022 on the ground of registration of the aforesaid first information report stating that the act alleged in the F.I.R. has tarnished the reputation of the college. It was also alleged in the suspension order that the opposite party no.4 was guilty of embezzlement of students' funds and amount of mid-day-meal. The suspension of the opposite party no.4 was approved by means of an order dated 20.04.2020, passed by the District Inspector of Schools, Farrukhabad. On 08.07.2022 the Manager of the College has sent a letter to the District Inspector of Schools stating that the opposite party no.4 was placed under suspension on 22.03.2022 and thereafter an enquiry committee has submitted a report dated 03.06.2022 holding the opposite party no.4 guilty of the charges and the Committee of Management has terminated the services of the opposite party no.4 on the post of Principal of the College.

5. On 25.07.2022 the District Inspector of Schools wrote a letter to the Manager of the College stating that in view of the order dated 12.07.2022, passed by the Chief Judicial Magistrate, Farrukhabad, whereby the court has accepted the final report submitted by the Investigating Officer, approval to suspension of the opposite party no.4 was cancelled.

6. The petitioner filed Writ-A No.12814 of 2022 challenging the aforesaid order dated 25.07.2022, passed by the DIOS, Farrukhabad which was disposed of by means of an order dated 31.08.2022, passed by a coordinate Bench of this court providing that a three member committee appointed by the petitioner may issue a fresh notice to the opposite party no.5 containing list of witnesses and other evidence and the enquiry should be conducted and concluded within a period of three months.

7. Thereafter, the Manager of the College wrote a letter dated 30.11.2022 to the District Inspector of Schools, Farrukhabad stating that the opposite party no.4 had appeared before the Enquiry Committee but he did not cooperate with the Committee and did not submit his version but subsequently he submitted his written explanation and evidence on 16.10.2022. The Committee gave further opportunity to the opposite party no.4 to submit evidence in support of his claim. The other concerned persons had also been called to adduce their evidence, after which the Enquiry Committee found that the opposite party no.4 is guilty of having committed an offence of rape regarding which the victim had lodged an F.I.R. but the opposite party no.4 has managed to get a final report filed in connivance with the informant and with the police authorities.

The Committee of Management of the institution has decided to terminate the services of the opposite party no.4 from the post of Principal.

8. The opposite party no.4 challenged the aforesaid order by filing Writ-A No.1703 of 2023, which was disposed of by means of an order dated 21.03.2023, whereby the aforesaid order was quashed and the opposite party no.4 was directed to be reinstated and the management was granted liberty to proceed in accordance with the law afresh, from the stage of enquiry report. The petitioner challenged the aforesaid order passed by the Hon'ble Single Judge Bench by filing Special Appeal No.242 of 2023 in which an interim order was passed staying the operation of the judgment and order dated 21.03.2023, passed by the writ court. The said appeal is still pending.

9. Meanwhile, the opposite party no.4 filed Writ-A No.4424 of 2024, in which an order dated 18.04.2024 was passed directing the District Inspector of Schools to file his own affidavit indicating why he has not taken a decision in the matter of approval of the petitioner's termination. The District Inspector of Schools issued notices dated 22.04.2024 to the petitioner and the opposite party no.4 and thereafter he has passed the impugned order dated 24.04.2024 refusing to accord approval to the termination of service of the opposite party no.4 on the ground that the only charge against the opposite party no.4 was lodging of an F.I.R., the allegation levelled in which could not be established during investigation and the Investigating Officer has submitted a final report which has been accepted by the Chief Judicial Magistrate.

10. Although, the suspension order contained two other charges of embezzlement of students' funds and money of mid-day-meal, the charge-sheet issued to the opposite party no.4 did not contain any such charge and the only allegation against the petitioner on which the enquiry was held, was based regarding lodging of the F.I.R. against him, the allegations levelled in which could not be substantiated.

11. It is further recorded in the impugned order that the petitioner did not comply with the direction issued by this court in the order dated 31.08.2022 for proving the list of witnesses and other evidences to the opposite party no.4. Even as per the provisions contained in Regulation 37 of Chapter 3 of the Regulations framed under U.P. Intermediate Education Act, it is mandatory for the Management to provide copies of the enquiry report and all the other related documents to the delinquent employee, which has not been done in the present case.

12. In the order dated 30.11.2022, merely this much has been stated that the petitioner failed to adduce any evidence to prove his innocence, but this order does not make a reference to any evidence led to prove the charges. It is settled law that where the employer levels charges of commission of any misconduct against any employee, it is the employer who has to adduce evidence in support of the charges to prove that the employee is guilty of the charges. Without the charges having been established by producing any evidence, the employee cannot be called upon to adduce evidence to prove himself innocent and in any case he cannot be held guilty merely

because he could not adduce evidence to prove his innocence.

13. The order dated 13.11.2022 holds the petitioner guilty of commission of offence of rape regarding which although an F.I.R. had been lodged, but the allegations levelled in the F.I.R. could not be established during investigation and the Investigating Officer submitted a final report, which has been accepted by the learned Chief Judicial Magistrate, Farrukhabad. The order dated 13.11.2022, besides holding the opposite party no.4 guilty, goes on to held the informant of the F.I.R. as also the concerned police personnel guilty of having acted in connivance with the opposite party no.4, which findings apparently are without any evidence, besides being without jurisdiction.

14. In these circumstances, the District Inspector of Schools has not committed any illegality in passing the impugned order declining to accord approval to the termination of opposite party no.4 as the charges levelled against the opposite party no.4 in the F.I.R. could not be established during investigation and the final report submitted by the Investigating Officer has been accepted by the learned Chief Judicial Magistrate.

15. So far as the challenge laid by the petitioner to the resolution dated 18.02.2022, passed by the Regional Level Committee for grant of selection grade pay to the opposite party no.4 and the consequential order dated 13.02.2024, passed by the District Inspector of Schools, Farrukhabad, directing the petitioner to submit documents for payment of selection grade to the opposite party no.4 in furtherance of the resolution dated 18.02.2022, the aforesaid resolution states that the District Inspector of Schools had submitted a recommendation for payment of selection grade pay to the opposite party no.4 on 15.12.2021. The Committee had examined all the documents and found that the opposite party no.4 was working as Principal of the College since 28.06.2010 and he has completed the eligibility condition of having completed ten years' service on 28.06.2020. A resolution passed by the Managing Committee of the college on 06.12.2020 was also a part of the documents submitted, whereby the Managing Committee had unanimously resolved for payment of selection grade pay to the opposite party no.4 as he had completed ten years service.

16. The learned counsel for the petitioner has submitted that the Committee of Management has not submitted any other resolution. When a three member regional committee headed by the Director of Education has recorded a factual statement that the documents submitted to the three members committee included a resolution dated 06.12.2020, passed by the Committee of Management, this court does not find it proper to go into this disputed question of fact being raised by the petitioner that it had not submitted any such resolution.

17. The learned counsel for the petitioner next submitted that even as per the averment made in the impugned order the Committee of Management had merely recommended grant of selection grade pay to the opposite party no.4 on the ground that he had completed ten years service but it does not state that the petitioner had completed ten years satisfactory service, which is an essential condition of grant of selection grade pay to a teacher.

18. When the Committee of Management itself recommended payment of selection grade pay to the opposite party no.4 stating that he had complete ten years service and was entitled to be granted selection grade pay, the mere fact that the resolution dated 18.02.2022 does not state that it was written in the resolution that the opposite party no.4 had completed ten years 'satisfactory' service would not affect the legality of the resolution for payment of selection grade pay to the petitioner passed by the regional level committee when the Committee of Management of the college had itself recommended payment of selection grade pay to the opposite party no.4, which implies that the Committee of Management of the college was satisfied with the services of the opposite party no.4.

19. In view of the aforesaid discussions, this court does not find any illegality in the impugned resolution dated 18.02.2022, passed by the regional level committee recommending payment of selection grade pay to the opposite party no.4 and the consequential communication dated 13.02.2024 issued by the District Inspector of Schools, Farrukhabad.

20. The writ petition lacks merit and the same is accordingly ***dismissed.***

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**(2024) 7 ILRA 120**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 12.07.2024**

**BEFORE**

**THE HON'BLE RAJESH SINGH CHAUHAN, J.**

Writ A No. 9427 of 2023

**Anuradha Singh ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Niraj Kumar Srivastava, Neelima Jaiswal

**Counsel for the Respondents:**
C.S.C.

**Rule 56 of Fundamental Rules, Volume -2, Part 2 to 4-**Petitioner suffering from physical and mental ailment severely-not able to discharge her duties-requested for voluntary retirement after completing 30 years of service-aged about 55 years-her request rejected-impugned-though competent authority have jurisdiction to turn down such application-if reason valid-it should not be interfered in the routine manner-as per specific opinion of Orthopedic surgeon-her life may be endangered –her fundamental right to life and personal liberty may not be violated – reason indicated in impugned order suffers from perversity-quashed.

**W.P. allowed.** (E-9)

**List of Cases cited:**

Manjushree Pathak Vs Assam Industrial Development Corpn. Ltd. & ors., (2000) 7 SCC 390

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Niraj Kumar Srivastava, learned counsel for the petitioner and Sri Ashwani Kumar Singh Rathaur, learned Standing Counsel for the State-opposite parties.

2. In the present case, pleadings are complete, therefore, learned counsels for the parties have requested that the matter may be heard and disposed of finally.

3. By means of this petition, the petitioner has prayed following main reliefs:-

*"i. Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 23.8.23, passed by the opposite party no.2 contained in Annexure no. 1.*

*ii. Issue a writ, order or direction in the nature of Mandamus restraining the opposite parties to give effect to the operation and implementation of the impugned orders dated 23.8.2023 contained in Annexure no.1.*

*iii. Issue a writ, order or direction in the nature of Mandamus commanding the opposite parties to calculate the entire post retiral dues within a shortest stipulated time and to disburse the same to the petitioner immediately."*

4. This is a peculiar case where the petitioner, who is an employee and is suffering from physical and mental ailment severely, is not able to discharge her duties, therefore, she requested for voluntary retirement after completing 30 years of services. She is aged about 55 years and in view of Rule 56 of Fundamental Rules, Volume-2, Part 2 to 4 of the Financial Hand Book, she is fulfilling all required conditions to get voluntary retirement. To be more precise, the petitioner was appointed in the Department on 28.10.1992 and she was serving at Malkhan Singh District Hospital, Aligarh on the post of Head Assistant.

5. Attention has been drawn by the learned counsel for the petitioner towards Annexure No.2 of the writ petition, which is a Medical Certificate issued from Mother's Institute of Neuro - Psychiatric Disorders (MIND), E-106, Sector-41, Noida (UP), which reads as under:-

*"MEDICAL CERTIFICATE*

*Date-28 May, 2023*

*This is to certify that Mr. Anuradha Singh, W/o Sh. Arvind Singh is receiving treatment from our clinic from 04 April 2016 onwards to till date. she has been severely depressed with seven anxiety neurosis. Despite medication and psychologist therapies, she is not fully recovered and still needs someone along with her for any work. She is advised to take long rest along the ongoing medicines for an early and better amelioration of her symptoms.*

*28.05.2023"*

6. Further attention has been drawn towards the prescription of the Orthopedic Surgeon dated 25.05.2023, which reads as under:-

*"Certified that I have been treating Ms Anuradha Singh, whose signatures are attested below, since 2015, for various Orthopedic issues, chiefly being PROGRESSIVE CERVICAL SPONDYLOSIS WITH CERVICAL SLIP DISC CAUSING SEVERE LEFT SIDED RADICULOPATHY with SUSPECTED INFLAMMATORY ARTHRITIS which causes RECURRENT MULTIPLE JOINT PAINS.*

*Based on this I recommend that she should not indulge in following activities.*

*1. Prolonged sitting.*

*2. Prolonged desk work / writing work.*

*3. Traveling.*

*4. Household work.*

*Being progressive in nature, her medical condition is unlikely to improve."*

7. In the light of aforesaid compelling medical circumstances, the petitioner preferred a representation dated 30.05.2023 to the Director

(Administration), Medical and Health Services, U.P., Lucknow (Annexure No.4) and again on 31.07.2023 to the same authority (Annexure No.5) apprising her physical and mental condition seeking voluntary retirement indicating therein that she is fulfilling all the requisite conditions to get the voluntary retirement. She has preferred a reminder representation through registered post on 22.08.2023 (Annexure No.6).

8. Further attention has been drawn towards Annexure No.7 of the writ petition, which is a case law of the Apex Court laid down in the case of **Manjushree Pathak v. Assam Industrial Development Corpn. Ltd. and Others, (2000) 7 SCC 390**, referring para-16 thereof, which reads as under:-

*"16. The Division Bench of the High Court has failed to see that the Scheme conferred discretion on the Corporation under clause 8.1 coupled with the duty to act judiciously when application for voluntary retirement was made by an employee. The said clause did not confer any unfettered discretion upon the Corporation to refuse the benefit of the Scheme to any employee, being an authority coming within the meaning of Article 12 of the Constitution. It was not open to the Managing Director of the respondent Corporation to act on extraneous consideration by issuing a show-cause notice dated 15-2-1996/16-2-1996 so as to deprive the appellant of the benefit flowing from acceptance of her voluntary retirement. It is true that under clause 8.1 of the Scheme, discretion was available to the respondent Corporation but that discretion was not absolute. It was circumscribed by the terms mentioned in the said clause and it was to be exercised judiciously. In the case on hand the Managing Director of the Corporation has failed to act reasonably and fairly. He abdicated his duty by not exercising discretion at all in the light of the facts and circumstances of the case stated above in sufficient detail."*

9. Learned counsel for the petitioner has stated that despite the aforesaid critical physical and mental condition of the petitioner and also despite the fact that she was fulfilling all the requisite conditions to get the voluntary retirement, her request has been turned down by the competent authority vide impugned order dated 23.08.2023 only for the reason that since there is scarcity of the employees in Group-C clerical cadre, therefore, she may not be granted voluntary retirement.

10. Learned counsel for the petitioner and learned Standing Counsel are agreed on the point that the competent authority is having jurisdiction to turn down such application of an employee inasmuch as this is the prerogative of the employer to accept the application for voluntary retirement or to turn down the same and if the reason to turn down such application is valid and legal, the same should not be interfered in the routine manner.

11. However, in view of the present facts and circumstances of the issue in question, if the petitioner is compelled to discharge her duties, she may suffer irreparable loss and injury, which cannot be compensated in terms of money inasmuch as on account of suffering from severe depression with seven anxiety neurosis and she is taking heavy medication regarding mental ailment as well as she is not able for

prolonged sitting or prolonged desk work/ writing work as per the specific opinion of the Orthopedic Surgeon, her life may be endangered, in that way, her Fundamental Right enshrined under Article 21 of the Constitution of India would be violated. Every citizen of the country is having Fundamental Right to life and personal liberty and that right to life may not be violated without having any cogent and proper reason.

12. The reason so indicated by the employer is not proper in the case of the present petitioner to the effect that if the Department is not having proper employees and the petitioner is compelled to discharge her duties in such critical medical condition, she may likely to loose her life or she may likely to cause damage to herself. This is not a case where the petitioner has applied for voluntary retirement in a casual manner only after completing the requisite term of service and attaining the age but it appears that her application for seeking voluntary retirement has been filed under serious compelling circumstances. Therefore, the reason so indicated in the impugned order suffers from perversity, arbitrariness and given without proper application of mind.

13. Accordingly, this writ petition is **allowed.** The order dated 23.08.2023 passed by opposite party no.2, contained in Annexure no.1 to the writ petition, is set aside/ quashed.

14. Opposite party no.2 i.e. Director (Administration), Medical and Health Services, U.P., Lucknow is directed to pass a fresh order, strictly in accordance with law, considering the medical and physical ailment of the petitioner and also in the light of the observation so given herein-above. After passing the appropriate order, consequential order shall be passed by the opposite party no.2 forthwith, preferably within a period of four weeks from the date of receipt of certified copy of this order and the petitioner shall be paid all post retiral dues/ benefits strictly in accordance with law.

15. No order as to costs.

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**(2024) 7 ILRA 123**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 09.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ-A No. 9709 of 2024

**Bhagirath Prasad Sharma ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Om Prakash Chaube

**Counsel for the Respondents:**
C.S.C.

**Delay and Latches-**Petitioner's claim for payment of difference in salary for the post of officiating Principal for 2006 to 30.06.2009–raised the claim for first time after more than 15 years-law is well settled that a claim for arrears of salary for a period earlier than three years cannot be entertained by the High Court-Writ filed in 2024 for claim of 2006 to 30.06.2009-Petition suffers from latches.

**W.P. dismissed.** (E-9)

**List of Cases cited:**

1. Jai Prakash Narayan Singh Vs St. of U.P., 2014 SCC OnLine All 15392 (2014) 6 All LJ 668

2. St. of Uttaranchal & anr. Vs Sri Shiv Charan Singh Bhandari & ors.: (2013) 12 SCC 179

3. St. of W. B. Vs Debabrata Tiwari: 2023 SCC OnLine SC 219

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

1. Heard Sri Om Prakash Chaube, the learned counsel for the petitioner and Sri Pradipta Kumar Shahi, the learned Additional Chief Standing Counsel for the State respondents.

2. By means of the instant writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged the validity of an order dated 20.01.2024 passed by the respondent no. 5 - Deputy Director of Education (Secondary), Jhansi rejecting the petitioner's representation for payment of difference in salary for the post of officiating Principal for the period June, 2006 to 30.06.2009, on the ground that there was no provision of payment of salary of a post held on officiating basis at that point of time.

3. Earlier the petitioner had filed a Writ-A No. 227 of 2023 with the following prayers: -

*"i. To issue a writ, order or direction in the nature of mandamus commanding the respondents to make the payment of gratuity amount to the petitioner along with 9% interest with in stipulated time.*

*ii. To issue a writ, order or direction in the nature of mandamus commanding the respondent No.3 and 4 to consider the claim/representation dated 14.12.2022/16.12.2022 submitted by the petitioner before him with in stipulated time."*

4. The aforesaid Writ A No. 227 of 2023 was decided by an order dated 15.02.2023, which states that: -

*"The only prayer made by the counsel for the petitioner to direct the respondent no.5 to pass appropriate orders on the representation made by the petitioner dated 14.12.2022, copy of which is appended as Annexure-9 to the writ petition.*

*On the other hand, it is argued by the learned Standing Counsel that the respondent no.5 namely Deputy Director of Education (Secondary) Jhansi Division Jhansi will take a decision in the matter within a period of six weeks thereafter.*

*At this stage, a prayer has been made by the counsel for the petitioner that petitioner may be permitted to make a fresh representation.*

*In view of the above, without entering in to the merits of the case, the present writ petition is disposed of with liberty to the petitioner to file a fresh comprehensive representation ventilating all his grievances before the respondent no. 5/Deputy Director of Education (Secondary) Jhansi Division Jhansi within a period of three weeks from today along with certified copy of this order and in case any such representation is filed by the petitioner before the respondent no. 5 within the time indicated hereinabove, he shall consider and decide the same strictly in accordance with law by a speaking and reasoned order as expeditiously and preferably within a period of six weeks from the date of filing of such*

*representation by the petitioner before him."*

5. Apparently, the petitioner had not sought a writ of mandamus for payment of difference in salary for the post of officiating Principal for the period January 2006 to 30.06.2009 even in the earlier writ petition and he had merely sought a direction for disposal of his representations dated 14.12.2022/16.12.2022, wherein he had claimed payment of difference in salary as aforesaid.

6. Thus it appears that the petitioner raised the claim of payment of difference in salary for the period June 2006 to 2009 for the first time through his representation dated 14.12.2022/16.12.2022, i.e., that is after expiry of more than 13 years.

7. By means of the impugned order dated 20.01.2024, the Deputy Director Education (Secondary Education) has rejected the petitioner's representation on the ground that the petitioner had worked as officiating principle for the period June 2006 to 30.06.2009 and at that point of time there was no provision for making payment of salary of Principal to a teacher who worked on the post on officiating basis.

8. In is relevant to note that a Full bench of this Court had held in **Jai Prakash Narayan Singh v. State of U.P.,** 2014 SCC OnLine All 15392 = (2014) 6 All LJ 668, that once the nature of that power is construed as a power to make an appointment albeit on an officiating basis till a regularly selected candidate becomes available, there would be no justification to deny a claim for the payment of salary to such a person who has been appointed on an officiating basis. Where a person has been appointed as an officiating principal until a regularly selected candidate takes charge, this involves an assumption of duties and responsibilities of a greater importance than those attaching to the post of a teacher. Hence, a person who is appointed as an officiating principal under the Statutes of the University until a regularly selected candidate is made available, would be entitled to the payment of salary attached to the post of principal. It was only after the aforesaid Full Bench judgment passed on 26.09.2014, that a person working on a post on officiating basis was held to be entitled to get salary for the post.

9. Even after the aforesaid law was laid down on 26.09.2014, the petitioner has submitted the representation claiming the difference of salary of the post held by him substantively and the post which he held on officiating basis during the period June 2006 to 30.06.2009, on 14/12/2022/16.12.2022 and he has filed the Writ Petition claiming the aforesaid amount in the year 2024.

10. Although, the provisions of the Limitation Act, 1963 do not apply to the proceedings under Article 226 of the Constitution of India, it is settled law that a person should approach the Court for redressal of his grievances with reasonable promptitude and writ petitions raising stale claims would not be entertained by this Court.

11. The learned Counsel for the petitioner has relied upon a judgment in the case of **Union of India v. Tarsem Singh**, (2008) 8 SCC 648, wherein the Hon'ble Supreme Court summarized the law as follows: -

***"To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition)*** *or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence,* ***the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."***

(Emphasis added)

12. The same principle of law was reiterated in **State of M.P. v. Yogendra Shrivastava**: (2010) 12 SCC 538, in which it was held that: -

*"18....Where the issue relates to payment or fixation of salary or any allowance, the challenge is not barred by limitation or the doctrine of laches, as the denial of benefit occurs every month when the salary is paid, thereby giving rise to a fresh cause of action, based on continuing wrong. Though the lesser payment may be a consequence of the error that was committed at the time of appointment, the claim for a higher allowance in accordance with the Rules (prospectively from the date of application) cannot be rejected merely because it arises from a wrong fixation made several years prior to the claim for correct payment. But in respect of grant of consequential relief of recovery of arrears for the past period, the principle relating to recurring and successive wrongs would apply. Therefore* ***the consequential relief of payment of arrears will have to be restricted to a period of three years prior to the date of the original application."***

13. The learned Counsel for the petitioner has relied upon a judgment rendered by a Division bench of this Court in **Syed Mohammad Suleman versus State of U. P. and 2 Others:** Special Appeal Defective No. 655 of 2015 decided on 15.09.2015, wherein this Court had followed the aforesaid dictum of law laid down in Tarsem Singh (Supra).

14. The learned counsel for the petitioner has relied upon the judgment of Division Bench of this Court in **Jwala Devi versus State of U.P. and 5 others**: Special Appeal Defective No. 768 of 2021 decided on 11.01.2022. The relevant portion of the order passed by an Hon'ble Single Judge of this Court in **Jwala Devi versus State of U.P. and 5 others:** Writ A No. 6549 of 2021, decided on 17.08.2021, is being reproduced below: -

*"Learned counsel for the petitioner states that the payment of gratuity is a recurring cause and, therefore, the question of delay would not arise. Arguments advanced on behalf of the petitioner would merit acceptance where the grievance is in respect of payment of pension as such amount becomes due and payable each month. This is not the position with regard to gratuity as the amount is paid in lump sum either at the time of retirement or death of the employee concerned. Unexplained latches in raising grievance, in that regard cannot be explained on the ground that the petitioner has a recurring cause."*

15. Allowing the Special Appeal filed against the aforesaid order, the Division Bench held that: -

*"It is settled law that payment of gratuity is the right of the employee, provided gratuity is actually payable in accordance with law. Non-payment of gratuity, in the event it is legally payable, is the statutory responsibility of the employer. Therefore, the writ petition of the widow of the deceased employee asking for payment of gratuity cannot be dismissed merely on the ground of laches, unless it is found that the gratuity is not legally payable."*

16. In **Jwala Devi** (Supra), the question of effect of latches on a Writ Petition filed for claiming payment of arrears of salary was not decided and, therefore, this judgment is not relevant for deciding this issue.

17. In paragraph 21 of the judgment in the case of **Bichitrananda Behera versus State of Orissa,** 2023 SCC OnLine SC 1307, the Hon'ble Supreme Court has referred to some precedents on the point of latches and the relevant passage is being reproduced below: -

*"21. Profitably, we may reproduce relevant passages from certain decisions of this Court:*

*(A) Union of India v. Tarsem Singh, (2008) 8 SCC 648:*

*"To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the*

*High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."*

*(emphasis supplied by the Hon'ble Supreme Court)*

*(B) Union of India v. N Murugesan, (2022) 2 SCC 25:*

***"Delay, laches and acquiescence***

*20. The principles governing delay, laches, and acquiescence are overlapping and interconnected on many occasions. However, they have their distinct characters and distinct elements. One can say that delay is the genus to which laches and acquiescence are species. Similarly, laches might be called a genus to a species by name acquiescence. However, there may be a case where acquiescence is involved, but not laches. These principles are common law principles, and perhaps one could identify that these principles find place in various statutes which restrict the period of limitation and create non-consideration of condonation in certain circumstances. They are bound to be applied by way of practice requiring prudence of the court than of a strict application of law. The underlying principle governing these concepts would be one of estoppel. The question of prejudice is also an important issue to be taken note of by the court.*

*Laches*

*21. The word "laches" is derived from the French language meaning "remissness and slackness". It thus involves unreasonable delay or negligence in pursuing a claim involving an equitable relief while causing prejudice to the other party. It is neglect on the part of a party to do an act which law requires while asserting a right, and therefore, must stand in the way of the party getting relief or remedy.*

*22. Two essential factors to be seen are the length of the delay and the nature of acts done during the interval. As stated, it would also involve acquiescence on the part of the party approaching the court apart from the change in position in the interregnum. Therefore, it would be unjustifiable for a Court of Equity to confer a remedy on a party who knocks its doors when his acts would indicate a waiver of such a right. By his conduct, he has put the other party in a particular position, and therefore, it would be unreasonable to facilitate a challenge before the court. Thus, a man responsible for his conduct on equity is not expected to be allowed to avail a remedy.*

*23. A defence of laches can only be allowed when there is no statutory bar. The question as to whether there exists a clear case of laches on the part of a person seeking a remedy is one of fact and so also that of prejudice. The said principle may not have any application when the existence of fraud is pleaded and proved by the other side. To determine the difference between the concept of laches and acquiescence is that, in a case involving mere laches, the principle of estoppel would apply to all the defences that are available to a party. Therefore, a defendant can succeed on the various grounds raised by the plaintiff, while an issue concerned alone would be amenable to acquiescence.*

***Acquiescence***

*24. We have already discussed the relationship between acquiescence on the one hand and delay and laches on the other.*

*25. Acquiescence would mean a tacit or passive acceptance. It is implied and reluctant consent to an act. In other words, such an action would qualify a passive assent. Thus, when acquiescence takes place, it presupposes knowledge against a particular act. From the knowledge comes passive acceptance, therefore instead of taking any action against any alleged refusal to perform the original contract, despite adequate knowledge of its terms, and instead being allowed to continue by consciously ignoring it and thereafter proceeding further, acquiescence does take place. As a consequence, it reintroduces a new implied agreement between the parties. Once such a situation arises, it is not open to the party that acquiesced itself to insist upon the compliance of the original terms. Hence, what is essential, is the conduct of the parties. We only dealt with the distinction involving a mere acquiescence. When acquiescence is followed by delay, it may become laches. Here again, we are inclined to hold that the concept of acquiescence is to be seen on a case-to-case basis."*

*(emphasis supplied by the Hon'ble Supreme Court)*

*(C) Chairman, State Bank of India v. M J James, (2022) 2 SCC 301:*

*"36. What is a reasonable time is not to be put in a straitjacket formula or judicially codified in the form of days, etc. as it depends upon the facts and circumstances of each case. A right not exercised for a long time is nonexistent. Doctrine of delay and laches as well as acquiescence are applied to non-suit the litigants who approach the court/appellate authorities belatedly without any justifiable explanation for bringing action after unreasonable delay. In the present case, challenge to the order of dismissal from service by way of appeal was after four years and five months, which is certainly highly belated and beyond justifiable time. Without satisfactory explanation justifying the delay, it is difficult to hold that the appeal was preferred within a reasonable time. Pertinently, the challenge was primarily on the ground that the respondent was not allowed to be represented by a representative of his choice. The respondent knew that even if he were to succeed on this ground, as has happened in the writ proceedings, fresh inquiry would not be prohibited as finality is not attached unless there is a legal or statutory bar, an aspect which has been also noticed in the impugned judgment. This is highlighted to show the prejudice caused to the appellants by the delayed challenge. We would, subsequently, examine the question of acquiescence and its judicial effect in the context of the present case.*

*xxx*

*38. In Ram Chand v. Union of India [Ram Chand v. Union of India, (1994) 1 SCC 44] and State of U.P. v. Manohar [State of U.P. v. Manohar, (2005) 2 SCC 126] this Court observed that if the statutory authority has not performed its duty within a reasonable time, it cannot justify the same by taking the plea that the person who has been deprived of his rights has not approached the appropriate forum for relief. If a statutory authority does not pass*

*any orders and thereby fails to comply with the statutory mandate within reasonable time, they normally should not be permitted to take the defence of laches and delay. If at all, in such cases, the delay furnishes a cause of action, which in some cases as elucidated in Union of India v. Tarsem Singh [Union of India v. Tarsem Singh, (2008) 8 SCC 648 : (2008) 2 SCC (L&S) 765] may be continuing cause of action. The State being a virtuous litigant should meet the genuine claims and not deny them for want of action on their part. However, this general principle would not apply when, on consideration of the facts, the court concludes that the respondent had abandoned his rights, which may be either express or implied from his conduct. Abandonment implies intentional act to acknowledge, as has been held in para 6 of Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144] Applying this principle of acquiescence to the precept of delay and laches, this Court in U.P. Jal Nigam v. Jaswant Singh [U.P. Jal Nigam v. Jaswant Singh, (2006) 11 SCC 464 : (2007) 1 SCC (L&S) 500] after referring to several judgments, has accepted the following elucidation in Halsbury's Laws of England: (Jaswant Singh case [U.P. Jal Nigam v. Jaswant Singh, (2006) 11 SCC 464 : (2007) 1 SCC (L&S) 500], SCC pp. 470-71, paras 12-13)*

*"12. The statement of law has also been summarised in Halsbury's Laws of England, Para 911, p. 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.'*

*13. In view of the statement of law as summarised above, the respondents are guilty since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken*

*appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussions on the financial management of the Nigam. Why should the court come to the rescue of such persons when they themselves are guilty of waiver and acquiescence?"*

*39. Before proceeding further, it is important to clarify distinction between "acquiescence" and "delay and laches". Doctrine of acquiescence is an equitable doctrine which applies when a party having a right stands by and sees another dealing in a manner inconsistent with that right, while the act is in progress and after violation is completed, which conduct reflects his assent or accord. He cannot afterwards complain. [See Prabhakar v. Sericulture Deptt., (2015) 15 SCC 1 : (2016) 2 SCC (L&S) 149. Also, see Gobinda Ramanuj Das Mohanta v. Ram Charan Das, 1925 SCC OnLine Cal 30 : AIR 1925 Cal 1107] In literal sense, the term acquiescence means silent assent, tacit consent, concurrence, or acceptance, [See Vidyavathi Kapoor Trust v. CIT, 1991 SCC OnLine Kar 331 : (1992) 194 ITR 584] which denotes conduct that is evidence of an intention of a party to abandon an equitable right and also to denote conduct from which another party will be justified in inferring such an intention. [See Krishan Dev v. Ram Piari, 1964 SCC OnLine HP 5 : AIR 1964 HP 34] Acquiescence can be either direct with full knowledge and express approbation, or indirect where a person having the right to set aside the action stands by and sees another dealing in a manner inconsistent with that right and in spite of the infringement takes no action mirroring acceptance. [See "Introduction", U.N. Mitra, Tagore Law Lectures — Law of Limitation and Prescription, Vol. I, 14th Edn., 2016.] However, acquiescence will not apply if lapse of time is of no importance or consequence.*

*40. Laches unlike limitation is flexible. However, both limitation and laches destroy the remedy but not the right. Laches like acquiescence is based upon equitable considerations, but laches unlike acquiescence imports even simple passivity. On the other hand, acquiescence implies active assent and is based upon the rule of estoppel in pais. As a form of estoppel, it bars a party afterwards from complaining of the violation of the right. Even indirect acquiescence implies almost active consent, which is not to be inferred by mere silence or inaction which is involved in laches. Acquiescence in this manner is quite distinct from delay. Acquiescence virtually destroys the right of the person. [See Vidyavathi Kapoor Trust v. CIT, 1991 SCC OnLine Kar 331 : (1992) 194 ITR 584] Given the aforesaid legal position, inactive acquiescence on the part of the respondent can be inferred till the filing of the appeal, and not for the period post filing of the appeal. Nevertheless, this acquiescence being in the nature of estoppel bars the respondent from claiming violation of the right of fair representation."*

(emphasis supplied by the Hon'ble Supreme Court)

18. In **Mrinmoy Maity v. Chhanda Koley**, 2024 SCC OnLine SC

551, the Hon'ble Supreme Court held that: -

*"9. ...An applicant who approaches the court belatedly or in other words sleeps over his rights for a considerable period of time, wakes up from his deep slumber ought not to be granted the extraordinary relief by the writ courts. This Court time and again has held that delay defeats equity. Delay or latches is one of the factors which should be born in mind by the High Court while exercising discretionary powers under Article 226 of the Constitution of India. In a given case, the High Court may refuse to invoke its extraordinary powers if laxity on the part of the applicant to assert his right has allowed the cause of action to drift away and attempts are made subsequently to rekindle the lapsed cause of action.*

*10. The discretion to be exercised would be with care and caution. If the delay which has occasioned in approaching the writ court is explained which would appeal to the conscience of the court, in such circumstances it cannot be gainsaid by the contesting party that for all times to come the delay is not to be condoned. There may be myriad circumstances which gives rise to the invoking of the extraordinary jurisdiction and it all depends on facts and circumstances of each case, same cannot be described in a straight jacket formula with mathematical precision. The ultimate discretion to be exercised by the writ court depends upon the facts that it has to travel or the terrain in which the facts have travelled.*

*11. For filing of a writ petition, there is no doubt that no fixed period of limitation is prescribed. However, when the extraordinary jurisdiction of the writ court is invoked, it has to be seen as to whether within a reasonable time same has been invoked and even submitting of memorials would not revive the dead cause of action or resurrect the cause of action which has had a natural death. In such circumstances on the ground of delay and latches alone, the appeal ought to be dismissed or the applicant ought to be non-suited. If it is found that the writ petitioner is guilty of delay and latches, the High Court ought to dismiss the petition on that sole ground itself, in as much as the writ courts are not to indulge in permitting such indolent litigant to take advantage of his own wrong. It is true that there cannot be any waiver of fundamental right but while exercising discretionary jurisdiction under Article 226, the High Court will have to necessarily take into consideration the delay and latches on the part of the applicant in approaching a writ court."*

19. Therefore, the law is well settled that a claim for arrears of salary for a period earlier than three years, cannot be entertained by the High Court and the Writ Petition filed in the year 2024 for claiming payment of arrears of salary for the period June, 2006 to 30.06.2009 cannot be entertained.

20. Further, the mere fact that the petitioner had filed Writ A No. 227 of 2023 which was disposed off by means of an order dated 15.02.2023, giving the petitioner liberty to file a representation ventilating his grievances, the submission of the representation and rejection thereof will not revive the more than 15 years old stale cause of action of the petitioner.

21. In the case **of State of Uttaranchal and another Vs. Sri Shiv Charan Singh Bhandari and others:**

(2013) 12 SCC 179 the Hon'ble Supreme Court held that *"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."*

22. The aforesaid decision has been relied upon by the Hon'ble Supreme Court in **State of West Bengal Vs. Debabrata Tiwari:** 2023 SCC OnLine SC 219, where after submitting an application in the year 2005-06 the petitioners did nothing further to pursue the matter for a period of ten years. The Hon'ble Supreme Court held that such prolonged delay in approaching the High Court may be regarded as a waiver of a remedy and such a delay would disentitle the writ petitioners to the discretionary relief under Article 226 of the Constitution of India.

23. In view of the aforesaid discussion, the Writ Petition filed in the year 2024 claiming payment of difference in salary for the period June 2006 to 2009, i.e., that is after expiry of more than 15 years, suffers from latches and the same is dismissed on this ground alone.

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**(2024) 7 ILRA 133**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 08.07.2024**

**BEFORE**

**THE HON'BLE AJIT KUMAR, J.**

Writ-A No. 18272 of 2021

**Sanjay Sharma ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Siddharth Khare, Sr. Advocate

**Counsel for the Respondents:**
Sri Abhishek Srivastava, Sri Brajesh Pratap Singh, C.S.C.

**Service Law-**Petitioner dismissed from service-except for oral examination no oral enquiry was held-no departmental witness was examined-preliminary enquiry report not proved-St.ment before the committee that had held preliminary enquiry report was against procedure prescribed for holding major rnquiry-aggrieved-document required to be proved-is to be proved either by person who have answered it or by one who is witness while the document being prepared or examined or executed-any procedure if not followed in getting a document proved-findings based on such report cannot be relied-if law requires that something be done in a particular manner, it must be done that manner , and in no manner at all-impugned order bad in law-departmental enquiry was not properly held-remitted for **fresh enquiry.**

**W.P. allowed.** (E-9)

**List of Cases cited:**

1. St. of Tamil Nadu Vs Pramod Kumar, IPS & anr. (2018) 17 SCC 677

2. Managing Director ECIL Hyderabad etc. Vs B. Karunakar etc. AIR 1994 SC 1074

3. Uttar Pradesh & ors. Vs Saroj Kumar Sinha (2010)2 SCC 772

4. M/s Tata Chemicals Ltd. Vs Commissioner of Customs (Preventive) Jamnagar (2015) 11 SCC 628 and 2022 8 SCC 713

5. Mahesh Narain Gupta Vs St. of U.P. & ors. 2011 (2) ILR 570

6. St. of U.P. & ors. Vs Kishori Lal & anr., 2018 (9) 397 (DB) (LB)

7. St. of U.P & ors. Vs Rajit Singh, 2022 (4) ADJ 295

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

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Siddharth Khare, learned counsel for the petitioner and Sri Abhishek Srivastava, learned counsel for respondent nos. 2 and 3 and Sri Brajesh Pratap Singh, learned counsel for respondent no. 4.

2. The petitioner before this Court while working as Executive Engineer came to be suspended on 5.10.2019 setting into motion a regular disciplinary enquiry. It transpires from the record that some preliminary fact finding enquiry report was submitted by a three member committee constituted in that regard on 3rd April, 2020 and as a consequence thereof, a regular chargesheet was issued on 26.10.2020 to the petitioner which as many as three articles of charges to which petitioner submitted a detailed reply on 31.12.2020 denying all the charges.

3. It further transpires that thereafter an oral enquiry was held as per chargesheet itself petitioner was issued with notice by the enquiry officer to appear before the enquiry committee and get himself examined. In response to the same petitioner did appear before the Enquiry Committee on 15.2.2021 and an oral statement was recorded, which has come to be so noted on the order sheet of the enquiry proceeding as has come to be annexed alongwith counter affidavit as Annexure CA-1. It has come further to be noted therein that petitioner did not ask for any other witness to be examined, nor did he file any other document in addition to what he had already submitted alongwith reply. It is thereafter that oral enquiry was stated to have been concluded and the final enquiry came to be submitted indicting the petitioner of the charges levelled in the chargehseet. Soonafter the report was submitted bringing home the charge by enquiry committee on 15.2.2021, petitioner was issued with a show cause notice to which he submitted reply and finally his reply having not been found satisfactory, he was awarded with maximum punishment of dismissal from service. Upon appeal being preferred against the said order, it met the same fate as his explanation offered to the show cause notice not found satisfactory and hence this petition.

4. Twin arguments advanced by learned counsel for Senior Advocate appearing for the petitioner:

a. The chargesheet issued to the petitioner was approved only by Managing Director and Chairman of the U.P. Power Corporation being appointing authority and the disciplinary authority, the chargesheet ought to have been issued only after approval of the Chairman under the relevant regulation. In the circumstances, therefore, once the chargesheet was not approved by the competent authority, the entire enquiry pursuant thereto was taken to be without lawful authority and resultantly the order of dismissal from service was also to be held bad; and

b. Except for the oral examination of the petitioner, no oral enquiry was held, inasmuch, no departmental witness was examined and enquiry officer instead of getting preliminary enquiry report proved before him proceeded to rely upon the same and the statement made before the committee that had held preliminary enquiry report brought home the charge

which was against procedure prescribed for holding major enquiry.

5. Learned Senior Advocate has relied upon the relevant regulations as contained in 2021 Regulation.

6. Meeting the arguments advanced by learned Senior Advocate Sri Abhishek Srivastava, learned counsel for the respondent submitted that the Board of Directors of the U.P. Power Corporation Ltd. had adopted a resolution as back as on 28th April, 2010, by which Managing Director have been conferred with power of the disciplinary authority in all matters of disciplinary proceeding and imposition of various penalties except penalty of dismissal, which power continues to be vested with Chairman of Corporation. He has brought on record the consequential letter issued pursuant to resolution brought by the Board of Director dated 28th April, 2010. He, therefore, argues that since at the time of issuance of chargehseet, it could not have been perceived as to whether petitioner was to be awarded with major penalty in the nature of dismissal from service as it was to depend upon the outcome of the enquiry report, therefore, Managing Director was the competent authority in the matter to approve the chargesheet to set into motion a regular disciplinary enquiry.

7. In so far as second argument advanced by learned Senior Advocate is concerned, Sri Srivastava has submitted that from the perusal of the enquiry report, it does appear that petitioner demanded and yet no departmental witness was examined. He, however, submits before the Court that these pleas were not taken either in reply to the show cause notice, nor even at the stage of enqiury when it was being conducted, nor at the stage of appeal and so this may not be open for the petitioner to raise two issues here before the Court first time under Article 226 of the Constitution. He has also submitted that in the matter of disciplinary enquiry, this Court will be rarely interfering in exercise of its extra ordinary jurisdiction of under Article 226 of the Constitution.

8. Meeting the argument, in rejoinder affidavit, Mr. Khare has placed the judgment of Supreme Court in the case of **State of Tamil Nadu v. Pramod Kumar, IPS and Another (2018) 17 SCC 677,** in which Supreme Court held that if there is inherent flaw in framing of the chargesheet then it goes to the root of the matter of disciplinary proceeding being de hors the beyond procedure and so cannot result in valid imposition of penalty. It is further submitted that it is well settled legal proposition that when rules require a thing to be done in a particular manner then it should be done in that manner **alone M/s Tata Chemicals Ltd. v. Commissioner of Customs (Preventive) Jamnagar (2015) 11 SCC 628** and 2022 8 SCC 713

9. Having heard learned counsel for the respective parties and having perused the records, I find that first argument advanced by Mr. Khare regarding incompetent chargesheet deserves to be rejected. Under the relevant rules cited before me the authority to impose punishment of dismissal/removal from service has only been vested with Chairman and so at the stage of issuance of charge sheet a punishment could not have been proved. However, if authority chooses to impose punishment of dismissal after enquiry, it

is at that stage show cause notice should be issued only by the Chairman.

10. Now coming to the merit of the case regarding disciplinary proceedings and action, I find from the perusal of the chargesheet that in the chargesheet, the basic document that have been relied upon are committees' report and statements of certain consumers and other persons recorded before the committee specially constituted that had held preliminary enquiry. These documents have been relied upon including besides the bank deposits, payslip in support of first charge. From the perusal of the enquiry report, I find that after referring to the article of charges, specially charge no. 1, the enquiry committee proceeded to refer and record the oral statement made by the petitioner and thereafter it has proceeded to examine charge no. 1 on merits and has relied upon not only preliminary enquiry report, but also statement of certain outsiders and the consumers that were recorded before the preliminary conducting committee. Thus, it is clear that while holding regular enquiry committee failed to record statement of witnesses whose statement was recorded before the preliminary enquiry conducting committee so as to ensure that those statements are proved in departmental enquiry committee. Those persons were not at all summoned by enquiry officer to test the veracity of the findings returned by the preliminary enquiry report.

11. In the considered view of the Court any document that is relied upon for arriving at finding of fact must be strictly proved. The legal proposition is very sound to the effect about a document which is required to be proved, is to to be proved either by who had answered it or by the person who is witness while the document was being prepared or getting examined the person in whose presence the document was executed or if examine the person who may said to be authorized persons to have custody of the document. Any of the procedures, if not followed in getting a particular document proved or even preliminary enquiry report is also not proved and that is relied upon then in my considered view finding of fact based upon such report cannot be relied upon so as to bring home the charge. I, therefore, find there to be basic flaw in the entire enquiry committee report even in respect of charge nos. 2 and 3. Thus findings returned by the enquiry committee could not have been reckoned with by the disciplinary authority while relied upon the same.

12. In the matter of State of **Uttar Pradesh and Others v. Saroj Kumar Sinha (2010)2 SCC 772,** the Supreme Court has very categorically held that oral enquiry is sine qua non in the matters of disciplinary enquiry when conducted for awarding major penalty. Vide paragraph 22, the Court has held thus:

*"34. This Court in the case of Kashinath Dikshita v. Unionof India, (1986) 3 SCC page 229, had clearly stated the rationale for the rule requiring supply of copies of the documents, sought to be relied upon by the authorities to prove the charges levelled against a Government servant. In that case the enquiry proceedings had been challenged on the ground that non supply of the statements of the witnesses and copies of the documents had resulted in the breach of rules of natural justice. The appellant therein had requested for supply of the copies of the documents as well as the statements of the witnesses at a preliminary enquiry. The request made by the appellant was in terms turned down by the disciplinary authority.*

*35. In considering the importance of access to documents in statements of witnesses to meet the charges in an effective manner this Court observed as follows:*

*"When a government servant is facing a disciplinary proceeding, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner. And no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies, how can the concerned employee prepare his defence, cross- examine the witnesses, and point out the inconsistencies with a view to show that the allegations are incredible? It is difficult to comprehend why the disciplinary authority assumed an intransigent posture and refused to furnish the copies notwithstanding the specific request made by the appellant in this behalf. Perhaps the disciplinary authority made it a prestige issue. If only the disciplinary authority had asked itself the question: "What is the harm in making available the material?" and weighed the pros and cons, the disciplinary authority could not reasonably have adopted such a rigid and adamant attitude. On the one hand there was the risk of the time and effort invested in the departmental enquiry being wasted if the courts came to the conclusion that failure to supply these materials would be tantamount to denial of reasonable opportunity to the appellant to defend himself. On the other hand by making available the copies of the documents and statements the disciplinary authority was not running any risk. There was nothing confidential or privileged in it."*

*36. On an examination of the facts in that case, the submission on the behalf of the authority that no prejudice had been caused to the appellant, was rejected, with the following observations:*

*"Be that as it may, even without going into minute details it is evident that the appellant was entitled to have an access to the documents and statements throughout the course of the inquiry. He would have needed these documents and statements in order to cross-examine the 38 witnesses who were produced at the inquiry to establish the charges against him. So also at the time of arguments, he would have needed the copies of the documents. So also he would have needed the copies of the documents to enable him to effectively cross- examine the witnesses with reference to the contents of the documents. It is obvious that he could not have done so if copies had not been made available to him. Taking an overall view of the matter we have no doubt in our mind that the appellant has been denied a reasonable opportunity of exonerating himself."*

13. A division bench of this Court in the case of **Mahesh Narain Gupta v. State of U.P. and Others 2011 (2) ILR 570** had dealt with this aspect to the fact held thus:

*"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."*

14. Very recently in the case of State **of U.P. and Others v. Kishori Lal and Another, 2018 (9) 397 (DB) (LB)** the Court has held that oral enquiry to be mandatory. Vide paragraph 14, the Court had held thus:

*"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. The court have followed recently the judgment of coordinate bench in the case of Suresh Babu v. State of U.P. and Others being Writ A No. 12991 of 2023 decided on 19.10.2023.

16. Further in the case of M/s Tata Chemicals Ltd. v. Commissioner of Customs (Preventive) Jamnagar (2015) 11 SCC 628, Supreme Court has held that *"if the law requires that something be done in a particular manner, it must be done that manner, and if not done in that manner has no existence in the eye of the law at all. The Customs Authorities are not absolved from following the law depending upon the acts of a particular assessee. Something that is illegal cannot convert itself into something legal by the act of a third person."*

17. In view of above, therefore, the order of punishment which is maximum penalty in the nature of dismissal cannot be sustained in law and the same deserves to be set aside and so also the order of appeal affirming the same also deserves to be set aside.

18. At this stage, Mr. Srivastava, has tried to argue that since petitioner has been dismissed from service he should not be directed to be reinstated, in this connection he has relied upon the judgment of Supreme Court in the case **of State of U.P and Others v. Rajit Singh, 2022 (4) ADJ 295**. He has heavily relied upon paragraph 8 of the judgment, which is reproduced hereunder:

*8. It appears from the order passed by the Tribunal that the Tribunal*

*also observed that the enquiry proceedings were against the principles of natural justice in as much as the documents mentioned in the charge sheet were not at all supplied to the delinquent officer. As per the settled proposition of law, in a case where it is found that the enquiry is not conducted properly and/or the same is in violation of the principles of natural justice, in that case, the Court cannot reinstate the employee as such and the matter is to be remanded to the Enquiry Officer/Disciplinary Authority to proceed further with the enquiry from the stage of violation of principles of natural justice is noticed and the enquiry has to be proceeded further after furnishing the necessary documents mentioned in the charge sheet, which are alleged to have not been given to the delinquent officer in the instant case. In the case of Chairman, Life Insurance Corporation of India and Ors. Vs. A. Masilamani, (2013) 6 SCC 530, which was also pressed into service on behalf of the appellants before the High Court, it is observed in paragraph 16 as under:-*

*"16. It is a settled legal proposition, that once the court sets aside an order of punishment, on the ground that the enquiry was not properly conducted, the court cannot reinstate the employee. It must remit the case concerned to the disciplinary authority for it to conduct the enquiry from the point that it stood vitiated, and conclude the same. (Vide ECIL v. B. Karunakar [(1993) 4 SCC 727], Hiran Mayee Bhattacharyya v. S.M. School for Girls [(2002) 10 SCC 293], U.P. State Spg. Co. Ltd. v. R.S. Pandey [(2005) 8 SCC 264] and Union of India v. Y.S. Sadhu [(2008) 12 SCC 30]).*

19. In the case of **Managing Director ECIL Hyderabad etc. v. B. Karunakar etc. AIR 1994 SC 1074,** a constitution bench judgment, it has been categorically held while court of law or Tribunal proceeds to quash the order of punishment then it should remand matter to be tried again from that stage where flaw has occurred and employees states as was then be retired. The Court has observed "*Where after following the above procedure the Courts/Tribunals sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority, management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report." Since here is a case where I find that departmental enquiry was not properly held in the matter, therefore, matter deserves to be remitted to the stage of holding enquiry afresh on the basis of charge sheet issued to the petitioner and reply already submitted by petitioner.*

20. It is also not disputed that suspension of petitioner was revoked on 4.11.2020 and petitioner was working at the time when impugned order was passed.

21. Accordingly, while I quash the orders dated 09.06.2021 passed by Chairman U.P. Power Corporation Ltd. Lucknow and order dated 21.10.2021 issued by the Board of Director of U.P. Power Corporation Ltd. with consequential benefits to the petitioner, I hereby provide that department shall be holding enquiry afresh by appointing fresh enquiry committee giving full information in that regard to the petitioner and concluding the enquiry by holding full fledged oral enquiry in accordance with the procedure prescribed within a maximum period of three months from the date of production of

certified copy of this order and bring the disciplinary proceeding itself shall be concluded within further period of two months. Petitioner shall be entitled to current salary only and arrears of salary shall depend upon the outcome of the result of the writ petition. Since petitioner was already reinstated while enquiry was gong on by revoking suspension order, the authority may not suspend him again in the given facts and circumstances of the case.

22. With the aforesaid observations and directions, this petition stands allowed.

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**(2024) 7 ILRA 140**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 08.07.2024**

**BEFORE**

**THE HON'BLE AJIT KUMAR, J.**

Writ-A No. 26095 of 2018

**Altaf Husain ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Siddharth Khare

**Counsel for the Respondents:**
C.S.C., Sri Rafat Raza Khan

**Regularisation-U.P.-**Regularization claim got rejected-that on date of enforcement of regularization rules in 2016-the Petitioner was not working on daily charge basis-Petitioner continued to work from 1991 till 2014 when he was removed and in 2017 he was engaged as an outsource employee-on the date of enforcement of rules –the Petitioner was not in employment-no error in the impugned order.

**W.P. dismissed.** (E-9)

**List of Cases cited:**

1. Janardan Yadav Vs St. of U.P. & ors., 2008 (1) UPLBEC 498

2. Arjun Kumar Singh & ors. -Writ - A No. 16819 of 2018

3. Ram Nath Verma & ors. Vs St. of U.P. & ors., 2017 (7) ADJ 46

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

1. In the light of office order dated 02.03.2021 a photocopy of the rejoinder affidavit is supplied by learned counsel for the petitioner which is taken on record.

2. Heard Sri Siddharth Khare, learned counsel for the petitioner and Sri Rafat Raza Khan, learned counsel for the contesting respondents.

3. Petitioner before this Court is aggrieved by the order dated 07.07.2018, whereby, his claim for regularization as a Group - D employee has been rejected.

4. Briefly stated facts are that the petitioner was initially appointed on daily wage basis on the post of Fitter on 01.02.1999. He claimed to have discharged his duties as such and was working at the relevant point of time when the regularization rules dated 12.09.2016 were brought into force by the State Government providing for regularization of daily wage/ work charge/ contract employees upon Group - C and Group - D posts of the Government Department (outside the purview of Public Service Commission). This Government Order though was issued in respect of Government Department posts but it is an admitted position to the parties that this Government Order was adopted by the Urban Development Department.

5. The claim of the petitioner has been rejected on the ground that on the date of enforcement of regularization rules in the year 2016, petitioner was not working on daily charge basis. It has been held that the petitioner continued to work from 1991 till 2014 when he was removed and it was in the year 2017 only when the then Chairman, Nagar Palika Parishad engaged Altaf Hussain as an outsource employee. Thus, petitioner being not in employment on the date of enforcement of regularization order, could not be given benefit thereof and his claim for regularization came to be rejected.

6. The submission advanced by learned counsel for the petitioner is that the petitioner was in employment on the cut off date i.e. 31.12.2001 as he was engaged initially on 01.02.1999 and he worked until the year 2014 when he was fired being only a daily wage employee but he was re-engaged in the year 2017 and therefore, the period from 2014 and 2017 should be taken to be of artificial breaks. He has placed reliance upon the judgment of this Court in the case of **Janardan Yadav v. State of U.P. & Others, 2008 (1) UPLBEC 498** followed by a coordinate bench of this Court in the case of **Arjun Kumar Singh & 11 Others** being **Writ - A No. 16819 of 2018** and also another judgment of coordinate bench in the case of **Ram Nath Verma & Others v. State of U.P. & Others, 2017 (7) ADJ 46.**

7. Having perused the order impugned, the relevant regularization rules, 2016 placed before me and the authorities cited, I find that the rules do provide vide its clause 6(1) that an employee seeking regularization must have been working as daily wager or contract employee or as a work charge employee since prior to 31.12.2001 and must be in service on the date of enforcement of regularization rules. The regularization Rules came into force on 12.09.2016. There is no quarrel that the petitioner was engaged on daily wage post on 01.02.1999 and worked till 2014, so he was in employment prior to the cut off date, but unfortunately before the rules were brought into force, petitioner had already been removed from the employment. Thus, on the date of enforcement of rules, petitioner was not in employment.

8. The judgment in the case of **Janardan Yadav** (supra) deals with the provisions of sub clause 6(1) of the rules and interprets it to mean that an employee must be in employment since prior to cut off date and on the date of enforcement of rules, but he is not required to be in continuous service from the cut off date till the enforcement of rules, it has been held that it is not the intendment of rule making authority. The word "continuing in service" has been interpreted to mean that he has worked with artificial breaks during the period but must have been in employment since prior to cut off date and on the date of enforcement of rules. This fact in the case of **Janardan Yadav** *(supra)* was not in dispute that the petitioner Janardan Yadav was working in the establishment on the date of commencement of Rules, 2001. Paragraph no. 5 of the judgment is reproduced hereunder:

*"Since the facts are not is dispute and it is also not disputed that the petitioner was engaged on daily wage basis in 1984, i.e., before 29.6.1991 and was also working on the date of commencement of Rules 2001, i.e, on 21.12.2001, thus it is evident that he was entitled to be considered for regularization under the said Rules. The only question up for*

*consideration is whether the said Rules require continuous service throughout, i.e., from the date of initial engagement till the commencement of the Rules. In my view, there is no such requirement under the Rules as is apparent from perusal thereof. Rule 4(1) of Rules 2001 is reproduced as under:*

*"4. Regularisation of daily wages appointments on Group "D' posts.- (1) Any person who-*

*(a)was directly appointed on daily wage basis on a Group "D' post in the Government service before June 29, 1991 and is continuing in service as such on the date of commencement of these rules; and*

*(b)possessed requisite qualification prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, shall be considered for regular appointment in permanent or temporary vacancy, as may be available in Group "D' post, on the date of commencement of these rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders."*

9. Same is the legal view taken by a coordinate bench in the case of **Arjun Kumar Singh** *(supra).* The coordinate bench has found regularization rules 2001 and 2016 to be providing regularization on some parameters and I do not find these judgments to be in any manner helpful to the petitioner. The judgment in the case of **Ram Nath Verma** *(supra)* by another coordinate bench also holds that a person must be in service on the date of enforcement of rules. Vide paragraph nos. 16 and 17 the Court has observed thus:

*"16. The Court found that only requirement under Rule 4(1)(a) of the Rules, 2001 is that the incumbent should directly be appointed on daily wage basis before 29.6.1991 and is continuing in service as such on the date of commencement of the Rules.*

*17. The respondents have admitted in the said case that the petitioners fulfill all the three conditions mentioned in Rule-4 of the Rules, 2001 except their continuous service. This fact clearly demonstrates that the issue in respect of the three conditions i.e. (i) their engagement should be of prior to 1991; (ii) they have requisite qualification required for the regular appointment; and (iii) they are continuing in service, cannot be re-opened by the respondents in subsequent proceedings as the admitted position noted by the Court has not been challenged by the respondents. Hence, the only question which requires consideration is that whether the ground for rejection of their regularization that they are continuously working, is to be considered."*

9. In view of the above, I do not find any manifest error in the order impugned.

10. Petition lacks merit and is accordingly **dismissed**.

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**(2024) 7 ILRA 142**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 05.07.2024**

**BEFORE**

**THE HON'BLE AJIT KUMAR, J.**

Writ A No. 50923 of 2008

**Anwar Ahmad Siddiqui ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Anoop Kumar Srivastava, Ajeet Singh, Jitendra Rana, P.C. Srivastava

**Counsel for the Respondents:**
C.S.C., B. Dayal, Kuldeep Singh Chuahan

**A. Service Law - Retrospective regularization -** A retrospective regularization if restores seniority, then fixation of salary/ pay scale of an employee cannot be lower than that of other employee/ employees who is/ are junior to him**. (Para 7)**

**B.** By the impugned order, the pay fixation and promotional pay scale awarded to the petitioner, taking him to have been regularized with effect from 27.09.1991, was cancelled. Held – In the resolution adopted by the development authority conferring retrospective regularization clearly stated that no pecuniary benefits were to be given to the petitioner however, the resolution does not specify that the period for which the petitioner was given regularization (i.e., between 27.09.1991 and 29.01.2001) would not be counted for future benefits, such as time scale, selection pay, ACP benefits, etc. The phrase salary benefits, etc. would not be admissible should be understood to mean that no arrears of salary would be given to the petitioner. While the resolution grants retrospective regularization and preserves the petitioner's seniority, it implies that this period can be accounted for future pay scale and other service benefits, such as ACP benefits, time scale benefits, and selection grade benefits. Impugned order quashed **(Para 6)**

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

1. Heard Shri Jitendra Rana, learned counsel for the petitioner and Shri Ramesh Kumar Singh, learned Advocate holding brief of Shri B.Dayal, learned counsel for respondents No. 2 and 3.

2. Petitioner before this Court who had been working as accounts clerk with the concerned local body has assailed the order passed by the vice-chariman of the Meerut Development Authority dated 12.09.2008 whereby the pay fixation and the promotional pay scale awarded to the petitioner taking him to have been regularized with effect from 27.09.1991 has been cancelled.

3. The submission advanced on behalf of the petitioner is that once the petitioner was given regularization with effect from 27.09.1991 when other persons junior to him were regularized as accounts clerk by the development authority, the natural consequence was to give him pay protection in terms of promotional pay scale and incidental benefits as per Acquired Career Progression Scheme. He submits that since regularization order was passed by the development authority and approved by the then secretary of the development authority and the vice president also clearly provided that the petitioner would not be given any salary benefit, it was clear that the petitioner would not be paid any arrears of salary for the period 27.09.1991 to 29.01.2001, however, he further submits, the selection made and the promotional avenues that were conferred upon the petitioner, were only made admissible upon his attaining requisite period of service i.e. 10 years and 14 years and these service time period has naturally fallen after the petitioner was given his first posting on 29.01.2001. According to him, therefore, period running from 27.09.1991 and 29.01.2001 was certainly to be reckoned with as there was no such rider in the order and the resolution adopted by the development authority regarding benefits to be conferred upon him by way of seniority for his retrospective regularization. Thus, according to learned counsel all the pecuniary benefits of time scale selection, etc. stood conferred upon him taking into

consideration his service period between 27.09.1991 and 29.01.2001 and there was no fallible error on part of the development authority in doing so which may have warranted interference by the vice chariman under the impugned order and yet he has been penalized. It is also argued that the order impugned definitely had adverse consequences and, therefore, the petitioner ought to have been served upon with prior notice much less a show cause notice, at least, to offer his explanation before passing any such order.

4. Learned counsel for the contesting respondent has sought to defend the order impugned herein this writ petition on the ground that since there no pecuniary benefit was to be given under the earlier order of regularization dated 23.02.2007 giving seniority to the petitioner wef 27.09.1991, the petitioner was definitely not entitled to any benefit in terms of time scale pay, etc. However, in the entire counter affidavit not a single avernment has come up that the petitioner was conferred with any pecuniary benefit as such towards the arrears or increment between the period 27.09.1991 to 29.01.2001. All that he has argued is that even the time scale and other benefits could not have been conferred upon taking the service in question into account. Learned counsel for the local body has, admitted this fact that there is no such avernment in the counter affidavit that the order did not confer upon the petitioner with regularization w.e.f 27.09.1991, had never been recalled at any point of time.

5. Having heard learned counsel for the respective parties and having perused the records particularly the order dated 16.05.2008 as approved by the vice Chairman, I find that petitioner though was given effective appointment on 29.01.2001 upon retirement of one Ravindra Kumar the then accounts clerk but the development authority detected a serious error in not giving regularization to the petitioner on 14.02.1991 when instead of four persons in the general category, two persons in the SC category and one person in the OBC category, five persons were appointed in the general category leaving the OBC quota completely unfilled and diverting the OBC category posts to the general category. It is an admission in the resolution adopted by the development authority itself that this was a serious error that had occurred and petitioner deserved regularization in the year 1991 itself and this was how by means of the said resolution the error was sought to be rectified at later point of time.

6. From the perusal of the resolution it clearly transpires that no pecuniary benefits were liable to be given to the petitioner only for the reason that since regularization was being given effect to retrospectively, as well as the seniority. However, the resolution does not say that the period for which the petitioner is given regularization i.e. between 27.09.1991 and 29.01.2001, would not be counted for future benefits, time scale, selection pay, ACP benefits, etc. The words "???? ??? ?? ??? ???? ??? ????" salary benefits, etc. would not be admissible, would be taken to mean only that no arrears of salary shall be given to the petitioner for simple reason that he was being regularized with retrospective effect. This obviously would be the correct interpretation of resolution for the simple reason that the petitioner did not work as accounts clerk during the relevant period. The settled legal principle 'no work no pay' would certainly be attracted. But while the resolution gives retrospective regularization and protects seniority of the petitioner, as such it would

definitely mean that this period could be accountable for the purposes of future pay scale and other service benefits like ACP benefits, time scale benefits and selection grade benefits. In the impugned order which has been passed, there is no mention, nor I find to be any recital to this effect that petitioner was given any pecuniary benefit and thereby arrears of salary or arrears otherwise of dues for the period running between 27.09.1991 till 29.01.2001. All these fixation of selection grade, etc. has been done only after 29.01.2001 when the petitioner got substantive appointment as accounts clerk and started working as such.

7. Even otherwise a retrospective regularization if restores seniority, then fixation of salary/ pay scale of an employee cannot be lower than that of other employee/ employees who is/ are junior to him. This if is permitted will lead to arbitrariness and discrimination and so should be hit by Article 14 of the Constitution petitioner is to be protected considering entire period of service, may be arrears of salary for the period are not paid .

8. In view of the above, therefore, the resolution adopted by the development authority and the approval thereof by the vice chairman dated 12.09.2008 impugned herein this writ petition cannot be sustained.

9. It is stated at the Bar that the petitioner has already attained the age of superannuation. Accordingly, resolution of the board and and the approval thereof by the Vice Chairman dated 12.09.2008 annexure No.12 to the writ petition is hereby quashed. Whatever the dues have remained withheld only on account of impugned order which has been set aside today, shall be paid to the petitioner forthwith within a period of three months from the date of production of certified copy of this order. If the petitioner is receiving pension, the same shall be revised and fixed, accordingly. It is made clear that if the arrears as directed herein above, are not paid within the stipulated period of time as prescribed above, petitioner shall be entitled to interest at the rate of 12% from the date of expiry of three months till actual payment is made.

10. This petition thus, stands allowed accordingly.

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**(2024) 7 ILRA 145**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 23.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ A No. 52949 of 2016

**Ajay Kumar Shukla ...Petitioner**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Petitioner:**
Shreya Gupta

**Counsel for the Respondents:**
C.S.C., A.K.S. Parihar, Ashok Kumar Yadav

**A. Service matter-Constitution of India, 1950-Article 226-selection/appointment of lecturers-petitioner participated in the examination-second revised answer key was published in which answers to questions no.s 59 and 81 were not revised inspite of the petitioner's objections while question no. 117 was revised, although the same was not in dispute-mandamus issued directing the respondent to re-evaluate the answer-**

**sheets-if the petitioners figures in the merit list, he shall be offered appointment and he will be given seniority from the date of first appointments were made, but without any back wages or other benefit whatsoever-Other candidates, who do not make the grade after re-evaluation shall not be ousted from service, but shall figure at the bottom of the list of selected candidates based on the first selection.(Para 1 to 64)**

**B. When the answers run contrary to the material published in a large number of acknowledged textbooks, which are commonly read by students in the State, it leave no room for doubt that the answer given by the students is correct and the key answer is incorrect. The key answers are palpably and demonstrably erroneous, the petitioner cannot made be made to suffer on account of errors committed by the Selection board and it calls for interference by the court so that the error is rectified and the wrong answers do not adversely affect the fate of the candidates and their merit is tested in a proper manner. (Para 59, 60)**

**The writ petition is allowed.** (E-6)

**List of Cases cited:**

1. Kanpur Univ. thru Vice Chancellor & Ors Vs. Samir Gupta & Ors (1983) 4 SCC 309

2. Saumitra Ginodia Vs. UOI & Ors (2017) SCC OnLine All 4303: (2018) 2 All LJ 98

3. Manish Ujwal & Ors Vs. Maharishi Dayanand Saraswati Univ. & Ors (2005) 13 SCC 744

4. Rohit Nandan Shukla Vs. UPSC Alld. & Anr. (2016) 5 ADJ 485

5. Ran Vijay Singh & Ors Vs. St. 0f UP & Ors (2018) 2 SCC 357

6. UPPSC Vs. Rahul Singh (2018) 7 SCC 254

7. Rishal Vs RPSC (2018) 8 SCC 81

8. HC of Tripura Vs. Tirtha Sarathi Mukherjee (2019) 16 SCC 663

9. Mahesh Kumar Vs. SSC & Anr. (2022) SCC OnLine SC 2290

10. Uday Bhan Yadav Vs. St. of UP & 2 Ors SPLA No. 492 of 2020

11. Rajesh Kumar Vs. St. of Bih. (2013) 4 SCC 690

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

1. By means of the instant writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged validity of selections made on the post of Post Graduate Teachers (English) for the year 2013, held in pursuance of Advertisement No.2-2/2013 dated 04.01.2013 issued by the Secondary Education Services Selection Board. An alternative prayer has been made for revision of the final answer key and issuance of select list on the basis thereof.

2. Briefly stated, facts of the case are that the Secondary Education Selection Service Board, Uttar Pradesh (herein referred to as 'the Selection Board') had issued a notification dated 04.01.2013 for making selections for appointments to various posts of Lecturers, including 97 Posts of Lecturers (English) in boys category and 13 posts of Lecturer (English) in girls category. The petitioner had applied and participated in the written examination held on 22.02.2015 in furtherance of the aforesaid advertisement.

3. The dispute involved in the present writ petition relates to question Nos. 59, 81 and 107 of 'A' Series question paper of English, which were as follows:-

*"Question No.59. Shakespeare's The tempest is a –*
*(A) Tragedy*
*(B) Comedy*
*(C) Tragic Comedy*
*(D) History play*

*Question No.81. Thomas hardy started his literary career as –*
*(A) Novelist*
*(B) Short story writer*
*(C) Poet*
*(D) Dramatist*

*Question No.107. Fill in the blank with suitable preposition:-*
*Some trains run _ _ _ electricity*
*(A) from*
*(B) on*
*(C) with*
*(D) by"*

4. The Selection Board published a provisional answer key wherein the correct answer of question No.59 was shown as option 'C - Tragic Comedy', the correct answer of question No.81 was shown as option 'C – Poet' and correct answer of question No.107 was shown as option 'D - By'.

5. After publication of the provisional answer key, some candidates filed objections against the answers of nine questions and thereafter, the Selection Board published a revised answer key dated 20.5.2015 wherein it revised answers of question Nos. 36, 59 and 81. Further question Nos.1, 28, 46, 48, 67 and 117 (of 'A' series question paper) were marked "F" indicating that the questions either contained more than one correct answer or no correct answer and, therefore, all the candidates were awarded full marks for the aforesaid questions. This resulted in serious prejudice to the petitioner and some other candidates and, therefore, the petitioner filed Writ A No.45977 of 2015 in this court along with another petitioner.

6. Some other writ petitions were also filed with the same grievance. One of such writ petitions bearing Writ A No.37051 of 2015; *Atender Kumar and another Vs. State of U.P. and another*, was disposed of by means of an order dated 09.07.2015 directing the Selection Board to take a decision on the objections filed by the petitioners. Writ A No.45977 of 2013 was also disposed of by means of an order dated 31.08.2015, permitting the petitioners to file objections before the Selection Board and the Selection Board was directed to take a decision on the same expeditiously, after receiving a report from the expert body.

7. In furtherance of the aforesaid order passed by this Court, the Selection Board referred sought an expert's opinion from the University of Allahabad. The petitioner had filed detailed objections before the Selection Board on 08.09.2015.

8. After receiving the report of the expert body, the Selection Board published the second revised answer key on 20.04.2016, wherein apart from the questions, whose answers had been challenged, revised answers were issued in respect of some other questions also. The Selection Board had marked "F" in front of three new questions No. 23, 30 and 46 in the second revised answer key and it revised the answer of question No.117, which was not in dispute. Answers of question Nos. 28, 36, 48, 59 and 81 given

in the first revised answer key remain unaltered.

9. The petitioner contends that the answers mentioned in the provisional answer key contain correct answers to all the questions and the Selection Board wrongly entertained some objections filed by some candidates in a mechanical manner and the revised answer keys published on 20.05.2015 and 20.04.2016 have resulted in serious prejudice to the interests of the petitioner. As per the petitioner, correct answers to question Nos.1, 23, 28, 30, 36, 46, 48, 67 and 117 were available in the question paper and yet, all the aforesaid questions have been marked "F", due to which all the candidates were awarded full marks for the aforesaid questions.

10. The petitioner further submits that answers to the question Nos. 36, 59, 81 and 107 given in the provisional answer key were correct and the same have wrongly been altered by the Selection Board while revising the answer keys.

11. In the provisional answer key, answer to question No.59 was that "Shakespeare's 'The tempest' is a 'Tragic comedy', which has been changed to 'Comedy' in the revised answer keys. The petitioner contends that the answer to question No.59 shown in the provisional answer key was correct and to support the submission, the petitioner has annexed copies of extracts of a book titled "A Norton Critical Edition - William Shakespeare - The Tempest" containing criticism of The Tempest, wherein the authors have written in the preface of the book that:-

*"The editors of the first folio divided Shakespeare's plays into three generic groupings- Comedies, Histories and Tragedies. They placed 'The Tempest' in the first of three categories, but few modern readers have been entirely content to leave it there. The play shares some of the other wordily settings and romantic playfulness of A Midsummer Night's Dream, and it moves, like other Shakespearean comedies, toward reconciliation and marriage; but the seriousness of its tone, the suffering experienced by all of the play's characters, and the presence of themes such as exile, enslavement, and mortality have led* ***many modern critics to label it a tragicomedy*** *or to group it with Shakespeare's other late plays in a special category called the "romance"."*

12. The petitioner has also annexed extracts from another book titled "Shakespeare's The Tempest" published in accordance with the latest syllabi of various Universities in India, annotated and edited by Mr. J.P. Goel, M.A. (English), LL.B., wherein it is written that *"The Tempest has been regarded as a very popular tragi-comedy a Shakespeare's last phase of his writing career."*

13. The answer to question No.81 given in the provisional answer key was that *Thomas Hardy started his literary career as a 'Poet'* whereas in the revised answer keys, the answer was changed so as to make it *Thomas Hardy started his literary career as a Novelist.*

14. The petitioner contends that the answer given in the provisional answer key was correct and to buttress this submission, the petitioner has annexed copies of extracts from a book titled *"An Anthology of English Poetry"*, which has been edited by '*The Board of Editors*

*Department of English and Modern European Languages, University of Allahabad'* and is prescribed for the B.A. II English Literature Course of the University of Allahabad. In the preface to the book, Professor Deepika Srivastava, Head of the Department of English and Modern European Languages, University of Allahabad, has written that different teachers have edited different portions of the book. Chapter 4 of the book is titled "Thomas Hardy" and it is written in the book that:-

*"Though his Novels made him famous,* ***Hardy considered himself a Poet and started his literary career with poetry****. He turned to poetry again after the hostile reaction to his novel, 'Jude the Obscure' (1896). Hardy is regarded as a transitional poet whose poetry bridges the Victorian and Modern ages of literature."*

*He produced eight volumes of poetry. These include Wessex Poems (1898), Times Laughing-Stocks (1909), Satires of circumstance (1914) and Winter Words (1928). The bulk of his poetry was written in his late fifties and up to his death at the age of eighty-eight."*

15. The petitioner has also annexed extracts of a book titled *"Thomas Hardy - Selected Poems"* (Edited with a critical introduction, texts, notes, questions and answers) by Ramji Lall, M.A., formerly Principal Dayal Singh College, University of Delhi, New Delhi. Chapter 3 of this book is titled *"Hardy's Poetic Career"* and it is written therein that *"Hardy brought out his first volume of verse in 1898, after he had stopped writing novels. He had certainly written some poetry when he was yet a young man; and then he had taken to a novel-writing, and written a large number of novels which brought him fame and renown."*

16. The petitioner has also annexed copies of extracts from a book titled *"A Critical Study of Thomas Hardy - TESS OF THE D'URBERVILLES*" authored by Dr. B.P. Asthana, M.A. LLB., PhD, wherein the author has written in Chapter 7 titled "Hardy as a Poet" that *"Hardy is famous as a great novelist yet he started his career as a poet and also ended as a poet."* .

17. The petitioner has filed a supplementary affidavit annexing therewith extracts from a book titled "A history of English Literature" by Edward Albert, M.A. revised by J.A. Stone, M.A. published by George G. Harrap & Co. Ltd. (London, Toronto, Wellington, Sydney), wherein it is written that: -

*"Hardy began as a poet, and, though for a long time he was unable to find a publisher for his verse, he continued to write poetry. After the public outcry against his two greatest novels, he wrote only verse."*

18. The petitioner further contends that the answer to question No.107 mentioned in the provisional answer key was that "Some trains are run by electricity" whereas the Selection Board has wrongly revised the answer so as to make it read "Some trains are run on electricity". In support of this submission, the petitioner has annexed an extract from *'Oxford Dictionary, 8th Edition'* wherein while explaining the word 'Tram', it is mentioned in the Dictionary that as a Noun, Tram means *"A vehicle driven by electricity"*, which implies that *'trains run by electricity and not on electricity'*

19. The petitioner contends that in case evaluation is done on the basis of answers to the aforesaid questions mentioned in the provisional answer key, he would be selected.

20. The petitioner has filed a supplementary affidavit annexing therewith copies of extracts of some more books of some renowned authors. In *"A Practical Guide to English Grammar"* authored by K.P. Thakur, M.A. M.Ed., Ph.D, PGCTE, (CIEFL, Hyderabad), former Principal, RDS College, Muzaffarpur, the meaning of the word 'by' has been explained as per which the correct answer to question No.107 would be "Some trains are run by electricity".

21. As per the book 'How to right Correct English (Applied English Grammar)" authored by Shri Rajendra Prasad Sinha, M.A., Ex-Chairman, Bihar College Service Commission also, the correct answer would be 'by'.

22. Extracts from another book titled *"The Advanced Learner's Dictionary of Current English"* published by London Oxford University Press, have also been annexed with the supplementary affidavit, which explains the meaning of word 'by' with the help of an example that *"Machines are driven by steam (water-power, electricity, etc.). Our houses are lighted by electricity."* which indicates that the correct answer to question No.107 will be - "Some trains are run by electricity".

23. In a book titled "High School English Grammar & Composition" prescribed by the Board of High School and Intermediate Education, U.P. for High School Classes, it is written that - 'Some trains are run by electricity'.

24. The Secretary, U.P. Secondary Education Service Selection Board, Allahabad has filed a counter affidavit stating that after receipt of the objections, the same were referred to a subject expert, who gave his opinion in support of the objections, a copy whereby has been annexed with the counter affidavit. A perusal of the opinion of expert, who is a Professor of English, University of Allahabad, reveals that regarding question No. A-59, the expert has opined:-

*"The Tempest is actually classified in Shakespeare's first folio as* ***a comedy, Simply put****, William Shakespeare's The Tempest* ***includes aspects of both tragedy and comedy****. Generally considered Shakespeare's final play (believed to be written around 1610), it is considered the last of his late romance plays. Highly theatrical—better viewed on stage than through reading—The Tempest includes the tragic element of the treacherous death plans followed by Prospero's revenge in addition to the many comic moments; including the love interests of Miranda and Ferdinand, the trickster Ariel, and the monstrous Caliban.* ***The comic moments far outweigh the tragic elements****, making it one of Shakespeare's most enjoyable and sometimes incongruous plays*

*Objection overruled."*

25. Regarding question No. A-81, the expert has opined:-

*"A distinction between "Career" and "literary career" needs to made. The literary career of a person starts with his/her first publication. Hardy's first published work is an essay (1865). His first unpublished book, a novel, is The Poor Man and the Lady (1867) while his first*

*published book, again a novel, is Desperate Remedies (1871). His poems, Wessex Poems, got published much later in 1898. Thus, from the given options, Hardy's literary career began as a novelist."*

26. Regarding question No. A-107, the expert has opined:-

***"Why do trains run on electricity?***

Why don't they run on Diesel? Of course in some places where there is no electricity infrastructure over the tracks the trains do run on diesel.

***MACHINE/ENGINE***

a) [intransitive] if a machine or engine runs, it operates:

She got out of the car and left the engine running.

***Run on electricity/gas/petrol etc.*** (=get its power from electricity etc.)

Most cars run on unleaded fuel."

27. It is significant to mention that the opinion regarding question No. A-107 as printed originally is *"Objection overruled",* but afterwards, the expert has scored out the word *"overruled"* and has written in hand writing *"conceded".*

28. In rejoinder affidavit, the petitioner has contended that the subject expert has not referred to any standard books on the subject and his opinion is contrary to the material published in authoritative works and textbooks. The petitioner contends that the expert has dealt with the matter in a confusing manner.

29. Although the petitioner has impleaded two selected candidates namely, Shri Santosh Kumar Shukla and Ms. Sapna as respondent Nos.3 & 4 on 17.11.2016 and notice was issued to respondent Nos.3 & 4 on the same date through registered post, which has not been returned un-served, the respondent Nos.3 & 4 have not put in appearance to oppose the Writ Petition.

30. The learned Counsel for the petitioner has relied upon the judgments in the cases of **Kanpur University, Through Vice Chancellor and Others v. Samir Gupta and Others: (1983) 4 SCC 309, Saumitra Ginodia versus Union of India and Others**: 2017 SCC OnLine All 4303: (2018) 2 All LJ 98, **Manish Ujwal and Others v. Maharishi Dayanand Saraswati University and others**: (2005) 13 SCC 744 and **Rohit Nandan Shukla v. U.P.S.C. Allahabad And Another** 2016 (5) ADJ 485.

31. The learned Counsel for the respondent no. 2 has submitted that the U.P. Secondary Education Service Selection Board, Allahabad has revised the answer key on the basis of opinion of a subject expert and it has not committed any illegality in doing so. By placing reliance on the judgments in the cases of **Ran Vijay Singh and Others versus State of U.P. and Others:** (2018) 2 SCC 357, **U.P. Public Service Commission versus Rahul Singh: (2018) 7 SCC 254, Rishal v. Rajasthan Public Service Commission:** (2018) 8 SCC 81, **High Court of Tripura v. Tirtha Sarathi Mukherjee**: (2019) 16 SCC 663.

32. In **Kanpur University, Through Vice Chancellor and Others v. Samir Gupta and Others:** (1983) 4 SCC 309, the Hon'ble Supreme Court held that: -

***"16…. We agree that the key answer should be assumed to be correct unless it is proved to be wrong and that it***

***should not be held to be wrong by an inferential process of reasoning or by a process of rationalisation. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well-versed in the particular subject would regard as correct. The contention of the University is falsified in this case by a large number of acknowledged textbooks, which are commonly read by students in U.P. Those textbooks leave no room for doubt that the answer given by the students is correct and the key answer is incorrect."***

(Emphasis added)

33. The judgment in **Kanpur University, Through Vice Chancellor and Others v. Samir Gupta and Others** (Supra) was followed in **Manish Ujwal and Others v. Maharishi Dayanand Saraswati University and others:** (2005) 13 SCC 744, wherein the Hon'ble Supreme Court set aside an order passed by an Hon'ble Single Judge Bench of the High Court dismissing the Writ Petition and an order passed by a Division bench affirming the Single Judge Bench, and held that where the key answers are palpably and demonstrably erroneous, the student community, whether the appellants or intervenors or even those who did not approach the High Court or the Supreme Court, cannot be made to suffer on account of errors committed by the University. The University and those who prepare the key answers have to be very careful and abundant caution is necessary in these matters for more than one reason. First and paramount reason being the welfare of the student as a wrong key answer can result in the merit being made a casualty. The second reason is that the courts are slow in interfering in educational matters which, in turn, casts a higher responsibility on the University while preparing the key answers; and thirdly, in cases of doubt, the benefit goes in favour of the University and not in favour of the students. If this attitude of casual approach in providing key answers is adopted by the persons concerned, directions may have to be issued for taking appropriate action, including disciplinary action, against those responsible for wrong and demonstrably erroneous key answers.

34. A Division Bench of this Court deciding the case of **Rohit Nandan Shukla v. U.P.S.C. Allahabad And Another** 2016 (5) ADJ 485, followed the judgment in the case3 of **Kanpur University, Through Vice Chancellor and Others v. Samir Gupta and Others** (Supra).

35. In **Saumitra Ginodia versus Union of India and Others**: 2017 SCC OnLine All 4303: (2018) 2 All LJ 98, a Division Bench of this Court held that: -

*"20. Thus, we find that the opinion of the University or the expert, normally, should be accepted as it is assumed that such experts are well versed in their subject. We are further of the opinion that* ***the decision of the examining body or the expert is not beyond judicial review. The prime consideration is to maintain the fairness of the examination and welfare of the students/candidates, inasmuch as, in the event a wrong answer key is accepted, it would alter the fate of many candidates. The object of conducting an examination is to assess the merit of the candidates and to find out as to who is most suitable one for admission. The object of conducting a test would be defeated in case a wrong answer given is held to be beyond judicial review.***

*21. Normally, the Court should be cautious in interfering with the opinion of the expert but* ***where it is found that the answer keys are demonstrably wrong, that is to say, it cannot be such as no reasonable body of men, well versed in the particular subject, would regard it as correct, in that event the Court should exercise its writ jurisdiction and ensure that the error is rectified."***

(Emphasis added)

36. In **Ran Vijay Singh and Others versus State of U.P. and Others: (2018) 2 SCC 357,** also the Hon'ble Supreme Court referred to the judgment in the case of **Kanpur University v. Samir Gupta (**Supra) and further held that

*"... the onus is on the candidate to clearly demonstrate that the key answer is incorrect and that too without any inferential process or reasoning. The burden on the candidate is therefore rather heavy and the constitutional courts must be extremely cautious in entertaining a plea challenging the correctness of a key answer. To prevent such challenges, this Court recommended a few steps to be taken by the examination authorities and among them are: (i) establishing a system of moderation; (ii) avoid any ambiguity in the questions, including those that might be caused by translation; and (iii) prompt decision be taken to exclude the suspect question and no marks be assigned to it.*

* * *

*30. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are:*

*30.1. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;*

*30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;*

*30.3. The court should not at all re-evaluate or scrutinise the answer sheets of a candidate—it has no expertise in the matter and academic matters are best left to academics;*

*30.4. The court should presume the correctness of the key answers and proceed on that assumption; and*

*30.5. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate.*

*31. On our part we may add that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. If an error is committed by the examination authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical precision is not always possible. This Court has shown one way out of an impasse — exclude the suspect or offending question.*

*32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above,*

*there is interference by the courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination — whether they have passed or not; whether their result will be approved or disapproved by the court; whether they will get admission in a college or university or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers."*

37. In **U.P. Public Service Commission v. Rahul Singh**: (2018) 7 SCC 254, the Hon'ble Supreme Court held that: -

*"14. ...When there are conflicting views, then the court must bow down to the opinion of the experts. Judges are not and cannot be experts in all fields and, therefore, they must exercise great restraint and should not overstep their jurisdiction to upset the opinion of the experts."*

38. In **Rishal v. Rajasthan Public Service Commission:** (2018) 8 SCC 81, cited by the learned Counsel for the respondent no. 2, the Hon'ble Supreme Court had perused the answers given by the Expert Committee and had come to a conclusion that no error can be found with the answers of the Expert Committee. Thus even **Rishal** (Supra) relied upon by the learned Counsel for the respondent no. 2 does not lay down that the Courts cannot examine the correctness of opinion of an expert body.

39. **In High Court of Tripura v. Tirtha Sarathi Mukherjee:** (2019) 16 SCC 663, the Hon'ble Supreme Court examined t\and explained the ratio of law laid down in **Ran Vijay Singh** (Supra) in the following words: -

*"20. The question however arises whether even if there is no legal right to demand re-valuation as of right could there arise circumstances which leave the Court in any doubt at all. A grave injustice may be occasioned to a writ applicant in certain circumstances. The case may arise where even though there is no provision for re-valuation it turns out that despite giving the correct answer no marks are awarded. No doubt this must be confined to a case where there is no dispute about the correctness of the answer. Further, if there is any doubt, the doubt should be resolved in favour of the examining body rather than in favour of the candidate. The wide power under*

*Article 226 may continue to be available even though there is no provision for re-valuation in a situation where a candidate despite having giving correct answer and about which there cannot be even the slightest manner of doubt, he is treated as having given the wrong answer and consequently the candidate is found disentitled to any marks.*

*21. Should the second circumstance be demonstrated to be present before the writ court, can the writ court become helpless despite the vast reservoir of power which it possesses? It is one thing to say that the absence of provision for re-valuation will not enable the candidate to claim the right of evaluation as a matter of right and another to say that in no circumstances whatsoever where there is no provision for re-valuation will the writ court exercise its undoubted constitutional powers? We reiterate that the situation can only be rare and exceptional.*

*22. We would understand therefore the conclusion in para 30.2 which we have extracted from the judgment in Ran Vijay Singh v. State of U.P. [(2018) 2 SCC 357] only in the aforesaid light. We have already noticed that in H.P. Public Service Commissionv. Mukesh Thakur [(2010) 6 SCC 759], a two-Judge Bench in para 26 after survey of the entire case law has also understood the law to be that in the absence of any provision the Court should not generally direct re-valuation."*

40. The learned Counsel for the respondent no. 2 has relied upon the decision in the case of **Mahesh Kumar v. Staff Selection Commision and Another: 2022 SCC OnLine SC 2290,** which is being reproduced below: -

*"1. The grievance voiced by the petitioner before the High Court was that certain marks which were deducted ought not to have been deducted. Basically, the issue before the High Court was evaluation of the answer scripts of the petitioner. The High Court has rightly refused to entertain the writ petition by observing that when the conscious decision has been taken by the experts and the courts have no expertise in the matter and academic matters are best left to the academics, we see no reason to interfere with the same. Hence, the Special Leave Petition stands dismissed."*

41. Neither the facts of the case, nor the law laid down in various precedents on the point was considered in **Mahesh Kumar.**

42. The learned Counsel for the respondent no. 2 has also placed reliance upon a Division Bench judgment of this Court in **Kaushlesh Mishra v. State of U.P. And 2 others** Special Appeal No. 42 of 2021 decided on 08.07.2021, whereby the Division Bench dismissed the Special Appeal and affirmed the judgment of the Single Judge Bench dismissing the Writ Petition by holding that the Court cannot take place of an expert to evaluate the correctness of the answer, where the petitioner - appellant had failed to place any material on record to show correctness of the answer given by him. This decision was based on the facts of the case, where the appellant had failed to place any material on record to show correctness of the answer given by him whereas in the present cased, the petitioner has placed ample material on record to show that the answers given by him were correct.

43. The learned Counsel for the respondent no. 2 has also placed reliance

on a Division Bench judgment in the case of **Uday Bhan Yadav v. State of U.P. And 2 Others:** Special Appeal No. 492 Of 2020 decided on 06.10.2020, wherein the Learned Counsel for the appellant was asked to indicate the last date for submission of objection to tentative answer key to find out whether objection were submitted on or before the last date, but he was unable to indicate the last date for submission of objection. The Court held that in absence of an indication about the last date either in the petition or appeal, it cannot be said that petitioner submitted objection before the last date and the Special Appeal was dismissed for this reason. This judgment is of no help to the respondent no. 2 as no such point is involved in the present case.

44. The principles of law which can be culled out from a cumulative reading of the aforesaid judgments on the point, are that: -

44.1- The wide power under Article 226 are available where a candidate despite having giving correct answer is treated as having given the wrong answer and consequently the candidate is found disentitled to any marks.

44.2- However, the Court should be cautious in interfering with the opinion of the expert.

44.3- The key answer should be assumed to be correct unless it is clearly demonstrated to be wrong.

44.4- If the key answer runs contrary to the material published in a large number of acknowledged textbooks, which are commonly read by students in the State, it leave no room for doubt that the answer given by the students is correct and the key answer is incorrect.

44.5- Where the key answers are palpably and demonstrably erroneous, the student community cannot be made to suffer on account of errors committed by the University.

44.6- Where it is found that the answer keys are demonstrably wrong, the Court should exercise its writ jurisdiction and ensure that the error is rectified.

44.7- The decision of the examining body or the expert is not beyond judicial review. The prime consideration is to maintain the fairness of the examination and welfare of the students/candidates, inasmuch as, in the event a wrong answer key is accepted, it would alter the fate of many candidates. The object of conducting an examination is to assess the merit of the candidates and to find out as to who is most suitable one for admission. The object of conducting a test would be defeated in case a wrong answer given is held to be beyond judicial review.

45. When we examine the facts of the present case in light of the above mentioned principles of law, it appears that in the provisional answer key published by the Selection Board, the correct answer of question No.59 was shown as option ‘C - Shakespeare’s ‘The tempest’ is a ‘Tragic comedy’, which has been changed to ‘Comedy’ in the revised answer keys.

46. The Secretary, U.P. Secondary Education Service Selection Board, Allahabad has relied upon the opinion of a subject expert, who is a Professor of English, University of Allahabad. The expert has also opined that the Tempest includes aspects of both tragedy and comedy, but the comic moments far outweigh the tragic elements. The expert’s personal opinion regarding question no. 59, which apparently tilts both ways to some

extent, is not supported by any material published in any book.

47. In a book titled "Shakespeare's The Tempest" published in accordance with the latest syllabi of various Universities in India, annotated and edited by Mr. J.P. Goel, M.A. (English), LL.B., it is written that *"The Tempest has been regarded as a very popular tragi-comedy."* In another book titled *"A Norton Critical Edition - William Shakespeare - The Tempest"* containing criticism of The Tempest, the authors have written that many modern critics to label it a tragicomedy. The subject expert, whose opinion has been relied by the Selection Board, has himself expressed the view that the Tempest includes aspects of both tragedy and comedy. When the Selection Board and the subject expert have failed to refer to any other material to support the contrary view, the revision of answer to question 59 so as to make it 'The tempest' is a 'Comedy', in place of the original answer in the provisional answer key that 'The tempest' is a 'Tragic comedy', is manifestly wrong.

48. Similarly, in the provisional answer key published by the Selection Board, the answer to question 81 was that *'Thomas Hardy started his literary career as a Poet'* whereas in the revised answer keys, the answer was changed so as to make it *'Thomas Hardy started his literary career as a Novelist'.*

49. The petitioner contends that the answer given in the provisional answer key was correct and to buttress this submission, the petitioner has annexed copies of extracts from a book titled *"An Anthology of English Poetry", which has been edited by 'The Board of Editors Department of English and Modern European Languages, University of Allahabad'* and is prescribed for the B.A. II English Literature Course of the University of Allahabad. Chapter 4 of the book is titled "Thomas Hardy" and it is written in it that *"Hardy considered himself a Poet and started his literary career with poetry. He turned to poetry again after the hostile reaction to his novel, 'Jude the Obscure' (1896). Hardy is regarded as a transitional poet whose poetry bridges the Victorian and Modern ages of literature."*

50. Chapter 7 of the book - "A Critical Study of Thomas Hardy - *TESS OF THE D'URBERVILLES"* authored by Dr. B. P. Asthana, M.A. LLB., PhD, is titled "Hardy as a Poet" and it is written in it that *"Hardy is famous as a great novelist yet he started his career as a poet and also ended as a poet."*

51. In another book titled *"A history of English Literature"* by Edward Albert, M.A. revised by J.A. Stone, M.A. published by George G. Harrap & Co. Ltd. (London, Toronto, Wellington, Sydney), it is written that *"Hardy began as a poet, and, though for a long time he was unable to find a publisher for his verse, he continued to write poetry. After the public outcry against his two greatest novels, he wrote only verse."*

52. Regarding question No. A-81, the expert has opined that "A distinction between *"Career" and "literary career" needs to made. The literary career of a person starts with his/her first publication. Hardy's first published work is an essay (1865). His first unpublished book, a novel, is The Poor Man and the Lady (1867) while his first published book, again a novel, is Desperate Remedies (1871). His poems,*

*Wessex Poems, got published much later in 1898. Thus, from the given options, Hardy's literary career began as a novelist."* This opinion of the expert is his personal opinion and he has not referred to any book.

53. When *"An Anthology of English Poetry"* edited by *'The Board of Editors Department of English and Modern European Languages, University of Allahabad'*, which is prescribed for the B.A. II English Literature Course of the University of Allahabad professes ***that "Hardy considered himself a Poet and started his literary career with poetry"*** the personal unpublished opinion of an expert which is not supported by any published material, will not overrule the published source of knowledge. The students who gave answer to question 81 as per the published book cannot be faulted.

54. The petitioner further contends that the answer to question No.107 mentioned in the provisional answer key was that "Some trains are run by electricity" whereas the Selection Board has wrongly revised the answer so as to make it read "Some trains are run on electricity". In 'Oxford Dictionary, 8th Edition', it is published that as a Noun, Tram means "A vehicle driven **by** electricity", which implies that 'trains run **by** electricity and not **on** electricity'.

55. In *"A Practical Guide to English Grammar"* authored by K.P. Thakur, M.A. M.Ed., Ph.D, PGCTE, (CIEFL, Hyderabad), former Principal, RDS College, Muzaffarpur, the meaning of the word 'by' has been explained as per which the correct answer to question No.107 would be "Some trains are run **by** electricity".

56. In the book titled *"High School English Grammar & Composition"* prescribed by the Board of High School and Intermediate Education, U.P. for High School Classes, it is written that - 'Some trains are run **by** electricity'.

57. As per the book *'How to right Correct English (Applied English Grammar)"* authored by Shri Rajendra Prasad Sinha, M.A., Ex-Chairman, Bihar College Service Commission also, the correct answer would be 'by'.

58. *"The Advanced Learner's Dictionary of Current English"* published by London Oxford University Press, explains the meaning of word 'by' with the help of an example that *"Machines are driven by steam (water-power, electricity, etc.). Our houses are lighted by electricity."* which indicates that the correct answer to question No.107 will be - "Some trains are run by electricity".

59. Regarding question No. A-107, the expert had originally printed his opinion as *"Objection overruled",* but afterwards, he scored out the word *"overruled"* and has written in hand writing *"conceded"*, which shows that he himself was initially of the view that the answer to question 107 published in the provisional answer key was correct. He has not referred to any standard books on the subject which may support the alteration of his opinion and his altered opinion is contrary to the material published in authoritative works and textbooks. Therefore, the altered opinion which is contrary to his own original opinion and which is contrary to the information published in various books is manifestly wrong.

60. When the answers run contrary to the material published in a large number of acknowledged textbooks, which are

commonly read by students in the State, it leave no room for doubt that the answer given by the students is correct and the key answer is incorrect. The key answers are palpably and demonstrably erroneous, the petitioner cannot be made to suffer on account of errors committed by the Selection Board and it calls for interference by this Court in exercise of the Writ jurisdiction so that the error is rectified and the wrong answers do not adversely affect the fate of the candidates and their merit is tested in a proper manner.

61. Now comes the question regarding the relief which can be granted in this case. The advertisement for the selection was issued on 04.01.2014. The examination was held on 22.02.2015. After entertaining objections against the provisional answer key, the revised answer key was published on 20.05.2015. the petitioner had filed Writ A No. 45977 of 2015 on 13.08.2015, which was disposed off on 31.08.2015 after recording the submission of the respondents that the matter had already been referred to the English Department of the Allahabad University for verifying the correctness of the answers and permitting the petitioner to file objections, which should be decided after receiving the report from the Expert Body. The second revised answer key was published on 20.04.2016 in which answers to question nos. 59 and 81 were not revised in spite of the petitioner's objections and answer to question 117 was revised, although the same was not in dispute. Thereafter the final result was published and the petitioner filed this Writ Petition on 04.11.2016.

62. On 17.11.2016, this Court had passed an interim order that if any selection is made in the meantime, the same shall be subject to the final order to be passed in this Writ Petition. Notices were issued to the selected candidates – the respondent nos. 2 and 3, but they did not come forward to contest the Writ Petition and the same has been contested by the U. P. Secondary Education Service Selection Board. In these circumstances, when the petitioner has been pursuing his rights diligently, the mere fact that the respondent nos. 3 and 4 did not come forward to contest the Writ Petition and meanwhile appointments have been made and they are continuing in service, will not disentitle the Petitioner to be granted any relief for this reason.

63. In **Rajesh Kumar v. State of Bihar:** (2013) 4 SCC 690, while upholding interference in the result of selection on the ground that certain answers were incorrect, the Hon'ble Supreme Court had granted the following reliefs: -

*"22.1. Answer scripts of candidates appearing in 'A' series of competition examination held pursuant to Advertisement No. 1406 of 2006 shall be got re-evaluated on the basis of a correct key prepared on the basis of the report of Dr (Prof.) C.N. Sinha and Prof. K.S.P. Singh and the observations made in the body of this order and a fresh merit list drawn up on that basis.*

*22.2. Candidates who figure in the merit list but have not been appointed shall be offered appointments in their favour. Such candidates would earn their seniority from the date the appellants were first appointed in accordance with their merit position but without any back wages or other benefit whatsoever.*

*22.3. In case the writ petitioners, Respondents 6 to 18 also figure in the merit list after re-evaluation of the answer scripts, their appointments shall relate*

*back to the date when the appellants were first appointed with continuity of service to them for purpose of seniority but without any back wages or other incidental benefits.*

*22.4. Such of the appellants as do not make the grade after re-evaluation shall not be ousted from service, but shall figure at the bottom of the list of selected candidates based on the first selection in terms of Advertisement No. 1406 of 2006 and the second selection held pursuant to Advertisement No. 1906 of 2006.*

*22.5. The needful shall be done by the respondents, State and the Staff Selection Commission expeditiously but not later than three months from the date a copy of this order is made available to them."*

64. In view of the aforesaid discussion, the writ petition is ***allowed***. The revised answer key published in furtherance of the notification dated 04.01.2013 for making selections for appointments to the Posts of Lecturers (English) is quashed and a mandamus is issued directing the respondent no. 2 to re-evaluate the answer sheets keeping in view the observations made in the preceding parts of this judgment. If the petitioner figures in the merit list, he shall be offered appointment and he will be given seniority from the date the first appointments were made, but without any back wages or other benefit whatsoever. Other candidates, who do not make the grade after re-evaluation shall not be ousted from service, but shall figure at the bottom of the list of selected candidates based on the first selection in terms of Advertisement No. 1-1/2013 issued on 04.01.2014. The needful shall be done by the respondents 1 and 2 – State of U. P., Department of Secondary Education and the U. P. Secondary Education Service Selection Board expeditiously but not later than three months from the date a copy of this order is made available to them.

65. The parties shall bear their own costs of litigation.

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**(2024) 7 ILRA 160**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.07.2024**

**BEFORE**

**THE HON'BLE AJIT KUMAR, J.**

Writ A No. 57613 of 2014

**Vinod Kumar Rai ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Anil Kumar Srivastava, O.P. Sharma

**Counsel for the Respondents:**
C.S.C., Sunil Kumar Mishra

**Promotion-**Petitioner aggrieved by impugned order-cancelled his promotion as Tyre Inspector-promoted as per seniority -Earlier he was promoted from Assistant Vulcanizer to Vulcanizer in 2005- Petitioner was promoted in general category on merit -said order was wrongly recalled –stating that reservation shall not apply in view of judgment of Supreme Court-the said order was challenged in Court-during pendency again promoted-as soon as the earlier Writ Petition got dismissed in default-his promotion was canceled by impugned order-earlier promotion was on substantive vacancy and selection held by selection committee-Petitioner continued to discharge his duties-his candidature considered for further promotion on the Post of Tyre Inspector along with several employees against a substantive vacancy in general category as per service rules-not covered by roster-earlier promotion was lawful-therefore subsequent promotion liable to be upheld.

**W.P. allowed.** (E-9)

**List of Cases cited:**

U.P. Power Corporation Vs Rajesh Kumar & ors. 2012 5 ADJ page no. 19

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

1. Heard Shri Anil Kumar Srivastava, learned counsel for the petitioner, Shri Sunil Kumar Misha, learned counsel for the respondent Corporation.

2. Petitioner before this Court is aggrieved by the decision taken by the respondent Corporation dated 09.09.2014 whereby the promotion of the petitioner as Tyre Inspector made on 13.09.2012 has been cancelled.

3. It is submitted by learned counsel for the petitioner that petitioner while working on the post of Vulcanizer was promoted as per seniority as Tyre Inspector in the year 2012 and merely because his earlier writ petition, in respect of the promotion to the post of vulcanizer was dismissed in default, the respondents were not justified in cancelling the order of promotion. He submits that as earlier petitioner was promoted from the post of Assistant Vulcanizer to Vulcanizer on 11.02.2005, the said order was wrongly recalled on the ground that reservation shall not apply in view of the judgment of the Supreme Court in the case of ***U.P. Power Corporation Vs. Rajesh Kumar and others 2012 5 ADJ page no. 19*** where reservation to promotional posts were held to be bad without scheme. It is submitted that though petitioner was promoted in general category on the basis of merit on 11.02.2005 even then his promotion was sought to be withdrawn on the ground that roster will not apply. The said order dated 23.03.2005 came to be challenged in writ petition being Civil Misc. Writ Petition No. 27430 of 2005. It is submitted that the petitioner had withdrawn the earlier petition only because he was awarded with second promotion on 13.09.2012, of course, after the judgment was delivered by the Supreme Court on 27.04.2012 in ***Rajesh Kumar case (supra).***

4. *Per contra*, it is sought to be argued on behalf of respondent corporation that rightly or wrongly once order of promotion was withdrawn and the same was put to challenged, continuance of petitioner as Vulcanizer was at the strength of interim order and with the dismissal of the writ petition, the same could be withdrawn as the interim order got merged into the final order of dismissal. Thus, according to him, the order withdrawing his promotion on 23.03.2005 stood revived and the petitioner should be taken to have got reverted to the position of Vulcanizer. It is sought to be argued that the order impugned is justified one in the given facts and circumstances of the case.

5. Having heard learned counsel for the respective parties and having perused the record, I find that the order promoting the petitioner from Assistant Vulcanizer to Vulcanizer on 11.02.2005 was based upon the decision of the selection committee as he had passed the trait test examination held in that regard. Since he was promoted with the rider that he would be revered if the work was not found satisfactory, it was a promotion of the petitioner on clear vacancy substantively upon the selection held by the selection committee. The said order came to be cancelled only on the ground that as per the relevant Government Order, roster to the promotional post would not apply.

So the petitioner's candidature was sought to be non-suited only on the ground that the post fell in the reserved quota and the petitioner could not be promoted even though he had the requisite merit and was will placed in seniority. When this order came to be challenged before this Court in a Writ Petition being Civil Misc. Writ Petition No. 27420 of 2005, the order was stayed by this Court on 07.04.2005 in following terms:

*"Considering the submission of the petitioner that he was granted promotion after having faced regular selection committee and he has already joined on the promoted post, and by the impugned order he has been reverted back without giving an opportunity of hearing tot he petitioner or issuing any show cause notice to him, the operation of the impugned order dated 23,3.2005 passed by respondent no.3 shall remain stayed until further orders."*

6. It transpires that thereafter petitioner continued to discharge his duties successfully and his candidature came to be considered for further promotion on the post of Tyre Inspector under the order dated 13.09.2012 along with several other employees. This order was also against a substantive vacancy. Now when petitioner received second substantive promotion, he withdrew his writ petition and got the writ petition dismissed as infructuous on 29.07.2013. The order dated 29.07.2012 is reproduced hereunder:

*"Shri OP Sharma, counsel for the petitioner states that by passage of time, the writ petition has become infructuous.*

*The writ petition is dismissed accordingly."*

7. The question now for consideration before this Court falls is, as to whether the dismissal of the writ petition as infructuous would render second promotion of the petitioner to be bad and, therefore, deserved cancellation. Having perused the order of first promotion dated 23.03.2005, I find that this was a substantive promotion on the post of Vulcanizer as petitioner had successfully passed out the test held by the selection committee and his name was recommended accordingly. This promotion order was sought to be withdrawn only on the ground that reservation would be applicable. The question is whether the reservation could have been applied in promotion and whether such approach of the respondent would have been justified. In the case of ***U.P. Power Corporation Vs. Rakesh Kumar and others*** Supreme Court very categorically held that Article 16 (4) of the Constitution does not permit provision for reservation in matters of promotion and therefore, the rule of reservation was made prospective in the judgment of Supreme Court in the case of Indra Sahani but in order to find adequate representation of the backward class of citizens in services class or category it was considered necessary to provide for certain qualifiers and riders as contemplated in the celebrated M.Nagaraj's case. Referring paragraph No. 10 of the said judgment vide paragraph Nos. 39, 40, 42 the Court held thus:

*"39. At this stage, we think it appropriate to refer to the case of Suraj Bhan Meena and another (supra). In the said case, while interpreting the case in M. Nagaraj (supra), the two- judge Bench has observed:-*

*"10. In M.Nagraj case, this Court while upholding the constitutional validity of the Constitution (77th Amendment) Act,*

*1995 and the Constitution (85th Amendment) Act, 2001, clarified the position that it would not be necessary for the State Government to frame rules in respect of reservation in promotion with consequential seniority, but in case the Stage Government wanted to frame such rules in this regard, then it would have to satisfy itself by quantifiable data, that there was backwardness, inadequacy of representation in public employment and overall administrative inefficiency and unless such an exercise was undertaken by the State Government, the rule relating to reservation in promotion with consequential seniority could not be introduced."*

*40. In the said case, the Stage Government had not undertaken any exercise as indicated in M. Nagaraj (supra). The two-Judge Bench has noted three conditions int he said judgment. it was canvassed before the bench that exercise to be undertaken as per the direction in M.Nagraj (supra) was mandatory and the State cannot, either directly or indirectly, circumvent or ignore or refuse to undertake the exercise by taking recourse to the Constitution (Eighty-fifth Amendment) Act providing for reservation for promotion with consequential seniority. While dealing with the contentions, the two-judge Bench opined that the State is required to place before the Court the requisite quantifiable data in each case and to satisfy the court that the said reservation become necessary on account of inadequacy of representation of Scheduled Castes and Scheduled Tribes candidates in a particular class or classes of posts, without affecting the general efficiency of service. Eventually, the Bench opined as follows:-*

*"66. The position after the decision in M.Nagaraj case is that reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward Classes and subject tot he condition of ascertaining as to whether such reservation was at all required. 67. The view of the High Court is based on the decision in M.Nagaraj case as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Schedule Caste and Schedule Tribe communities in public services. The Rajasthan High Court has rightly quashed the notifications dated 28.12.2002 and 25.4.2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the Scheduled Caste and Scheduled Tribe communities and the same does not call for any interference."*

*41. As has been indicated hereinbefore, it has been vehementaly argued by the learned senior counsel for the State and the learned senior counsel for the Corporation that once the principle of reservation was made applicable tot he spectrum of promotion, no fresh exercise is necessary. It is also urged that the efficiency in service is not jeopardized. Reference has been made to the Social Justice Committee Report and the chart. We need not produce the same as the said exercise was done regard being had to the population and vacancies and not to the concepts that have been evolved in M. Nagaraj (supra).* ***It is one thing to thing that there are statutory rules or executive instructions to grant promotion but it cannot be forgotten that they were all subject to the pronouncement by this Court in Vir Pal Singh Chaughan (supra) and Ajit Singh (II) (supra). We are of the firm view that a fresh exercise in the light***

***of the judgment of the Constitution Bench in M.Nagaraj (supra) is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4 A) and 16(4B) are enabling provisions and the State can made provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provision of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein.***

*42. In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 ACt and Rules 8A of the 2007 Rules are ultra vires as they run counter to the dictum in M.Nagraj (supra). Any promotion that has been given on the dictum of Indra Sawhney (supra) and without the aid or assistance of Section 3(7) and Rule 8A shall remain undisturbed."*

(Emphasis added)

8. Thus, Section 3(7) of the 1994 Act and Rule 8 A of the 2011 Rules were held to be *ultra vires* as they ran counter to the dictum of the Division Bench of the Supreme Court in the case of M. Nagaraj and any promotion that was given shall be held to be bad except those promotions which were given without taking assistance of Section 3(7) of the Act and Rule 8-A of the Rules, 2011.

9. In the present case situation is reversed. Petitioner's promotion was sought to be annulled only on the ground that application of roster had not taken place. Thus, promotion of the petitioner based on selection in general category as per service rules, was clearly not covered by roster and so could not have been held to be bad and, therefore, though was stayed by the Court but in view of the legal position discussed above it was liable to be rendered void as no such promotion quota could have been fixed. The second promotion came to be granted to the petition after the judgment in **Rajesh Kumar case** and since the very promotion of the petitioner on the principal post of Vulcanizer had been held to be lawful, the second promotion was liable to be upheld. It is not the case of the respondent that second promotion was bad for any concealment of fact on the part of the petitioner. It has been cancelled only on the ground that petitioner's writ petition was rendered dismissed as infructuous. In my considered view, mere dismissal of petition as infructuous would not change the legal position either. Thus, in view of the above the order of withdrawal of the second promotional order cancelling the second promotion order is untaneable. Writ petition succeeds and is allowed. The order passed by the respondents dated 09.09.2014 is hereby quashed.

10. Petitioner shall be taken to have validly promoted in the year 2005 and then in the year 2012 as Tyre Inspector. Consequences to follow.

11. Cost made easy.

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**(2024) 7 ILRA 165**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.07.2024**

**BEFORE**

**THE HON'BLE AJIT KUMAR, J.**

Writ A No. 61181 of 2014

**Suresh Yadav** ...**Petitioner**
**Versus**
**State of U.P. & Ors.** ...**Respondents**

**Counsel for the Petitioner:**
V.K. Singh, D.K. Singh

**Counsel for the Respondents:**
C.S.C., Dileep Kumar Srivastava, S. Tiwari

**Service Law-**Petitioner appointed on daily wage basis- later regularized and continued in service-on a complaint made regarding his date of birth recorded differently in the LIC paper than that recorded in his service book-Petitioner was made to retire before his actual retirement-Preliminary fact finding enquiry report cannot take form of regular enquiry to enable the respondent to retire the Petitioner presuming his date of birth to be different than that recorded in service book-without changing date of birth originally recorded in the service book -an employee cannot be made to retire-LIC policy is not a document for determination of age in service law-impugned order quashed-Petitioner reinSt.d with salary.

**W.P. allowed.** (E-9)

**List of Cases cited:**

1. Surendra Singh Vs St. of U.P & ors., 2019 5 ADJ 365

2. Mohan Singh Vs U.P. Rajya Vidyut Utpadan Ltd. & ors., 2012 (8) ADJ 383

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

1 Heard Sri A.K.Rai, learned Advocate holding brief of Sri D.K.Singh, learned counsel for the petitioner Sri D.K.Srivastava, learned counsel for the respondent and learned Standing Counsel for the State respondents.

2. Petitioner before this Court was appointed in the year 1984 as a peon on daily wage basis in the office of Town Area Committee, Dohri Ghat, Mau. Later on his services came to be regularized in the year 1992 and he continued in service. However, after July, 1992, suddenly his salary was stopped and his services were terminated which came to be challenged before this Court vide Writ Petition No. 35296 of 1993 which was allowed by a detailed judgment and order dated 21st March, 2006 and it was how petitioner came to be reinstated. Suddenly, as it is alleged in the petition, on the basis of some complaint regarding date of birth recorded in the service book as 1.1.1964 just for his date of birth differently so recorded in the Life Insurance Corporation Policy paper , the Chairman of the Nagar Panchayat , Dohri Ghat Mau came to pass order dated 28.8.2014 withholding the salary of the petitioner while seeking direction and guidance from the Director, Local Bodies U.P. Lucknow. It is this order, which is challenged before this Court.

3. The argument raised is two fold: firstly, petitioner was made to retire on 30th August, 2014 wrongly presuming his date of birth to be 1.1.1964 on the basis of policy bond papers and that too without holding any enquiry worth its name and without giving any opportunity of hearing and notice much less a show cause notice to enable the petitioner to put up his defence; and secondly, date of birth even of a government servant can be changed in

service book only on the basis of his High School Certificate of employee and no application was to be entertained for the change in date of birth originally recorded in service book.

4. Yet another argument advanced by learned counsel for the petitioner is that Chairman, was not justified in withholding the payment of salary of the petitioner taking petitioner to have retired on 30th August, 2014 and date of birth while in service book has continued to be entered as 1.1.1964 for the purposes of contract of employment between employer and the employee, more especially in the circumstances when guidance was being sought from the Director, Local Bodies, U.P. Lucknow both Nagar Panchayat, Dohri Ghat Mau, the contesting respondent no. 3 as well as District Magistrate who have filed their respective counter affidavit in the matter. In the counter affidavit filed by respondent no. 2, namely, District Magistrate, Mau it is stated that some enquiry was got conducted by Sub Divisional Magistrate, Ghosi Mau and on the basis of letter of Executive Officer of the Nagar Panchayat, Dohri Ghat and it transpired from the transfer certificate issued by an institution, namely, Krishak Inter College, Kunda that petitioner's date of birth was 20th July, 1950. This transfer certificate is stated to have been issued in 1967 and has been brought on record, according to which petitioner had failed in the High School examination twice conducted by the U.P. Board of High School Intermediate for the session 1965-66 and 1966-67. The enquiry report that bears signatures of Sub Divisional Magistrate and Executive Officer does not show that any regular enquiry was held in the matter and it was only a preliminary fact finding enquiry that was submitted to the District Magistrate. Still further, I do not find any averment in the affidavit sworn by Rama Kant Verma, Tehsildar of Tehsil Ghosi filed on behalf of District Magistrate Mau that having found entry in the transfer certificate to the effect that petitioner had failed in the high school examination twice, the concerned enquiry officers appointed by the District Magistrate ever endeavoured to verify this fact from the Madhyamik Siksh Parishad, U.P. . Thus finding returned in the joint report of the Sub Divisional Magistrate and Executive Officer remained unverified from the proper place, which was Board of High School/Madhyamik Siksha Parishad.

5. In the considered view of the Court, this preliminary fact finding enquiry report itself cannot take form of regular enquiry to enable the respondent Nagar Panchayat, Dohri Ghat, Mau to retire the petitioner in the year 2014 presuming his date of birth as 20th September, 1950 .

6. Interestingly petitioner had been made to retire on 31st August, 2014 taking his date of birth to be 1st September, 1954 whereas in the enquiry report obtained by District Magistrate, the date of birth as per finding was 20th September, 1950. Thus, this enquiry report could not have formed basis to make the petitioner retire or get superannuated at an earlier stage than when he would have attained age of superannuation as per entry recorded in the service book.

7. In the entire counter affidavit filed by Chairman of the Local Bodies concerned, I do not find that at any point of time that petitioner's date of birth as originally recorded in the service book as 1.1.1964 was changed.

8. In my considered view without changing the date of birth originally

recorded in the service book, an employee cannot be made to retire. The basic philosophy behind the service jurisprudence is that there is contract of employment between employer and employee. The service book maintained by employer is a part of the contract of employment and any change therein has to first take place as it would be altering the condition of employment. The respondent local bodies was in clear error of law in superannuating the petitioner at an earlier age than what he would have attained as per service book entry.

9. One of the arguments advanced on behalf of the contesting respondent local body by learned counsel appearing in that behalf has been that petitioner did not pass out class eight from the institution which he was relying upon and instead he passed out class 8th examination from another institution. The institution from which petitioner claimed to have passed out, it was one Avatar Yadav who was student and transfer certificate of Avatar Yadav has been brought on record, but I find that there is no date of birth entered in that certificate, nor certificate bears signature of Principal or seal of Principal, nor certificate carries any date of issuance. It seems to be document either got prepared for the purpose of the case to defend the decision of the Chairman or somehow obtained that to mislead the Court on facts.

10. There could be an argument that Life Insurance Policy is one of the document, in which date of birth of the petitioner was recorded as 1.1.1954, however, Life Insurance Corporation Policy is not a document for the purposes determination of age in service law. Unless and until regular enquiry was held in the matter giving opportunity of hearing to the concerned employee to meet the charges. This aspect of the matter has virtually skipped the attention of the Chairman/ employer and therefore, merely because some private complaint was made citing the date of birth entered in the insurance policy of the petitioner, would not have entitled the Chairman of Local Body to unilaterally retire the petitioner at an earlier age and that too without changing the date of birth originally recorded in the service book at the time of entry in service.

11. Learned counsel for the respondent local body has not been able to show any rule or law otherwise which may entitled the local body to change date of birth of employee originally entered in service book. In the circumstances provisions as contained under Rules 2 and 3 of Uttar Pradesh Recruitment to Services (Determination of Date of Birth) Rules, 1974 are reproduced hereunder:

*"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 at the time of his entry into the Government service or where a Government servant has not passed any such examination as aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the Goverment 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. Change of date of birth-Bona fide mistake.-The date of birth can be changed only if there was a bona fide mistake. The principle of estoppel will apply and hence when the Government servant had indicated a particular date of birth in his application form or any other document at the time of employment the Court should not change that date of birth."*

12. From bare reading of the aforesaid provisions, it is clear that date of birth of employee who has not passed the High School Certificate cannot be changed once originally recorded at the time of entry in service.

13. In my above view I find support in the judgments of a coordinate benches of this court in the case of **Surendra Singh v. State of U.P and Others, 2019 5 ADJ 365**, and of the Division Bench judgment in the case of **Mohan Singh v. U.P. Rajya Vidyut Utpadan Ltd. And Others, 2012 (8) ADJ 383.**

15 . The Courts have repeatedly held that actions to be taken by the authorities must be sound and reasoned one, more especially in service cases where interest of employees is at a stake and so respondents authorities are not supposed to act an arbitrary manner. The method in which the Chairman in the present case had passed the order impugned retiring the petitioner without assigning any reason except relevant policy bond paper and that too without holding any enquiry. This was totally unwarranted .

16. It is unfortunate that District Magistrate in the matter has acted in a colourable exercise of power in holding such enquiry in a hush-hush manner. It was a case where he ought to have applied his mind, more especially when he is officer of Indian Administrative Service.

17. In view of above, the writ petition succeeds and is allowed. The order passed by the Chairman Nagar Panchayat, Dohri Ghat Mau dated 28.8.2014 is hereby quashed. The petitioner shall be reinstated in service and shall be taken to be in service until 31st December, 2023 and shall be paid salary accordingly. Whatever the amount has been paid towards retirement dues may be adjusted against salary and fresh post retirement dues shall be assessed and fixed and accordingly revised payment shall be made.

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**(2024) 7 ILRA 168**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 03.07.2024**

**BEFORE**

**THE HON'BLE MANISH KUMAR, J.**

Writ A No. 1000034 of 2001

**Smt. Prema Devi ...Petitioner**
**Versus**
**Sri Shri Kishna Agrawal ...Respondent**

**Counsel for the Petitioner:**
Ram Karan Agrawal, Anadi K. Sinha, Ram Karan Agrawal, Shatrughna Awasthi, Virendra Mishra

**Counsel for the Respondent:**
C.S. Pandey, Mohammad Adil Khan

**A. Civil Law –** landlord-tenant dispute- suit decreed for all reliefs prayed- ejectment, arrears of rent, water tax, drainage tax, damages and costs – revisional order as well as judgement decreeing the suit-under challenge- petition disposed of.

**B.** Whether the amount deposited by the respondent/tenant would be treated as deposited prior to the first date of hearing or not- what would be the first date of hearing- Section 20(4) of the Act of 1972- it is settled preposition of law that the first date of hearing would not be the date when the written statement is filed by the respondent/defendant- the first date of hearing would be the date on which the court applies its mind to the facts and controversy involved in the case-this date may be said to be the date for framing of issues when the court applies its mind to the facts of the case- the amount demanded by the petitioner in the suit was deposited by the tenant/respondent on the date fixed for framing of the issues prior to framing of the issues- respondent is entitled for the benefit of Section 20 (4) of the Act, 1972, as the respondent/tenant has deposited the amount demanded by the landlord prior to the first date of hearing**. (Para 13)**

**HELD:**
After going through the judgments of the Hon'ble Supreme Court, it is settled preposition of law that the first date of hearing would not be the date when the written statement is filed by the respondent/defendant. The first date of hearing would be the date on which the court applies its mind to the facts and controversy involved in the case and this date may be said to be the date for framing of issues when the court applies its mind to the facts of the case. It is undisputed fact between the parties that the amount demanded by the petitioner in the suit was deposited by the tenant/respondent on the date fix for framing of the issues prior to framing of the issues so the respondent is entitled for the benefit of Section 20 (4) of the Act, 1972, as the respondent/tenant has deposited the amount demanded by the landlord prior to the first date of hearing. (Para13)

**C.** What would be the effect of being tenant/respondent the owner of residential building to deprive him the benefit of Section 20 (4) of the Act- proviso to Section 20 (4) would be attracted only to those cases where the building under tenancy is in the use of the tenant for residential purpose- If the building under tenancy is being used by the tenant for the commercial or business purposes- acquisition by the tenant of a residential accommodation cannot, in the context of things, be relevant for determining whether the tenant ought not be held entitled to claim the benefit contemplated under Section 20 (4) of the Act,1972-it is an admitted case that it is a residential house in which the respondent is residing with his family -no evidence was led before the trial court whether it can be used for the commercial purposes-petition devoid of merit-dismissed.**(Paras 20 and 23)**

**HELD:**
As per the law settled in the case of *Sunil Kumar Mukherji Vs Kabiraj Bindo Madho Bhattachaya and others reported in (1977) 11 AHC CK 0010* and in the case of *Sheo Nath Prasad Vs IIIrd Additional District Judge and others reported in Allahabad Rent Cases, 1981 Page No. 207,* wherein it has been held that the purpose of the proviso is clear and it is that in case the petitioner has an alternative accommodation which can be used for the purpose for which he occupied the building under his tenancy, he should not be given the benefit of sub-section 4 of Section 20 of the Act, 1972. It is also held by this Court that proviso to Section 20 (4) would be attracted only to those cases where the building under tenancy is in the use of the tenant for residential purpose. If the building under tenancy is being used by the tenant for the commercial or business purposes, it is obvious that the acquisition by the tenant of a residential accommodation cannot, in the context of things, be relevant for determining whether the tenant ought not be held entitled to claim the benefit contemplated under Section 20 (4) of the Act, 1972. (Para 20)

After considering the facts and circumstances and discussions made above, now it is not necessary to replicate on the issue of the notice served by the petitioner to the respondent. The deposit as demanded by the petitioner from the respondent prior to the framing of the issues is admitted by both the parties i.e. by the learned counsel for the petitioner and learned counsel for the respondent hence amount was deposited on the first date of hearing, prior to the framing of the issues. The property which the petitioner has alleged in his reply to the objection filed by the respondent in a suit, it is an admitted case that it is a residential house in which the

respondent is residing with his family and it is also admitted that no evidence was led before the trial court whether it can be used for the commercial purposes or not and nor it has been mentioned that it is being used by the respondent for commercial purposes, assuch the petition is devoid of merit and is liable to be dismissed. (Para 23)

**Petition dismissed.** (E-14)

**List of Cases cited:-**

1.Samar Pal Singh Vs Chitranjan Singh reported in 2015 (3) ARC 463

2.Heera Lal Vs IInd ADJ & anr.,2010 2 ARC 31

3.Siraj Ahmad Siddiqui Vs Shri Prem Nath Kapoor report in AIR 1993 SC 2525

4.Mam Chand Pal Vs Smt. Shanti Agrawal reported in 2002 1 Allahabad Rent Cases 37 0

5.Sunil Kumar Mukherji Vs Kabiraj Bindo Madho Bhattachaya & ors. reported in (1977) 11 AHC CK 0010

6.Sheo Nath Prasad Vs IIIrd Additional District Judge & ors. reported in Allahabad Rent Cases, 1981 Page No. 207

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

1. The present writ petition has been preferred for setting aside the revisional order dated 12.12.2000 passed by the XIth Additional District, Judge, Lucknow in SCC Revision No. 107 of 1998 (Smt. Prema Devi Vs. Sri Shri Krishna Agarwal) and judgment and order dated 17.3.1998 passed by the Ist Additional Judge Small Causes Courts, Lucknow in S.C.C. Suit No. 71 /83 (Smt. Prema Devi Vs. Sri Krishna) and decreeing the said suit for all the reliefs prayed for i.e. ejectment, arrears or rent, water tax, drainage tax, damages and costs.

2. Learned counsel for the petitioner has submitted that the respondent was a tenant of the shop situated at 12 Gautam Budh Marg Lucknow belonging to the petitioner at a monthly rent of Rs. 100/- The respondent had defaulted in payment of arrears of rent, water tax and the drainage charges. The petitioner had served a notice dated 24.9.1983 terminating the tenancy and directing the respondent to pay the arrears within a particular period and failing which to vacate the shop immediately.

3. It is further submitted that when the respondent had neither paid the arrears nor vacated the shop, the petitioner preferred a suit under Section 20 of the Uttar Pradesh Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as " the Act, 1972") before Judge Small Causes. The suit preferred by the petitioner was dismissed by the impugned judgement dated 17.3.1998 against which the revision was preferred under Section 25 of The Provincial Small Cause Courts Act, 1887, which was also dismissed by the impugned order dated 12.12.2000.

4. It is further submitted that the learned trial court had failed to appreciate that the respondent i.e. the tenant had not deposited the arrears of rent and other dues on the first date of hearing of the suit as required under Section 20 (4) of the Act, 1972. The court below had also failed to appreciate that the respondent had a residential house in the city/within the same municipality hence as per the proviso to Sub-section 4 of the Section 20 of the Act, 1972, the respondent had to vacate the premises but the same was not considered by the learned trial court. In support of his submission, learned counsel for the petitioner had relied upon a judgment of Hon'ble Supreme Court in the case of

***Samar Pal Singh Vs. Chitranjan Singh reported in 2015 (3) ARC 463 and judgment of the this Court in the case of Heera Lal Vs. IInd ADJ and Another, 2010 2 ARC 31.***

5. It is further submitted that learned court below had also erred in giving a finding that the notice served by the petitioner is in contravention of the lease deed and was not a valid notice.

6. It is further submitted that the revisional court had not considered the illegalities/irregularities committed by the learned trial court while deciding the suit and dismissed the revision preferred by the petitioner mainly on the ground that the notice was not in consonance with the lease deed, as the petitioner had first terminated the tenancy and also demanded the arrears of rent and other dues as required under Section 20 (4) of the Act, 1972.

7. On the other hand, Sri Mohammad Arif Khan, learned Senior Advocate assisted by Sri Chandra Shekar Pandey has submitted that the arrears of rent and other dues as demanded by the petitioner were deposited prior to the first date of hearing after receiving summons from the court. A sum of Rs. 5,456/- was deposited on 15.2.1984 and Rs.560/- was deposited on 22.8.1984 i.e. total demand raised by the petitioner in the suit prior to framing of the issues and it is further submitted that first date of hearing is interpreted by this Court as well as by the Hon'ble Supreme Court that first date of hearing is when the court has applied his mind for adjudication of the case and in support of his submission, learned counsel has relied upon the judgment of Hon'ble Apex Court in case of ***Siraj Ahmad Siddiqui Vs. Shri Prem Nath Kapoor report in AIR 1993 SC 2525 and the in case of Mam Chand Pal Vs. Smt. Shanti Agrawal reported in 2002 1 Allahabad Rent Cases 370.***

8. It is further submitted that the house, which has been shown by the petitioner owned by the respondent is a residential house and is not being used for the purposes of commercial activity. The petitioner has also not adduced any evidence to show that the property, which is residential property can be used for commercial purposes or is being used by the respondent for commercial purposes. It was purely a residential house.

9. After hearing the parties and going through the record and the judgments relied by both the sides, the issues which are as below:-

(i) whether the amount deposited by the respondent/tenant would be treated as deposited prior to the first date of hearing or not and;

(ii) what would be the first date of hearing.

(iii) what would be the effect of being tenant/respondent the owner of residential building to deprive him the benefit of Section 20 (4) of the Act.

10. As per the petitioner first date of hearing would be when a written statement was filed by the respondent. The first date of hearing has been expressed in the statute in Explanation to the Sub-section 4 of Section 20 of the Act, 1972. For convenience the same is quoted hereinbelow:-

***"-- [Explanation. For the purposes of this sub-section-***

*(a) the expression "first hearing" means the first date for any step or*

*proceeding mentioned in the summons served on the defendant;"*

11. The said expression "first hearing" has been interpreted and decided by the Hon'ble Supreme Court in the case of ***Siraj Ahmad Siddiqui (Supra).*** The relevant paragraph is quoted hereinbelow:-

*"13. The date of first hearing of a suit under the Code is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions in the pleadings of the parties to the suit and in the documents filed by them for the purpose of framing the issues to be decided in the suit. Does the definition of the expression "first hearing" for the purposes of Section 20(4) mean some- thing different? The "step or proceedings mentioned in the summons" referred to in the definition should, we think, be construed to be a step or proceeding to be taken by the court for it is, after all, a "hearing" that is the subject matter of the definition, unless there be something compelling in the said Act to indicate otherwise; and we do not find in the said Act any such compelling provision. Further, it is not possible to construe the expression first date for any step or pro- ceeding" to mean the step of filing the written statement, though the date for that purpose may be mentioned in the summons, for the reason that, as set out earlier, it is permissible under the Code for the defendant to file a written statement even thereafter but prior to the first hearing when the court takes up the case, since there is nothing in the said Act which conflicts with the provisions of the Code in this behalf. We are of the view, therefore, that the date of first hearing as defined in the said act is the date on which the court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary."*

12. Subsequently, in another judgment in the case of ***Mam Chand Pal (Supra),*** the Hon'ble Supreme Court has interpreted the expression "first hearing" as it has interpreted in the case of ***Siraj Ahmad Siddiqui (Supra)*** and also placed reliance on catena of cases. The relevant paragraph in the case of ***Mam Chand Pal (Supra)*** :-

*"5. So far the question as to the meaning of the date of first hearing is concerned, the position stands well settled that it is the date on which the Court applies its mind to the facts and controversy involved in the case. Any date prior to such a date would not be date of first hearing. For instance date for framing of issues would be the date of first hearing when the Court is to apply its mind to the facts of case. As it relates to proceedings under the Small Causes Courts Act, there being no provision for framing of issues any date fixed for hearing of the case would be the first date for the purpose. The above stated position is clear from a catena of cases of the Allahabad High Court and some decisions of this Court also.* ***In Ved Prakash Wadhwa v. Vishwa Mohan, AIR 1982 SC 816: 1981 ARC 1 (S.C.),*** *this Court held that the date of first hearing would not be before a date fixed for preliminary examination of parties and framing of issues. It has further been held that if the amount is deposited before the date of first hearing, it would amount to compliance with the relevant provision of the Act.* ***In Sudarshan Devi & another v. Sushila Devi & another, 1999 (8) SCC 31: 1999 (2) ARC 668 (SC)****, the service of notice was by publication, hence tenant applied for copy of the plaint which was*

*furnished and fresh dates for filing WS and hearing was fixed. The Court considered the provisions of sub-section (4) of Section 20 of the Act along with Explanation (a) as well as series of earlier decisions and held that the date fixed for hearing of the matter was the date of first hearing and not the date fixed for filing of the written statement it has been observed that the emphasis in the relevant provision is on the word 'hearing'. The decision in the case of* ***Ved Prakash (supra)*** *was also relied upon. In yet another case* ***Advita Nand v. Judge, Small Causes Court Meerut & Ors., 1995 (3) SCC 407: 1995 (1) ARC 563****, the dates were fixed for filing of the written statement and later for hearing of the case after furnishing of a copy of the plaint, it was held that the Court was to apply its mind to the facts of the case on the date fixed for hearing and not earlier on the date fixed for filing of the written statement."*

13. After going through the judgments of the Hon'ble Supreme Court, it is settled preposition of law that the first date of hearing would not be the date when the written statement is filed by the respondent/defendant. The first date of hearing would be the date on which the court applies its mind to the facts and controversy involved in the case and this date may be said to be the date for framing of issues when the court applies its mind to the facts of the case. It is undisputed fact between the parties that the amount demanded by the petitioner in the suit was deposited by the tenant/respondent on the date fix for framing of the issues prior to framing of the issues so the respondent is entitled for the benefit of Section 20 (4) of the Act, 1972, as the respondent/tenant has deposited the amount demanded by the landlord prior to the first date of hearing.

14. As far as the third submission that the respondent has residential house and as per proviso to sub-section 4 of Section 20 of the Act, 1972. For convenience, the same is quoted hereinbelow:-

*"Provided that nothing in this sub-section shall apply in relation to tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city, municipality, notified area or town area."*

15. Wherein it is provided that nothing in sub-section shall apply in relation to a tenant, who has acquired in a vacant state, or has got vacated after acquisition, in residential building in the same city, municipality, notified area or town area. The learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court in support of his submission in the case of ***Samar Pal Singh Vs. Chitranjan Singh (Supra),*** the relevant paragraphs are quoted hereinbelow:-

*11. What is vehemently argued before us on behalf of the landlord is that in view of the proviso to sub-section (4) of Section 20, since the defendants have acquired as many as four houses within municipal limits of the city, as such, they are not entitled to protection provided under the sub-section. On the other hand, on behalf of the tenants, it is contended that the proviso to sub-section (4) deprives a tenant only if he has built or otherwise acquired a residential house in a vacant state in the city and in this connection it is further submitted that properties acquired by tenants are commercial.*

*12. From the language of sub-section quoted above, it is clear that under the proviso it is provided that nothing in*

*the sub-section could apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city. Learned counsel for the tenant/respondent did not dispute that the respondent has acquired property Nos. 621, 42, 43 and 72 in the municipal limits of Mowana (District Meerut). What the High Court has held is that the proviso deprives the tenant of the protection under sub-section (4) only if he has acquired residential building* ***. On carefully going through the record, we are unable to agree with the High Court that none of the properties acquired by the tenant are residential. (emphasis laid)*** *From the evidence on record, it is clear that only property no. 621 and property no. 42 are shops. The record reveals that property no. 43 consists of two rooms, one hall on the ground floor, and one room with Sehan on the first floor and property no.72 consists of five rooms. There is no specific finding that the nature of these two buildings is exclusively commercial* ***. In our opinion, High Court has erred in law by treating these two properties as commercial without there being evidence to that effect. A building which can be used for residential as well as commercial purposes cannot be said to be excluded from the clutches of proviso to sub-section (4), if built, or acquired in vacant state within limits of the municipal area in which the house from which eviction is sought by the landlord Needless to say in the present case building in question was let out for residential-cum-commercial purposes.(emphasis laid)***

*13. It cannot be said that object of sub-section (4) of Section 20 is to protect those tenants who have built, or acquired in vacant state a house which can be used for residential as well as commercial purposes. If word "residential" mentioned in the proviso is taken to mean what has been interpreted by the High Court, the object of the proviso would get defeated. As such, in our opinion, the High Court has erred in law in reversing the judgment and decree passed by the Judge Small Cause Court.*

16. Learned counsel for the petitioner has also relied upon the judgment of this Court in the case of ***Heera Lal (Supra)***. The relevant paragraph no. 5 is quoted hereinbelow.

*"5. It is urged on behalf of the petitioner that the finding of the trial Court that the petitioner tenant was not defaulter, was never set aside by the revisional Court. After going through the order of the prescribed authority, the Counsel for the petitioner has failed to point out any such finding. In fact the trial Court had come to the conclusion that the petitioner was a defaulter but due to the deposit of rent in Court, it gave the benefit of Section 20(4) of the Act. Further, once it was proved from the evidence on record that the tenant had acquired a residential building within the same municipal limit, he would not be entitled to protection granted under Section 20(4) of the Act. Thing finding of fact has not been shown to be either perverse or without any evidence."*

17. The said submission of the learned counsel for the petitioner that a specific plea was taken while replying the objection preferred by the respondent/tenant in the suit that the respondent/tenant had constructed a house in which he is living along with his family and the shop in which the respondent is the tenant is within the same municipality.

18. On being asked an specific query by the learned counsel for the petitioner whether any evidence was ever adduced or led by the petitioner before the trial court whether the said residential house constructed by the respondent can be used for commercial activity or not, or it was being used by the respondent for commercial purposes or not, learned counsel for the petitioner has very fairly replied that except that averment no evidence was adduced before the trial court that the residential building possessed by the respondent/tenant can be used for commercial purposes.

19. The judgment relied by the learned counsel for the petitioner i.e. in the case of ***Samar Pal Singh (Supra),*** wherein it has been observed by the Court that the High Court has erred in law by treating theses two properties as commercial without there being evidence to that effect. The property as alleged by the petitioner i.e. residential house in the name of the respondent/tenant is for purposes of residential as it is admitted by the petitioner before the trial court and petitioner had not adduced/lead any evidence that the same can be used for commercial purposes hence the judgment relied are not applicable on the facts of the present case.

20. As per the law settled in the case of ***Sunil Kumar Mukherji Vs. Kabiraj Bindo Madho Bhattachaya and others reported in (1977) 11 AHC CK 0010*** and in the case of ***Sheo Nath Prasad Vs. IIIrd Additional District Judge and others reported in Allahabad Rent Cases, 1981 Page No. 207***, wherein it has been held that the purpose of the proviso is clear and it is that in case the petitioner has an alternative accommodation which can be used for the purpose for which he occupied the building under his tenancy, he should not be given the benefit of sub-section 4 of Section 20 of the Act, 1972. It is also held by this Court that proviso to Section 20 (4) would be attracted only to those cases where the building under tenancy is in the use of the tenant for residential purpose. If the building under tenancy is being used by the tenant for the commercial or business purposes, it is obvious that the acquisition by the tenant of a residential accommodation cannot, in the context of things, be relevant for determining whether the tenant ought not be held entitled to claim the benefit contemplated under Section 20 (4) of the Act, 1972.

21. The relevant paragraph no. 4 of the judgment in the case of ***Sunil Kumar Mukherji Vs. Kabiraj Bindo Madho Bhattachaya and others reported in (1977) 11 AHC CK 0010*** is quoted herein-below:-

*"4. I may here point out that the explanation to the proviso was inserted by Section 13 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) (Amendment) Act, 1976. On a perusal of the proviso, I am of opinion that it applies only to a residential building for otherwise the use of the word "residential" before the word "building" in the proviso will have no meaning. If the intention was to make the proviso applicable to every building the word "residential" would not have been used before the word "building". It is an established rule of interpretation that no part of an enactment is to be held as surplusage. In the instant case since admittedly the premises in question were not held by the applicant for residential purposes, his having built a residential building within the meaning of the proviso would be of no consequence**. The purposes of the proviso is clear and it is that in case***

***the tenant has an alternative accommodation which he can use for the purpose for which he is occupying the building under his tenancy, he should not be given the benefit of Sub-section (4) (emphasis laid)****. In the instant case, however, since the premises in question were occupied by the applicant admittedly not for residential purpose but for running a press, namely, for commercial purpose, his having built a residential building in the year 1958 would not deprive him of the benefit which he was entitled to in view of his having made the deposit as contemplated by Sub-section (4). Another argument was addressed by counsel for the applicant, namely, that the proviso applied only to such buildings which had been constructed after the coming into force of the Act did not refer to such buildings which may have been constructed before its commencement. The argument is plausible but I am not expressing any final opinion on the matter inasmuch as the revision can be allowed on the ground already stated above.*

22. The relevant paragraph nos. 4 and 5 of the judgment in the case of ***Sheo Nath Prasad Vs. IIIrd Additional District Judge and others reported in Allahabad Rent Cases, 1981 Page No. 207*** are quoted herein-below:-

*4.) In the case of Sunil Kumar Mukherji (supra) a learned Single Judge of-this-court had occasion to deal with precisely the same controversy. After analysing the provision, and the principle underlying thereunder, the learned*

*Judge observed thus:-*

***"The purposes of the proviso is clear and it is that in case the tenant has an alternative accommodation which he can use for the purpose for which he is occupying the building under his tenancy, he should' not be given the benefit of sub-section (4). In the instant case, however, since the premises in question were occupied by the applicant admittedly not for residential purpose but for running a press, namely, for commercial purpose, his having built a residential building in the year 1958 would not deprive him of the benefit which he was entitled to in view of his having made the deposit as contemplated by sub-section (4). (emphasis laid)*** *Another argument was addressed by counsel for the applicant, namely, that the proviso applied only to such buildings which had been constructed after the coming into force of the Act did not refer to such buildings which, may have been constructed before its commencement. The argument is plausible but I am not expressing any final opinion on the matter, inasmuch as, the revision can be allowed on the ground already stated above."*

*5. I am in respectful agreement with the above statement of law. In my opinion, in the context of the aforesaid statutory provision and the purpose of the enactment of which the said provision is a part, it is obvious that the proviso to section 20 (4) would be attracted only to those cases where the building under tenancy is in the use of the tenant for residential purpose. If the building under tenancy is being used by the tenant for the commercial or business purposes, it is obvious that the acquisition by the tenant of a residential accommodation can not in the context of things, be relevant for determining whether the tenant ought not to be held, entitled to claim the benefit contemplated under Section 20 (4). In my opinion the tenant was clearly entitled to claim the benefit of Section 20 (4) and the learned District Judge has rightly held so.*

23. After considering the facts and circumstances and discussions made above, now it is not necessary to replicate on the issue of the notice served by the petitioner to the respondent. The deposit as demanded by the petitioner from the respondent prior to the framing of the issues is admitted by both the parties i.e. by the learned counsel for the petitioner and learned counsel for the respondent hence amount was deposited on the first date of hearing, prior to the framing of the issues. The property which the petitioner has alleged in his reply to the objection filed by the respondent in a suit, it is an admitted case that it is a residential house in which the respondent is residing with his family and it is also admitted that no evidence was led before the trial court whether it can be used for the commercial purposes or not and nor it has been mentioned that it is being used by the respondent for commercial purposes, as such the petition is devoid of merit and is liable to be dismissed.

24. The writ petition is **dismissed.**

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**(2024) 7 ILRA 177**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 16.07.2024**

**BEFORE**

**THE HON'BLE SAURABH LAVANIA J.**

Writ B No. 288 of 2024

**Mahesh Chandra Saxena & Ors.** **...Petitioners**
**Versus**
**State of U.P. & Ors.** **...Respondents**

**Counsel for the Petitioners:**
Nagendra Kumar Khare, Mohammad Aslam Khan, Mohan Singh

**Counsel for the Respondents:**
C.S.C

**U.P. Zamindari Abolition and Land Reforms Act,1950-Section 20 (b)-**Entries indicated in the documents relied by the Petitioners are not genuine-in 1356 Fasli , the land in dispute was recorded as "Imarati Lakdi ka Jungle" (Timber Trees) in U.P. Land Records Manual-land not recorded in the name of Raja Brijraj Bahadur Singh-area of said Gata was reduced by making correction/cutting in the Khatauni and U.P. Land records Manual –these cutting/corrections were made without any order of competent Revenue Official-benefit of Sec. 20 (b) of the Act, 1950 would be available to the Petitioners if the entry was genuine-no right available to them based upon the sale deed as their basis is not a valid document-***'Sublato Fundamento Cadit Opus'-'Nemo dat quod non habet'.***

**W.P. dismissed.** (E-9)

**List of Cases cited:**

1. Ram Avadh & ors. Vs Ram Das & ors. (2008) 8 SCC 58

2. Jasraj Inder Singh Vs Hemraj Multanchand. (1977) 2 SCC 155

3. Mohd. Karrar Ali and 2 others Vs the St. of U.P., AIR 1954 All 753

4. T.N. Godavaraman Thirumulpad etc. Vs U.O.I.& ors.; AIR 1997 SC 1228

5. Consolidation No. 1268 of 1979 (St. of U.P. Through The Divisional Forest Officer Vs The Deputy Director of Consolidation, U.P. & ors.)

6. St. of U.P. Vs Dy. Director of Consolidation & ors.; AIR 1996 SC 2432

7. Gyanendra Singh & anr. Vs Additional Commissioner, Agra Division, Agra & ors.; 2003 (95) RD 286

8. Sharad Kumar Dwivedi Vs St. of U.P. & ors. 2022 SCC OnLine All 466

9. Writ - C No.1001953 of 2006 (Ramesh Vs Additional Commissioner, Lucknow And 2 Ors.)

10. T.N. Godavaraman Thirumulpad etc. Vs U.O.I.& ors.; (1997) 2 SCC 267

11. Bachan & ors. Vs Kankar & ors. (1972) 2 SCC 555

12. Mohd. Ramzan Khan Vs D.D.C., Allahabad & ors.; 2009 SCC OnLine All 1111

13. Gujj Lal & ors. Vs Dy. Director of Consolidation, Firozabad and Ors., 2015 SCC OnLine All 8063

14. Smt. Sonawati & ors. Vs Sri Ram & anr.; 1967 SCC OnLine SC 128

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Mohd. Arif Khan, learned Senior Advocate with Advocate(s) Sri Nagendra Kumar Khare, appeared for petitioners. Advocate(s) Sri Hemant Kumar Pandey and Sri Dev Prakash Mishra, appeared for the State.

2. By means of present petition, the petitioners have assailed the order dated 10.04.2023 passed by respondent No. 2-District Magistrate/District Deputy Director of Consolidation, Lakhimpur Kheri in Case No. 2050/2022, Computerized Case No.D202210430002050 (Mahesh Chandra Saxena and Others vs. Prabaghiya Vanadhikari and Others) as also the order dated 16.10.2019 passed by respondent No.3-Consolidation Officer, Antim Abhilekh Second, Lakhimpur Kheri in Case No. 79/68 (Mahesh Chandra Saxena and Others vs. Prabaghiya Vanadhikari and Others).

3. After hearing the learned Senior Advocate for petitioners and learned counsel for the State, the judgment was reserved on 18.03.2024. On this date, learned counsel for the parties prayed for liberty to submit their written submissions alongwith some relevant documents, for which they were permitted.

4. The written submissions dated 01.04.2024 signed by Mohd. Aslam Khan, Advocate was submitted on behalf of petitioners. Alongwith written submission following have been annexed:-

(i) Copy of judgment passed by the Hon'ble Apex Court in the case of **Smt. Sonawati and Others vs. Sri Ram and Another; 1967 SCC OnLine SC 128**. In this case, based upon the entry of 1356 Fasli (1949 A.D.) rights over the land provided to Pritam Singh were interfered with by this Court and the judgment of this Court was affirmed by the Hon'ble Apex Court. The judgment of affirmation was passed by the Hon'ble Apex Court after observing that name of Pritam Singh was surreptitiously entered in Khasra for 1356 Fasli (1949 A.D.) and after taking note of Section 20(b) of U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short "Act of 1950") and the fact that in the Khasra Barahsala i.e. Consolidated Khasra for 1347-1358 Fasli (1940 to 1951 A.D.) Tota Ram and Lajja Ram are shown as persons cultivating the land and there is no record of name of any sub-tenant on the land.

(ii) Copy of judgment passed by the Hon'ble Apex Court in the case of **Ram Avadh and Others vs. Ram Das and Others (2008) 8 SCC 58**. In this case, the Hon'ble Apex Court, after considering the Section 20 of the Act of 1950 including Explanation III therein as also the entry in the Khatauni for the year 1356 to 1366 Fasli (1949 to 1959 A.D.) interfered in the judgment of the High Court and the revisional Court and affirmed the decision

of the Consolidaton Officer and Settlement Officer of Consolidation and provided rights to the appellants therein.

(iii) The copy of the judgment passed by the Hon'ble Apex Court in the case of **Jasraj Inder Singh vs. Hemraj Multanchand. (1977) 2 SCC 155**. This judgment relates to order of remand and according to this, the observations made in the remand order should be complied with by the authority to whom the matter was remanded back.

(iv) Copy of the United Provinces Private Forests Act, 1948 (U.P. Act No. 4 of 1949).

(v) Copy of the judgment passed by this Court in the case of **Mohd. Karrar Ali and 2 others vs. the State of U.P., AIR 1954 All 753.** According to this pronouncement, U.P. Private Forests Act, 1948 has no application to the land other than forests.

(vi) Copy of Para A-124 of U.P. Land Records Manual.

(vii) Copy of Chapter II of Indian Forests Act, 1927 (in short "Act of 1927") which includes Section 20-A as applicable in Uttar Pradesh.

(viii) Copy of the counter affidavit filed by the State in Writ Petition No. 174 (M/S) of 2001 (Mahesh Chandra Saxena & Ors. vs. State of U.P. & Others) annexing therewith the copies of Khatuani of 1356 Fasli (1949 A.D.) and 1359 (1952 A.D.) Fasli. The copy of counter affidavit has been filed to establish that in 1359 Fasli (1952 A.D.) there was no cutting.

(a) It would be apt to indicate that in the Khatauni of 1356 Fasli (1949 A.D.) the area of Gata/Plot No. 21 is mentioned as 431.46 acre and the name of Raja Brijraj Bahadur Singh does not find place, (the basis of claim of predecessor-in-interest of petitioner and the petitioners), and according to the same, entire land was recorded under entry/Ziman-8(iii)(a)(1), *"Imarti Lakdi Ka Jungle"*.

(b) It would be relevant to indicate that from the certified photocopy of the Khatauni of 1359 Fasli (1952 A.D.), (annexed as Annexure No. 4 to the writ petition), it is evident that area of Gata/Plot No. 21 i.e. 431.46 acres mentioned in Khatauni of 1356 Fasli (1949 A.D.) was reduced by making correction/cutting to 393.91 acres and this correction/cutting was made without any order of the competent Revenue Official and it bears signature of someone, whose designation has not been disclosed. It is also evident from this Khatauni that after reducing the original area i.e. 431.46 acres to 393.91 acres different Gata(s)/Plot(s) were carved out as Gata No(s). 21, 21/2, 21/3, 21/4, 21/5, 21/6 & 21/7. In the Khatauni, the names of Daal Singh S/o Mom Raj Singh, Gopal Singh S/o Sagar, Buddha S/o Kamma, Surta S/o Buddha, Param Singh S/o Mom Raj Singh and Amru S/o Ram Ram, respectively, showing Barley (Jow) crop against Gata No(s). 21/1 to 21/7, respectively, and this was also carried out without any order in this regard.

5. The written submission dated 24.05.2024 by the State, signed by Sri Hemant Kumar Pandey, Sri Dev Prakash Mishra and Sri Yogesh Kumar Awasthi, annexing therewith following documents was submitted. Alongwith this written submissions following have been annexed:-

(i) Copy of the sale deed(s) of Mahesh Chandra Saxena and Sanjiv Kumar Saxena, Nanhey Lal Sharma, Smt. Vijay Rani Sharma, Nanhey Lal Sharma, Smt. Kamla Saxena, Smt. Vijay Rani Sharma, respectively.

(ii) Copy of the Khatauni of 1356 Fasli (1949 A.D.) and 1359 Fasli (1952 A.D.).

(iii) Copy of the order dated 18.07.2018 passed by the Consolidation Officer.

(iv) Copy of the report dated 07.06.1999 prepared and submitted by Sri Arun Kumar Mishra, Commissioner, Lucknow Division, Lucknow before the Principal Secretary, Forests Department.

(v) Copy of Form-41 prepared during consolidation proceedings.

(vi) Copy of Form-45 prepared during consolidation proceedings.

(vii) Copy of Khatauni for 1424-29 Fasli (2017-2022 A.D.).

(viii) Copy of the judgment passed by the Hon'ble Apex Court in the case of **T.N. Godavaraman Thirumulpad etc. vs. Union of India and Others; AIR 1997 SC 1228.** In this case, the Hon'ble Apex Court described the word 'Forest'.

(ix) Copy of judgment passed by this Court in **Consolidation No. 1268 of 1979 (State of U.P. Through The Divisional Forest Officer vs. The Deputy Director of Consolidation, U.P. and Others).** In this case, the Hon'be Apex Court has issued certain guidelines to save the forest and to reduce the de-forestation.

(x) Copy of judgment passed by the Hon'ble Apex Court in the case of **State of U.P. vs. Dy. Director of Consolidation and Others; AIR 1996 SC 2432**. This case also deals with Forest land and according to this case, no right would be available over the Forest land after notification in terms of Section 4 and 20 of the Indian Forest Act, 1927.

(xi) Copy of Section 20-A of Indian Forest Act, 1927.

(xii) Copy of order dated 03.06.2016 issued by the Chief Conservator of Forest, U.P., Lucknow for making compliance of the directions issued by the Hon'ble Apex Court in the case of **T.N. Godavaraman (Supra).**

(xiii) Copy of judgment passed by the Hon'ble Apex Court in the case of **T.N. Godavaraman Thirumulpad vs. Union of India & Ors.** dated 03.12.2010.

6. The facts indicated in the written submissions dated 01.04.2024 filed by learned counsel for petitioners and the facts indicated in the petition are similar and learned Senior Advocate in his oral submissions placed all the relevant facts and law before this Court in support of his contention. Accordingly, to take note of relevant facts and the submissions advanced by the learned Senior Advocate, the averments made in the written submissions dated 01.04.2024 are extracted hereinunder:-

*"1. The property in dispute, namely, Plot no.21. having an area of 431.61 acres, situate in Mohal Mustahakam, Village, Alenganj, Pargana, Bhud, District, Kheri, before abolition of Zamindari i.e. in khatauni 1356 Fasli was recorded in the Khewat Khatauni of Raja Brijraj Bahadur of Jhandi Estate in Ziman 8 (3) (i) of Non-Z.A. khatauni i.e. "Krishi Yogya Banjar Bhumi and Imarati Lakari Ke Van". The predecessor in interest of the petitioners occupied cultivable portion of plot no.21 in 1358 Fasli and had sown barley crop without the consent of the Zamindar with the result, their names were entered/ recorded in khatauni 1359 Fasli prepared by the Lekhpal in Red Ink in Ziman 5-A as U.P. Land Records Manual was applicable to Non-Z.A. Area of Oudh with a duration of one year.*

*2. The names of the predecessor in interest of the petitioners were recorded in khatauni 1359 Fasli over plot nos.21/2*

*to 21/7 (annexure no.4). The said entry continued. The village was brought under consolidation operations, after issue of notification under section 4 of U.P. Consolidation of Holdings Act (hereinafter called) the Act and the names of the predecessor in interest of the petitioners were recorded. Notification under section 52 of the Act was published in 1392 Fasli and the records were remitted to Tehsil Authorities, Tehsil, Gola, District, Kheri. Fresh khatauni was prepared in 1395 Fasli and the names of the predecessor in interest of the petitioners, namely, Dal Singh & others were recorded over new nos. 22Kha to 22Chha.*

*3. The petitioners purchased the land in dispute, admeasuring 31.35 acres from the recorded tenure holders under registered sale deeds dated 17.3.1997, 28.4.1997, 2.5.1997, 1.7.1997 and 4.7.1997 for valuable sale consideration.*

*4. In pursuance to the sale deeds, possession was delivered to the petitioners and their names were also mutated in revenue records. Prior to the purchase by the petitioners, they made enquiries and they were informed by the Forest Settlement Officer, Kheri that the plots in dispute were not acquired by the Forest Department for reserve forest. It is submitted that a notification under section 4 of Indian Forest Act in respect to an area of 246.67 acres was issued relating to plot no * 0.22 = 21/2 old number and other plots. Thereafter a notification under section 20 of the Act was issued in respect to aforesaid plots on 26.4.1968 (annexure no.8).*

*5. As stated above, after purchase of the property in dispute from the recorded bhumidhars, the names of the petitioners were mutated and they are bonafide purchasers for valuable consideration without notice.*

*6. After a lapse of 45 years, an application was made by the Divisional Forest Officer (opposite party no.4) for deleting the names of the predecessor in interest of the petitioners from the aforesaid plots, stating therein that the property in dispute is reserve forest. Sub Divisional Officer, Gola Gokran Nath, called upon a report from the Tehsildar, Gola, who submitted a report on 16.5.1995 (annexure no.10), stating therein that the recorded tenure holders as per the report of the Lekhpal and Supervisor Kanoongo are in continuous possession and are paying its land revenue. A notification under section 20 of the Act was issued. On a comparison of the settlement map, it is apparent that plot nos.22 and 27 are outside reserve forest, standing on plot nos.21 and 23 and reserve forest situate at a distance of one km away from the plots in dispute. The Sub Divisional Officer, on a consideration of entire facts and the evidence on record, including the report submitted by the Tehsildar, rejected the application made by the Forest Department vide order dated 30.6.1995.*

*7. After rejection of the application made by the opposite party no.4, no action was taken by the Forest Department, assailing the said order by filing an appeal or revision and the petitioners, as stated above, are in continuous cultivtory possession.*

*8. It is submitted that as mentioned above, the petitioners being in occupation in 1358 Fasli and were cultivating the land in dispute and being recorded as occupants in 1359 Fasli, by virtue of section 20 (b) of the Act read with Rule 177 - A , they became Sirdar and lateron Bhumidhar by virtue of amendment made under section 131 of U.P.Zamindari Abolition & Land Reforms Act, as has been laid down by this Hon'ble Court as well as*

*Apex Court in the case of Smt. Sonawati, 1968 R.D. pages 151 and 2008 (8) SCC, page 58, Ram Avadh & others versus Ramdas & others.*

*9. The petitioners submit that longstanding entries could not be corrected in proceedings under section 33/39 of U.P.Land Revenue Act, as neither the State Government nor the Forest Department had ever assailed the longstanding entries recorded in the name of the predecessor in interest of the petitioners and after purchase. in the name of the petitioners, hence the application for correction of the entries made by the opposite party no.4 was rightly rejected by the Sub Divisional Officer, Gola.*

*10. The petitioners further submit that no notification, either under section 4, 6 or under section 20 of Indian Forest Act had so far been issued in respect to the plots in dispute. As mentioned above, since the land was lying vacant, the predecessor in interest of the petitioners starting cultivating the land in dispute without the consent of the landlord and being in occupation, their names were recorded by the concerned Lekhpal in Ziman 5-A of U.P. Land Records Manual applicable to Oudh.*

*11. Again an application was made by the Divisional Forest Officer, South, Kheri for correction of the entries in revenue records in respect to the plots in dispute, on which a report was again called upon from the Tehsildar, Gola Gokran Nath.*

*12. Sub Divisional Officer, Gola, even without affording any opportunity of hearing to the petitioners, passed an order on 28.10.1999 (annexure no. 13) for deleting the names of the petitioners and recording the land in dispute in the name of Forest Department "Imarati Lakari Ke Jangal, Zere-Intezam, Forest Department."*

*13. Being aggrieved by the exparte order dated 28.10.1999, the petitioners filed a revision no.54 (L.R.) 1999-2000 before the Board of Revenue, which was allowed vide order dated 11.10.2000 (annexure no.14) and the matter was remanded to the Sub Divisional Officer, Gola to pass fresh orders on merits, after impleading Gaon Sabha as well as after affording opportunity to the petitioners to adduce their evidence, after examining the original records. While remanding the matter, the Board of Revenue had specifically observed in para 4 of the judgment to the effect that the Forest Department could not produce any evidence in support of its claim that the land belongs to the Forest Department. It was further observed in para 6 of the order that the order dated 28.10.1999 passed by the Sub Divisional Officer is illegal and is liable to be set aside. The revision deserves to be allowed in part. A direction was issued that after registering a case under section 33/39, by arraying Gaon Sabha as a party, the matter may be decided afresh and in case, the entries made in revenue records are found to be forged, proceedings may be initiated against erring officials.*

*14. The petitioners being aggrieved by the order dated 11.10.2000 (annexure no.14) filed writ petition (M.S.) No.174 of 2001 which was allowed vide judgment dated 12.9.2014. It was observed that the petitioners claimed title under section 20 (b) of U.P.Act No.1 of 1951 as their predecessor in interest were recorded occupant in khatauni 1359 Fasli and in view of the law laid down by the Apex Court, entry in 1359 Fasli must be genuine and made according to the provisions of the Land Records Manual and not a fake entry. The said issue has not been decided by any court or authority. No proceedings*

*for correction of land records were taken under U.P. Consolidation of Holdings Act and prior entries continued. It was further observed that in the absence of any notification under section 117 of U.P. Zamindari Abolition & Land Reforms Act, Gaon Sabha has nothing to do in the matter. The matter was thus remanded to the Deputy Director of Consolidation, Kheri to conduct a proper enquiry, after giving an opportunity of hearing to the parties, if necessary, he may frame an issue and remit the matter to the Consolidation Officer for recording oral and documental evidence of the parties and may pass appropriate orders after receiving evidence and findings of the consolidation officer, after hearing the parties.*

*15. After remand, the Deputy Director of Consolidation even without complying the terms of the order of remand, as in view of the law laid down by the apex court in the case of Jasraj versus Hemraj, AIR 1977 SC page 1011. remanded the entire matter to the Consolidation Offier, where the statement of Forest Ranger was recorded. He had specifically stated that he does not know the number of the plots mentioned in the notification under section 20 of the Forest Act. He also does not know the number of the plots in dispute and their corresponding numbers prior to consolidation operations.*

*16. It would be pertinent to point out here that prior to passing of the order by the Sub Divisional Officer, on the subsequent application made by the Forest Department (opposite party no.4) for correction, an exparte report was submitted behind the back of the petitioners as they were not afforded any opportunity to participate in the said enquiry and this Hon'ble Court, while allowing the writ petition filed by the petitioners, after setting aside the orders passed by the Sub Divisional Officer and the Board of Revenue, remanded the matter to the Deputy Director of Consolidation, Kheri to conduct a proper enquiry, after giving an opportunity of hearing to the parties. No such enquiry, after remand of the matter by this Hon'ble Court, was ever made and the Sub Divisional Officer, resting upon the exparte report of the Commissioner (annexure no.12), he passed an order for deleting the names of the petitioners from the plots in dispute and recording the same in the name of Forest Department, as reserve forest, although this Hon'ble Court has also observed, while allowing the writ petition that Forest Department had failed to substantiate its claim by leading any evidence which is also evident from the notification dated 1.7.1968 issued under section 20 of the Forest Act, mentioning the notification issued on 29.3.1954 under section 4 of the Forest Act, wherein the plots in dispute does not find mention, hence the plots in dispute could not be said/held to be reserve forest, more particularly in view of the State Amendment made under section 4 of the Indian Forest Act published on 1.2.1966.*

*17. Being aggrieved by the order dated 16.10.2019 (annexure no.2) passed by the Consolidation Officer, to whom, the matter was remanded by the Deputy Director of Consolidation, Kheri to decide the matter on merits, though in pursuance to the order of remand passed by this Hon'ble Court, vide judgment dated 12.9.2014 (annexure no.15), a direction that was issued to the Deputy Director of Consolidation, Kheri to conduct a proper enquiry, after giving opportunity of hearing to the parties, decide the same. Thus the order passed by the Consolidation Officer (annexure no.2) was not only illegal but also against the terms of the order of*

*remand, in view of the law propounded by the Apex Court aforesaid.*

*18. Being aggrieved, the petitioners filed an appeal before the Settlement Officer of Consolidation, Kheri, who remitted the appeal to the Deputy Director of Consolidation, Kheri, after quoting the observations made by this Hon'ble Court vide judgment dated 12.9.2-14 (annexure no. 19).*

*19. The petitioners thereupon filed a revision under section 48 (1) of U.P. Consolidation of Holdings Act, befoe the Deputy Director of Consolidation, Kheri, who also endorsed the order passed by the Consolidtion Officer, resting upon exparte report submitted by the Commissioner, which was inadmissible as he had not come in the witness box to prove the said report. Deputy Director of Consolidation, Kheri (opposite party no.2), except quoting the judgments passed by the apex court had not decided the lis as per the observations made by this Hon'ble Court, vide judgment dated 12.9.2014 (annexure no.15). Thus the order passed by the opposite party no.2 was not only illegal but also without jurisdiction as well as against the terms of the order of remand. Now it is well settled proposition of law as has been propounded by the Apex Court that if the matter has been remanded by the higher court to the lower court with certain directions, the lower court is bound by the terms of the order of remand and has to decide the matter accordingly and cannot traverse beyond the specific terms of the order of remand. Thus the order passed by the opposite party no.2 is not only illegal but also without jurisdiction.*

*20. Main controversy involved, as has been observed by this Hon'ble Court vide 12.4.2014 (annexure no.15), has not yet been decided and the opposite party no.2, though he was required to decide himself, but instead of doing so, he had remitted the matter to the Consolidation Officer, after deciding the matter in accordance with law merely relying upon the exparte report of the Commissioner which was inadmissible. allowed the application made by the Forest Department and the said order has been endorsed by the opposite party no.2.*

*21. The petitioners submit that there is an enactment known as United Provinces Forest Act, 1948 (U.P.Act No.4 of 1949) (hereinafter called) the Private Forest Act of which section 2 provides that the said Act will not apply to any land which is vested in the Government or to any land in respect of which notifications and orders have been issued under the Indian Forest Act. Section 3 (15) defines the Private Forest. Section 13 deals with the management of the forests by owners under an approved working plan. Section 25 deals with the extinction of rights other than the landlords' rights. Section 42 deals with the right of rightholders to be exercised in accordance with the rules, while section 46 relates to the release of vested forests. As mentioned above, the plots in dispute had never been acquired for reserve forest, which could not be, in view of the submissions made hereinabove i.e. the State Amendment, made in section 3 of the Indian Forest Act and further after insertion of Chapter 5-A by U.P.Amendment, the claimant has been defined in section 38-A (a) means the claimants, claiming to be entitled to the land or any interest therein, acquired, owned, settled or possessed or purported to have been acquired, owned, settled or possessed whether under through or by any lease or license executed before the commencement of Act no.1, 1956 or owned in accordance with the provisions of any enactment, including the said Act. The*

*petitioners, who have acquired rights by remaining in cutltivatory possession in 1359 Fasli, by virtue of section 20 (b) of the Act became Sirdar and after abolition of zamindari and later on after amendment of Act no.131, they became bhumidhar with transferable rights. The State, Forest Department as well as Gaon Sabha had failed to establish the said entry to be forged or fictitious and the sole reliance placed by the Deputy Director of Consolidation as well as Consolidation Officer that there was a cutting/interpolation in the khatauni, the State through its counter affidavit has specifically stated that subsequently an insertion was made below the area of plot no.21 i.e. 393.910 acres as 431.46 acres which is evident from the khatauni filed by the petitioners as annexure no.4 is incorrect as the State of U.P. filed a counter affidavit in writ petition 174 of 2001 (M.S.) filed by the petitioners in which they had annexed the Photostat copy of the certified copy of khatauni obtained on 16.1.1999 as (annexure no.CA-1), there was no such cutting or interpolation. Photostat copy of the said khatauni is annexed herewith. Thus the findings recorded by the opposite parties no.2 and 3, dismissing the revision and allowing the application made by the Forest Department (opposite party no.4) are not only illegal but also against the law.*

*22. The petitioners submit that the provisions of United Provinces Forest Act, 1948 came up for consideration before this Hon'ble Court in the case of Mohd. Karrar Ali & others versus State of U.P. & others) reported in 1954 Allahabad, page 753, wherein it was propounded that U.P. Private Forest Act has got no application to the land other than forests.*

*23. The petitioners submit that so far as section 20-A inserted by the State Amendment Act in the Forest Act is concerned, the same has got no application and the land in dispute could not be said/held and deemed to be reserve forest as the land in dispute does not belong to the category mentioned in that section and the findings recorded by the opposite party no.2 that the land in dispute is deemed forest is vitiated in law. The land which is recorded in the revenue records as forest land belonging to the government in respect to that the said provision will apply and not in respect to the land in dispute of which the petitioners became Bhumidhar by operation of law being recorded occupant in khatauni 1350 Fasli in accordance with the provisions of Land Records Manual, para 123 in Red Ink, with the result, they became bhumidhar.*

*24. In view of the submissions made hereinabove, the writ petition may be allowed. The orders passed by the opposite parties no.2 and 3 be set aside."*

7. From the side of State opposing the present petition and supporting the impugned order(s), in nutshell, Sri Pandey, learned counsel for the State submitted as under:-

(i) Intentionally Khatauni of 1356 Fasli (1949 A.D.) of Gata/Plot No. 21 has not been placed on record. In the 1356 Fasli (1949 A.D.), the land in dispute was recorded as "*Imarati Lakdi Ka Jungle"* (Timber Trees), as indicated in entry (8) (iii)(a)(1) of Para 124-A of U.P. Land Records Manual and in this year the total area was 431.61 acres and in the Khatauni of 1356 Fasli (1949 A.D.) the land in dispute was not recorded in the name of Raja Brijraj Bahadur Singh. To establish the same, a copy of Khatauni of 1356 Fasli (1949 A.D.) was placed before this Court and the same was made part of record.

(ii) In the 1356 Fasli (1949 A.D.) without any order or recording any reasons, the area of Gata/Plot No. 21 was reduced from 436.46 to 431.61 acres as in the Khatauni of 1346 Fasli (1939 A.D.) the area was 436.46 acres. Subsequently in the 1359 Fasli (1952 A.D.), the area of Gata/Plot No. 21 was again reduced as in the Khatauni of 1359 Fasli (1952 A.D.), 37.55 acres were recorded in the name of predecessor-in-interest of petitioners that too without any order of competent person/authority under Ziman 5-A entry, which finds place in Para A-124 of U.P. Land Records Manual, and the same says that "*Occupiers of lands without title when there is no one already recorded in column 5 of the khasra*".

(iii) The Ziman 5-A entry favourable to the petitioners was not based upon any order of comptent revenue Official and in fact, is not in accordance with the procedure prescribed under the U.P. Land Records Manual including Para(s) 80, 81-A, A-80, A-81, 89-A and 89-B and accordingly this entry of 1359 Fasli (1352 A.D.), favourable to the petitioners, is completely fictitious, baseless, bogus, surreptitious and forged and can't be relied upon to extend the benefits to the petitioners.

(iv) The specific findings have been made in the impugned order(s) on the entry favourable to the petitioners and accordingly petitioners ought to have placed the relevant material on record to impeach the said findings related to the entries in the revenue record particularly the entries made in the Khatauni of 1359 Fasli (1952 A.D.), in which names of predecessor-in-interest of the petitioners were entered after creating/carving new Gata(s)/Plot(s) No. 21/1 to 21/7 from Gata/Plot No. 21 that too without any order in this regard. However, no such document has been placed on record to impeach the said findings.

(v) The basis of initiation of proceedings against the petitioners was the report dated 07.06.1999 (Annexure No. 12 to the writ petition). According to this report, the entries, as indicated by the petitioners, of 1356 Fasli (1949 A.D.) and 1359 Fasli (1952 A.D.) are forged/bogus entries and to controvert and impeach the same, no document has been placed on record except a questionnaire, annexed as Annexure No. 3 to the petition, which is also a bogus document and is not liable to be relied upon.

(vi) If the facts mentioned in Para 4 of the petition are taken to be true, though not correct, that Gata/Plot No. 21 area 431.61 acres situated in Mohal Mustahkam Village-Allenganj Pargana-Bhud, Tehsil-Gola, District-Lakhimpur-Kheri, before abolition of zamindari i.e. in Khatauni of 1356 Fasli (1949 A.D.) was recorded in the khewat Khatauni of Raja Brijraj Bahadur of Jhandi Estate in Ziman 8(3)(1) of Non-ZA Khatauni, then also the petitioners would not get any right over the said land or part of the said land because the correct entry i.e. 8(iii)(a)(1) and the note appended to the same itself indicate that the same was under the control of Forest Department meaning thereby under the control of State Government and further, for the reason that at the time of submission of report dated 07.06.1999 trees were about 80-100 year old and accordingly, present age of the trees would be about 105-125 year and the trees of Sal (Shakhu) were/are covered under the expression "*Timber Tree*" as indicated in the said entry i.e. 8(iii)(a)(1) readwith note appended to the same.

(vii) The alleged entry of 1356 Fasli (1949 A.D.) in favour of Raja Brijraj Bahadur Singh, as indicated in questionnaire, is forged one and the fact

that questionnaire itself is forged/fabricated and bogus document can be deduced from the fact that in the year 1999 the age of trees was found to be between 80-100 year and accordingly in the 1356 Fasli (1949 A.D.) or 1359 Fasli (1952 A.D.) the age of the trees must be between 40-60 year and to impeach/controvert the same and also the findings related to existence of trees over the land in issue, which in fact was admitted by Mahesh Chandra Saxena and Nanhey Lal Sharma (Petitioner No. 4) during their examination and the same is evident from the impugned order dated 10.04.2023, nothing has been placed on record and accordingly, the entries of the 1356 Fasli (1949 A.D.) and 1359 Fasli(1952 A.D.) including regarding crop of Barley/Jow etc., as pleaded, are bogus and no right could be provided to any person including the petitioners, who have purchased the land from the persons whose names were recorded in the Khatauni of 1359 Fasli (1952 A.D.) without any order in this regard.

(viii) The land indicated in terms of entry 8(iii)(a)(1) in the revenue record is a 'Public Utility Land' and this entry is similar to the entry indicated in Para A-124 applicable in the area over which Act of 1950 applies and after considering the entry i.e. 5(iii)(a)(1) provided under Para A-124, this Court has already settled the issue in various pronouncements according to which, no right would be available to any person over such type of lands.

(ix) So far as the contention of learned counsel for the petitioners is concerned that the petitioners are saved under Section 20(b) of the Act of 1950. The same has no force as petitioners' case is basically based on entry in the revenue record of the Khatauni of 1359 Fasli (1952 A.D.) and the Section itself indicates 1356 Fasli (1949 A.D.).

(x) The benefit of Section 20(b) of the Act of 1950 would be available if the entry was/is genuine and in this case, the entry of 1359 Fasli (1952 A.D.) itself was/is bogus and fraudulent and as such, no right would be available to the petitioners based upon the sale deed as their basis itself is not a valid document in the eye of law. In this view of the matter, maxim ***'Sublato Fundamento Cadit Opus'***, which means *'foundation being removed, the structure falls',* would apply in the present case.

(xi) A person, who was not having any title, cannot create a title. In view of the fact that the predecessor-in-interest of petitioners were having no right over the land in dispute in terms of entry 8(iii)(a)(1) in the revenue record as also that without any order, the corrections were made in the Khatauni of 1359 Fasli (1952 A.D.), no right would flow to the petitioners despite sale deed(s) in their favour. Reference can be made to the maxim ***'Nemo dat quod non habet'*** which means *'no one can give what they do not have'.*

(xii) In this case, if the orders are interfered with on account of jurisdiction of respondent No.2 and/or on the ground that respondent No.2 has failed to act in terms of order of remand of this Court dated 12.09.2014 or on other procedural irregularities, then in that event, the bogus/forged entries, favourable to the petitioners, would revive in the revenue records, which were not in consonance with the law on issue. Thus, no interference is required in the matter.

(xiii) The entry in the revenue record was undisputedly in the 1356 Fasli (1949 A.D.) and prior to same was 8(iii)(a)(1) i.e. "under the management of Forest Department (including erstwhile forest made over to Forest Department)"

and a conjoint reading of the same as also Section 117 of the Act, 1950 and Section 132 of Act of 1950 would indicate that no right can be provided to an occupier of the forest land or land managed by the Forest Department.

(xiv) The rights were provided to the predecessor-in-interest of the petitioners on the basis of entry in Khatauni of 1359 Fasli (1952 A.D.) ignoring the fact that the original Gata/Plot No.21 indicated in the 1356 Fasli (1949 A.D.) was renumbered as 21/1 to 21/7 without any order of the revenue authority and to dispute or controvert this fact, no order has been placed on record and accordingly, it shall be presumed that the petitioners are admitting the fact that without any order of competent authority, the entries/corrections were made while preparing Khatauni of 1359 Fasli (1952 A.D.).

(xv) In the matter, an inquiry was also carried out by the Commissioner, Lucknow Division, Lucknow and after concluding the inquiry, he submitted his report dated 07.06.1999 to the Principal Secretary, Forest Department. The inquiry report is part of the record as Annexure No.12 to the present petition appended at page No.136 and a perusal of the same indicates that in the 1346 Fasli (1939 A.D.) and 1356 Fasli (1949 A.D.), the land was recorded under Category 8(iii)(a)(1), which in fact was forest land. It also indicates that the new numbers were allotted to original Gata No.21 without any order of the competent authority and this report would override the report of Tehsildar filed in the year 1995, which was basically based on the entries made in 1359 Fasli (1952 A.D.) and the Gata(s) involved in the notification issued under Sections 4 & 6 of the Act of 1927. The report dated 17.06.1999 also indicates that over the land in issue, there are several trees about 82-100 year old.

(xvi) Before the concerned authority i.e. Consolidation Officer, the statements of the witnesses were recorded and as per the statement(s) of Mahesh Chandra Saxena (Petitioner No.1) and Nanhey Lal Sharma (Petitioner No.4) the adjacent land to the land in issue belongs to the Forest Department and over the land in issue, there are as many as 2752 trees. Thus, the submissions of the learned counsel for the petitioners, based on the averments made in the present petition, that land is vacant land and was/is being used for agricultural purpose is completely fallacious and baseless rather false.

(xvii) Section 20A of the Forest Act, as applicable in Uttar Pradesh, provides deeming clause and according to the same, the land in issue is to be recognized and held as land of Forest Department and not of the petitioners.

(xviii) The land of the Forest Department is the land covered under the expression *"the land used for public purpose"* and accordingly, Section 132 of the Act of 1950 would be attracted and no right can be provided to any person over the land described under Section 132 of the Act of 1950 nor the claim over the same is legally valid.

8. In addition to above, the written submission dated 24.05.2024 was also filed on behalf of the State, which is extracted hereinunder:-

*"1. That the Khatauni of village Alanganj, Pargana Bhud, District Kheri, recorded in Account No. 91 of 1356F, plot no. 21, area 431.46 acre, is recorded as timber trees of forest. Notes of Para 124-A Category 8 defines "timber trees" and says it means a tree the value of which mainly lies in its timber for building purposes and in its fruit or like produce. Examples of*

*timber trees are* ***sakhu,*** *sagaun, hasna, deodar, haldua, country mango (not qalmi), neem, sheesham, jamun, asna, mahua, etc. Such trees as bargad, pakar, peepal, gular etc. are not timber trees." Further it admitted fact* ***that the entire portion of Bhukhand numbers - 21 and 22 is a vast forest of Sal trees (Saakhu Trees)*** *with the age of the trees estimated to be between 80 to 100 years. It is noteworthy that the trees grow naturally every year.*

*2. That the area of 431.46 acres of Gata No. 21- recorded in the Khata no. 98 of Khatauni 1359F of Village Alianganj Pargana Bhud District- Kheri was illegally reduced to 393.91 acres without any order.*

*3. That there was consolidation in the above mentioned village (Elanganj), after consolidation as per CH-41, Gata No. 22A area was 158.44 acres of timber forest, 22B area was 2.20 acres of forest, 22C area was 6.60 acres of forest, Gata No. 22D area was 7.15 acres of forest, Gata No. 22E was 8.30 acres of forest, Gata No. 22F was 5.00 acres of forest, Gata No. 22G was recorded as 2.10 acres of forest.*

*4. That Dr. George Joseph, Principal Secretary, Forest Department, Uttar Pradesh Government, through his letter no. 290/15/Camp/98 dated 30.11.98, requested the District Magistrate Lakhimpur-Kheri, to set up inquiry regarding irregularities committed in revenue records of forest land situated at village Ailanganj Pargana Bhood, Lakhimpur-Kheri. Considering the seriousness of the matter, the Government, with the approval of the Honorable Chief Minister, decided to get the matter investigated/inquired by Commissioner, Lucknow Division, Lucknow.*

*5. The Commissioner, Lucknow Division, Lucknow, conducted a site inspection on 04.06.99 in the presence of advocate representative of Shri Mahesh Chandra Saxena and others, village headmen, and former tenure holders/sellers. Following an examination of all village revenue records and land maps, etc., a report on the investigation/inquiry was submitted to the government on 07.06.99. Upon examination, the Commissioner, Lucknow Division, Lucknow, has reached the conclusion that based on the scrutiny of revenue entries, it is evident that prior to the Consolidation, the old plot number 21 (Bhukhand Sankhya-21) had an area of 436.46 acres in the settlement year of 1346 Fasli and it was recorded as Jimman 8(3)(a)(1) of Land Record Manual. It is noteworthy that prior to the abolition of Zamindari, the land under Jimman 8(3)(a)(1) (As per Awadh para 124-A) of Land Records Manual was designated as "forests of timber trees under the management of the forests department (including erstwhile private forests made over to forest department). Notes of Para 124-A Category 8 defines "timber trees" and says it means a tree the value of which mainly lies in its timber for building purposes and in its fruit or like produce. Examples of timber trees are sakhu, sagaun, hasna, deodar, haldua, country mango (not qalmi), neem, sheesham, jamun, asna, mahua, etc. Such trees as bargad, pakar, peepal, gular etc. are not timber trees." Further it admitted fact that the entire portion of Bhukhand numbers - 21 and 22 is a vast forest of Sal trees (Saakhu Trees) with the age of the trees estimated to be between 80 to 100 years. It is noteworthy that the trees grow naturally every year.*

*6. That the examination of the aforementioned entries makes it clear that prior to the Consolidation, the land was area 436.46 acres of plot number 21 (Bhukhand Sankhya-21) in settlement of*

*1346 Fasli and with an area of 436.46 acres was also recorded in Khatauni year of 1346 Fasli, under Jimman 8(3)(a)(1) of the settlement year. It is noteworthy that prior to the abolition of Zamindari, the land under Jimman 8(3)(a)(1) (As per Awadh para 124-A) of Land Records Manual was designated as "forests of timber trees under the management of the forests department (including erstwhile private forests made over to forest department). In the Khatauni of Fasli year of 1354 Fasli, the area of the aforementioned land plot number 21 (Bhukhand Sankhya-21) was recorded area 431.46 acres, Jimman 8(3)(a)(1) (As per Awadh para 124-A) of Land Records Manual was designated as "forests of timber trees under the management of the forests department (including erstwhile private forests made over to forest department) and the same entry was also found and continued in the Khatauni fasli year 1356 Fasli. Notes of Para 124-A Category 8 defines "timber trees" and says it means a tree the value of which mainly lies in its timber for building purposes and in its fruit or like produce. Examples of timber trees are sakhu, sagaun, hasna, deodar, haldua, country mango (not qalmi), neem, sheesham, jamun, asna, mahua, etc. Such trees as bargad, pakar, peepal, gular etc. are not timber trees." Further it admitted fact that **the entire portion of Bhukhand numbers - 21 and 22 is a vast forest of Sal trees (Saakhu Trees)** with the age of the trees estimated to be between 80 to 100 years. It is noteworthy that the trees grow naturally every year.*

*7. That Prior to the abolition of Zamindari, a person who had occupied land without any title was entitle to enter his name in Jimman 5Ka. Upon examination of the Khatauni of 1359 Fasli year, it is apparently evident that in Khata Number – 89 lagayat Khata Number – 94, certain entries at the end of Jimman 5, were initially omitted and cutting was made and later included certain entries in another handwriting, and the area of Bhukhand Number- 21 of Khata number 98 under Jimman 8(3)(a)(1) "forests of timber trees" (As per Awadh para 124-A) of Land Records Manual was reduced from 431.46 acres to 393.91 acres. In the Khasra of 1359 Fasli, the Bhukhand Number- 21 was initially recorded as 431.46 acres under Jimman 8(3)(a)(1) ""forests of timber trees under the management of the forests department (including erstwhile private forests made over to forest department)." (As per Awadh para 124-A), and made a new Plot number- 21/1, and the area was reduced from 431.46 acres to 393.91 acres by cutting down the area. Entries of 21/2 to 21/7, which could have been associated with the aforementioned Bhukhand Number- 21, but it was entered at the end of the Khasra. It is evident that there was no space between Bhukhand Number- 21 and 22, where the entries of 21/2 lagayat 21/7 could have been recorded. In the Khasra of 1359 Fasli, cultivation of "Barley" in the Rabi season is shown in bhukhand numbers - 21/2 to 21/7. However, the total area of barley cultivation in the prepared GOSWARA at the end of the Khasra is 245.72 acres, whereas in all the pages of the Khasra, the total area of barley cultivation in different plots comes 194.75 acres. Clearly, the area recorded in the GOSWARA is higher, which raises doubts about the entries in the Khasra. **During the inspection of the land in dispute, it was found that the entire portion of Bhukhand numbers - 21 and 22 is a vast forest of Sal trees (Saakhu Trees)** with the age of the trees estimated to be between 80 to 100 years. It is noteworthy that the trees grow naturally every year.*

*8. That Bhukhand numbers - 22Kha lagayat 22Chaछ has not been marked neither in the Map of consolidation settlement nor in the revenue map of the concerned village. Additionally, there is no separate sub-division of land Bhukhand number - 22 at the site, and there is no possession by the recorded persons over any area Bhukhand numbers - 22Kha lagayat 22Cha. Therefore, the disputed area 31.35 acres remains part of Bhukhand number - 22, and the entire area of Bhukhand number - 22 is/has been under the exclusive possession of the Forest Department. Thus, it is evident that the entries made in name of sellers and their ancestors in the Khasra and Khatauni were wholly illegal and without any basis. Forged or fraudulent, entries do not give any right to anyone. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title.*

*9. The Apex Court in case of **Bachan and another Vs. Kankar and others, AIR 1972 SC 2157** has held that an entry incorrectly introduced by Patwari into the record of rights in favor of a person is fictitious and confers no right on such person. The entries in the Khatauni of 1359 Fasli are completely illegal because the names Jimman 5A could have been entered in the Khatauni of 1359 Fasli, which name would have been mentioned in column 4 of the Khasra. At the end of the Khatauni of 1359 Fasli, entries were added by different handwriting, while omitting and cutting of certain entries in another handwriting, and fraudulently created a new khatas 21/2 to 21/7. The entry of crop cultivation of "Barley" in the Khasra of 1359 Fasli has been total inconsistent with the spot because agriculture activities are not feasible due to the presence of approximately 80 to 100-years old sal trees on these plots. Bhukhand numbers - 21 and 22 is a vast forest of **Sal trees (Saakhu Trees).***

*10. In view of aforesaid, the entries in revenue record of 1356 Fasli and 1359 Fasli, as pleaded, are fictitious entries. A **fictitious entry is one which is not genuine. It is an unreal entry. A fabricated entry is a fictitious entry, as held by this Hon'ble Court in Ramjeet Upadhyaya and Ors. vs. Dy. Director of Consolidation, Allahabad and Ors. MANU/UP/2846/2011.** The entries made by the revenue officials in the settlement and revenue records of 1359 Fasli do not have any legal basis based on the principle of distant boundary settlement. In **Vikram Singh Junior High School v. District Magistrate (F and R) and ors. 2002 (2) AWC 1262 (SC**, it was held that an entry in the revenue record must have a legal basis.*

*11. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well-settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on Court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property*

*would render the transaction void ab initio. Fraud and deception are synonymous.*

*12. In* ***A.V. Papayya Sastry v. Government of A.P, (2007) 4 SCC 221****, the Supreme Court was pleased to held that if any judgement or order is obtained by fraud it cannot be said to be a judgement or order. The relevant portion of the aforesaid judgement is quoted below:*

*"19. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed;*

*Fraud avoids all judicial acts, ecclesiastical or temporal.*

*** *** ***

*22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non-est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.*

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*38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent Court of Law after hearing the parties and an order is passed in favour of the applicant/plaintiff which is upheld by all the Courts including the final Court. Let us also think of a case where this Court does not dismiss Special Leave Petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the Courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any Court or authority to review, recall or reconsider the, order.*

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*39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non-est and cannot be allowed to stand. This is the fundamental principle of law 'and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the Court of first instance or by the final Court. And it has to be treated as non-est by every Court, superior or inferior."*

*13. That the Indian Forest Act 1927 is a complete code. The Indian Forest Act 1927 is a special Act and these lands have been notified under section 20 of the Forest Act and are national property. In the case of* ***State of U.P. vs. Dy. Director of Consolidation and Ors. MANU/SC/0612/1996****, the Hon'ble Apex Court has held that –*

***"The crucial question for consideration, however, is whether the Consolidation Authorities have the jurisdiction to go behind the notification under Section 20 of the Act and deal with the land which has been declared and notified as a reserve forest under the Act. It is necessary, therefore, to examine the scheme of Chapter II of the Act. Section 3 provides that the State Government may constitute any forest land or waste land which is the property of the Government or over which the Government has proprietary rights, or to the whole or any***

***part of the forest produce to which the Government is entitled, a reserved forest. Section 4 provides for the issue of a notification declaring the intention of the Government to constitute a reserved forest. Section 5 bars accrual of forest rights in the area covered by the notification under Section 4 after the issue of the notification. Section 6, inter alia, gives power to the Forest Settlement Officer to issue a proclamation fixing a period of not less than three months from the date of such proclamation and requiring every person claiming any right mentioned in Section 4 or Section 5 within such period, either to present to the Forest Settlement Officer a written notice specifying or to appear before him, and state the nature of such right and the amount and particulars of the compensation (if any) claimed in respect thereof. Section 7 gives power to the Forest Settlement Officer to investigate the objections. Section 8 prescribes that the Forest Settlement Officer shall have the same powers as a civil court has in the trial of a suit. Section 9, inter alia, provides for the extinction of rights where no claim is made under Section 6. Section 11(1) lays down that in the case of a claim to a right in or over any land, other than a right of way or right of pasture, or a right to forest produce or water course, the Forest Settlement Officer shall pass an order admitting or rejecting the same in whole or in part. In the event of admitting the right of any person to the land, the Forest Settlement Officer, under Section 11(2), can either exclude such land from the limits of the proposed forest or come to an agreement with the owner thereof for the surrender of his rights or proceed to acquire such land in the manner provided by the Land Acquisition Act, 1884. Section 17 provides for appeal from various orders under the Act and Section 18(4) for revision before the State Government. When all the proceedings provided under Section 3 to 19 are over the State Government has to publish a notification under Section 20 specifying definitely the limits of the forest which is to be reserved and declaring the same to be reserved from the date fixed by the notification.***

***It is thus obvious that the Forest Settlement Officer has the power of a civil court and his order is subject to appeal and finally revision before the State Government. The Act is a complete code in itself and contains elaborate procedure for declaring and notifying a reserve forest. Once a notification under Section 20 of the Act declaring a land as reserve forest is published, then all the rights in the said land claimed by any person come to an end and are no longer available. The notification is binding on the Consolidation Authorities in the same way as a decree of the civil court. The respondents could very well file objections and claims including objection regarding the nature of the land before the Forest Settlement Officer. They did not file any objection or claim before the authorities in the proceedings under the Act. After the notification under Section 20 of the Act, the respondents could not have raised any objections qua the said notification before the Consolidation Authorities. The Consolidation Authorities were bound by the notification which had achieved finality."***

*14. In a similar matter the Division of this Hon'ble Court in the case of* ***<u>State of U.P. vs. Kamal Jeet Singh decided on 04.08.2017 MANU/UP/2821/2017</u>****, in which the Hon'ble Court has allowed the claim of State of Uttar Pradesh held the following-*

*"From the above discussions, it is clear that the law laid down by Hon'ble the Apex Court in the case of **State of U.P. v. Deputy Director of Consolidation and others, 1996 All LJ 1393,** is fully applicable in the case and the revenue authorities or the authorities other than the authorities mentioned in the Forest Act cannot adjudicate the claim over the land included in the notification under Section 4 or 20 of the Forest Act.*

*On the basis of above legal propositions, we conclude the present petition as follows:*

*"I. From the date of notification under Section 4 of the U.P. Zamindari Abolition Act all the estate situates in U.P. vested in the State and stand transferred and vested in the State free from all encumbrances.*

*II. The land in question was previously in 1356F or before that was recorded as junglat/ghas/waste land.*

*III. Under the provisions of Section 3 of the Forest Act, the State may constitute any forest land or waste land which is the property of the Government or over which the Government has proprietary right and declare it as reserved forest. The land in question was recorded as junglat being under the proprietary right of the State and State has every authority to declare the land as forest land.*

*IV. After notification of Section 4 of the Forest Act no right shall be acquired in or over the land comprised in such notification except by succession or under a grant or contract in writing made or entered into by or on behalf of the Government. It is not a case where grant was made by the Government.*

*V. No right shall be alienated by a grant, sale or otherwise without the sanction of the State Government. Jagat Ram had no authority to transfer the land. Thus, the respondents have no better title than Jagat Ram.*

*VI. As reported by the revenue authorities the land was recorded as bushes or woody vegetation and it is included in forest in light of Section 38(a) & (b) of U.P. Act No. XXIII of 1965.*

*VII. After the issuance of notification under Section 4 of the Forest Act late Jagat Ram through whom respondents claim their right on the basis of a transfer deed, had filed an objection under Section 6 of the Forest Act and it was decided in the year 1958 and the land was declared as forest land. Thus the dispute reached to its finality, as indicated above, and except revision before the State no authority has jurisdiction to determine the rights as contained in Section 27-A of the Forest Act.*

*VIII. By way of measurement and by way of notification the petitioners have proved that the land in, question is included in the notification under Section 4 of the Forest Act."*

*46. Before parting with the order, we direct the Chief Secretary of U.P. to constitute a Committee consisting Principal Conservator of Forest with Commissioner/District Magistrate/Divisional Forest Officer/Sub Divisional Magistrate or any other Officer as may be deemed fit, having jurisdiction over local area and to examine and verify the records relating to land vested in the State Government/declared as forest reserved or forest land and to ensure that the land actually vested in the State Government vide notification/order or by operation of any Law is entered in the relevant records and name of the State Government is corrected and incorporated. Copy of the same be kept with the Principal Conservator of Forest and concerned revenue records. The Registry is directed to*

*send a copy of this order to the Chief Secretary, Government of U.P. within fifteen days. On the basis of submissions made above, the writ petition deserves to be allowed and the order dated 3.3.1978 passed by opposite party No. 3 and judgment and order dated 15.7.1978 passed by opposite party No. 2 deserve to be quashed. Accordingly, the writ petition is allowed and both the orders mentioned above are hereby quashed. No order as to costs."*

*15. This Hon'ble Court in the case of* ***State of U.P. and Ors. vs. Chunnu and Ors. (22.01.2022 - ALLHC) : MANU/UP/0737/2022*** *while considering the Hon'ble Supreme Court ' judgment in* ***AIR 2021 SC 4739) (Prabhagiya Van Adhikari Awadh Van Prabhag v. Arun Kumar Bhardwaj (Dead) Thr. LRs.*** *and others) has also allowed the claim of State Government.*

*16. In the case of* ***CONSOLIDATION No. - 1268 of 1979 State Of Uttar Pradesh Through The Divisional Forest Officer v. The Deputy Director Of Consolidation, U.P. And Others, the Hon'ble Has held that Declaration under Section 20 of the Forest Act cannot be questioned either by the Civil Court or by the Revenue Court or by consolidation Court. In spite of that D.D.C. held that land in dispute was wrongly declared as reserved forest778 through notification under Section 20 of the Act. D.D.C. clearly exceeded the jurisdiction. The declaration of reserved forest under Section 20 of the Act is binding upon the Consolidation Court like Civil Court decree. In this regard reference may be made to AIR 1996 S.C. 2432 State of U.P. V/S D.D.C.***

*17. This Hon'ble Court in case* ***of Sharad Kumar Dwivedi vs. State of U.P. and Ors. MANU/UP/3141/2022*** *considered the provisions of Para A-124 (5) (iii) Culturable Waste-*

*(a) Forests of timber trees-*

*(1)* ***under*** *the management of Forests Department (including erstwhile private forests made over to Forests Department)*

*(2) vested in the Gram Sabha.*

*(b) Forests of other trees, shrubs, bushes etc.*

*(1) (1) under the management of Forests Department (including erstwhile private forests made over to Forests Department)*

*(2) vested in the Gram Sabha." that is almost same as given under Jimman 8(3)(a)(1) (As per Awadh para 124-A) of Land Records Manual was designated as "forests of timber trees under the management of the forests department (including erstwhile private forests made over to forest department). While examining the relavant laws including the earlier authority of this Hon'ble Court in* ***Gyanendra Singh Vs. Additional Commissioner, Agra Division, Agra, MANU/UP/1697/2003 : 2003 (95) RD 286*** *has held that the land recorded as 'Jangal Dhak' is a forest land and is a public utility land and same cannot be transferred by way of lease, sale etc and no bhumidhari rights shall accrue in respect of the said land. These lands are saved under Section 132 of the U.P.Z.A. & L.R. Act, 1950. This Court considering the provisions of Section 132 of the U.P.Z.A. & L.R. Act, 1950 held that lands recorded as 'Jangal Dhak' are covered by the lands enumerated under Section 132 U.P.Z.A. & L.R. Act, 1950 and the same cannot be transferred in favour of anyone.*

*Radhey Shyam and Ors. vs. State of U.P. and Ors.*

*18. In the case of* ***Gyanendra Singh Vs. Additional Commissioner, Agra***

***Division, Agra, MANU/UP/1697/2003: 2003 (95) RD 286.*** *The Hon'ble Court held that the entry of the aforesaid plot clearly indicates that the said plots are a kind of forest recorded as Dhaka Forest. The use and utility of forest cannot be denied. Existence of forest are beneficial for human life and environment. There cannot be any denial that forest land is a land of public utility. Section 132 of U.P. Zamindari Abolition and Land Reforms Act mentions about the land in which bhumidhari rights shall not accrue. Section 132 of U.P. Zamindari Abolition and Land Reforms Act is extracted below :*

*132. Land in which (bhumidhari) rights shall not accrue.-Notwithstanding anything contained in Section 131, but without prejudice to the provisions of Section 19, (bhumidhari) rights shall not accrue in :*

***(a) pasture lands or lands covered by water and used for the purposes of growing singhara or other produce or land in the bed of a river and used for casual or occasional cultivation ;***

***(b) such tracts of shifting or unstable cultivation as the State Government may specify by notification in the Gazette ; and***

***(c) lands declared by the State Government by notification in the Official Gazette, to be intended or set apart for taungya plantation or grove lands of a (Gaon Sabha) or a local authority or land acquired or held for a public purpose and in particular and without prejudice to the generality of this clause :***

***(i) land set apart for military encamping grounds*** *;*

***(ii) lands included within railway or canal boundaries ;***

***(iii) lands situate within the limits of any cantonment ;***

***(iv) lands included in sullage farms or trenching grounds belonging as such to a local authority ;***

***(v) lands acquired by a town improvement trust in accordance with a scheme sanctioned under Section 42 of U.P. Town Improvement Act, 1919 (U.P. Act VII of 1919), or by a municipality for purpose mentioned in Clause (a) or Clause (c) of Section 8 of the U.P. Municipalities Act, 1916 (U.P. Act VII of 1916) ; and***

***(vi) lands set apart for public purposes under the U.P. Consolidation of Holdings Act, 1953 (U.P. Act No. 5 of 1954).***

*The Sub-clause (3) of Section 132 includes land held for a public purpose on which bhumidhari rights shall not accrue. The aforesaid three plots being recorded as "Dhaka Jangal" were covered by land as enumerated in Section 132 and lease of bhumidhari rights with non-transferable right cannot be granted on the said plots. No error has been committed by the courts below in cancelling the lease granted in favour of the Petitioners. The submission of Petitioners is that other persons have also been granted lease of "Dhaka Jangal", hence Petitioners have been discriminated in so far as the lease of other persons have not been cancelled and the Petitioners have only been singled out for cancellation. The counsel for the Petitioners has raised the submission based on discrimination. As noted above, lease of "Dhaka Jangal" is not permissible in accordance with Section 132 of U.P. Zamindari Abolition and Land Reforms Act and the fact that leases were granted to certain other persons cannot validate the lease of the Petitioners which was in violation of Section 132 of U.P. Zamindari Abolition and Land Reforms Act. The plea of discrimination is not available in a case where the benefit which*

*was taken by other persons cannot be said to be in accordance with law. Apex Court in* ***Chandigarh Administration and Anr. v. Jagjit Singh and another,MANU/SC/0136/1995 : (1995) 1 SCC 745****, held that mere fact that the Respondent has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the Petitioner on the plea of discrimination in case the order in favour of other persons is found to be contrary to law or not warranted in the facts of this case. Following was laid down in paragraph 8 :*

*8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the Respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the Petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the Petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the Respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the Respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/ unwarranted action must be correct, if it can be done according to law indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the Respondent authority to repeat the illegality ; the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law"*

*19. The Division Bench's Judgment of this Hon'ble Court* ***in Radhey Shyam and Ors. vs. State of U.P. and Ors, 2017(8)ADJ372,*** *while considering the provision of section 20-A of the forest Act, allowed the claim of similar nature in the favour of State Government. Section 20-A* ***provides "20 A. Certain forest land or waste land when deemed to be reserved forest--(1) Notwithstanding anything contained in this Act or in any other law for the time being in force, including the Merged States (Laws) Act, 1949 or the U.P. Merged States (Application of Laws) Act, 1950, or any order issued thereunder, any forest land or waste land in a merged State which immediately before the date of merger (hereinafter in this section referred to as the said date)-***

***(a) was deemed to be reserved forest under any enactment in force in that State, or***

***(b) was recognized or declared by the Ruler of such State as a reserved***

***forest under any law (including any enactment, rule, regulation, order, notification, custom or usage having the force of law) for the time being in force, or***

***(c) was dealt with a reserved forest in any administrative report or in accordance with any working plan or register maintained and acted upon under the authority of the Ruler.***

***Shall be deemed to be and since the said date to have continued to be a reserved forest subject to the same rights or concession, if any, in favour of any person as were in force immediately before the said date.***

***Explanation I.--A certificate of the State Government or of any officer authorized in his behalf to the effect that a report, working plan or register was maintained and acted upon under the authority of the Ruler shall be conclusive evidence of the fact that it was so maintained and acted upon.***

***Explanation II---Any question as to the existence or extent of any right or concession referred to in this subsection shall be determined by the State Government, whose decision, given after such enquiry, if any, as it thinks fit, shall be final.***

***Explanation III.--"Working plan' includes any, plan scheme, project, map, drawings and lay-outs prepared for the purpose of carrying out the operations in course of the working and management of forests.***

***(2) No right shall be deemed to have been acquired on or after the said date in or over any land mentioned in sub-section (1) except by succession or under a grant or contract in writing made or entered into by or on behalf of the State Government or some person in whom such right was vested immediately before the said date and no fresh clearings since made for cultivation or for any other purpose (except clearings made in accordance with any concessions granted by the Ruler and in force immediately before the said date or in accordance with the rules made by the State Government in this behalf since the said date) shall be recognized as or deemed to be lawful, anything contained in this Act or any other law for the time being in force notwithstanding.***

***(3) The State Government may within five years from the commencement of the Indian Forest (Uttar Pradesh Amendment) Act, 1965, revise any arrangement of the nature specified in Section 22, and pass any incidental or consequent, order, including any direction to the effect that any of the proceedings specified in the foregoing provisions of this Chapter be taken.***

***(4) In relation to any land mentioned in sub-section (1), the references in Sections 24 and 26-***

***(a) to Section 23 shall be construed as references to sub-section (2); and***

***(b) to rights admitted, recorded or continued under Section 14 or Section 15 shall be construed as references to rights of pasture or to forest produce admitted, recorded or continued in or under the corresponding enactment, law or document referred to in sub-section (1).***

***(5) Without prejudice to any action that may be or may have been taken for ejectment, vacation of encroachment or recovery of damages in respect of any unauthorized occupation of or trespass over any land mentioned in sub-section (1), or for seizure, confiscation, disposal or release (on payment of value or otherwise) of any forest produce in respect of which any***

***forest offence has been committed in relation to such land or of any tools, boats, carts, or cattle used in committing such offence, nothing in this section shall be deemed to authorize the conviction of any person for any act done before the commencement of the Indian Forest (Uttar Pradesh Amendment) Act, 1965, which was not an offence before such commencement."***

*20. The Hon'ble Court in the aforesaid case while considering section 20-A of the Forests Act allowed the claim of State Government in the similar nature as in present petition and directed in the operative portion as under-*

***"Before parting with the order, we are of the view to direct the Chief Secretary of U.P. to constitute a Committee consisting Principle Conservator of forest with Commissioner/District Magistrate/Divisional Forest Officer/Sub Divisional Magistrate or any other Officer as may be deemed fit, having jurisdiction over local area and to examine and verifying the records relating to land vested in the State Government/declared as forest reserved or forest land and to ensure that the land actually vested in the State Government vide notification/order or by operation of any Law be entered in the relevant records and name of the State Government accordingly be corrected and incorporated. Copy of the same be kept with the Principle Conservator of Forest and concerned revenue records. With above observations, we are of the view that both the writ petitions lacks merit and deserve to be dismissed.***

***Accordingly, both the petitions are dismissed. There shall be no order as to costs."***

*21. That in this case in his evidence before the Subordinate Court, DW-2 Om Prakash Forest Inspector of the Forest Department (Divisional Forest Officer) has clearly explained the situation in his affidavit that the **entire portion of Bhukhand numbers - 21 and 22 is a vast forest of Sal trees (Saakhu Trees)** with the age of the trees estimated to be between 80 to 100 years. It is noteworthy that Sal trees grow on their own and the entire area is under the exclusive control of the forest department. This Hon'ble Court in the case of **Gyanendra Singh vs. Additional Commissioner, Agra Division, Agra, 2003 (95) RD 286** has held that these are a forest and public utility land and the same cannot be transferred by way of lease, sale etc. and no bhumdhari rights shall accrue in respect of the said land. These lands are saved under Section 132 (c) as held for public purpose of the U.P.ZA. & L.R. Act, 1950 and the said judgment has been further followed by this Court in its judgment dated 05.07.2022 in **Public Interest Litigation No. 7472 of 2021 and in the case of Sharad Kumar Dwivedi vs. State of U.P. through Principal Secretary, Lucknow and others.** Thus, it is a reserved forest as per the provisions of section 20-A of the Indian Forest Act and same is covered under section 132 (c) as held for public purpose of the U.P.ZA. & L.R. Act, 1950 of the Zamindari Abolition & Land Reforms Act, 1950.*

*22. **Since, in the Khatauni of 1356 Fasli, Gata Number 21 measuring area 431.46 Acres of Khata No. 91 of village Ailanganj Pargana Bhud District-Kheri, is recorded as a timber forest**. Hence, in terms of Section 20A of the Indian Forest Act, the entire area of **Gata Number 21 measuring area 431.46 Acres of Khata No. 91 of village Ailanganj Pargana Bhud District- Kheri,** is a reserved forest land. More so, before the Subordinate Court, Mahesh Chandra*

*Saxena himself has admitted in cross-examination that the land in dispute is recorded as a forest in the revenue record of 1356 Fasli.*

*23. The legislature has inserted the aforementioned provisions with a laudable object. Forest is a national wealth which is required to be preserved. The State is the owner of the forests and forest-produce. Depletion of forests would lead to ecological imbalance. It is now well-settled that the State is enjoined with a duty to preserve the forests so as to maintain ecological balance and, thus, with a view to achieve the said object forests must be given due protection, keeping the principles contained in Article 48-A and 51-A(g) of the Constitution of India in mind.*

*24. The Apex Court in* **Hinch lal Tiwari vs. Kamala Devi and Ors. reported in MANU/SC/0410/2001 : (2001) 6 SCC 496 and Jagpal Singh and others vs. State of Punjab and others reported in MANU/SC/0078/2011 : (2011) 11 SCC 396** *that the material resources of the Community like forests, tanks, ponds, hillock, mountain etc; being nature's bounty need to be protected for a proper and healthy environment as they maintain delicate ecological balance and enable people to enjoy a quality life which is essence of the guaranteed right under Article 21 of the Constitution. The Government including Revenue Authorities have been mandated to take appropriate steps under the relevant statutory provisions to prevent damage, misappropriation of the such Public-Utility land under Section 132 of the Act and, therefore, no bhumidhari right can be given on the forest land. This is a national property for well-being of entire living creatures. In the above facts and circumstances, the Writ Petition is liable to be dismissed with exemplary costs."*

9. Having considered the aforesaid as also the pleadings and documents on record, this Court finds it appropriate to first consider the issue related to category/entry under which the entire land in issue i.e. Gata/Plot No. 21 was recorded in the Khatauni of 1356 Fasli (1949 A.D.) and the relevant para in this regard is Para-4 of the writ petition, which on reproduction reads as under:-

*"4. That the disputed property was entered in the ownership of Raja Brijraj Bahadur of Jhandi as proprietor/khewatdar/Zamindar of Mohal Mustahkam village Alenganj Pargana Bhud District Kheri, before abolition of Zamindari in Uttar Pradesh. Before 1356 F Gata no.21 area 431.61 acr. was entered as owner with possession in the khewat khatauni of Raja Brijraj Bahadur of Jhandi in Ziman 8(3)1 of Non-ZA khatauni. The photocopy of the questionnaire from record room is being annexed herewith* ***Annexure No.3*** *to this writ petition."*

10. On being asked regarding the entry indicated in Para 4 of writ petition, quoted above, learned Senior Advocate, appearing for petitioners had stated that typographical error regarding the entry, inadvertently, could not be corrected while filing the present petition and this entry should be read as Ziman 8(iii)(a)(1).

11. Before proceeding further on the facts of the case, this Court finds it appropriate to indicate relevant part of para(s) of U.P. Land Records Manual i.e. Para 124 (Applicable for Arrangements of holdings in Agra) and Para 124-A (Applicable for Arrangement of buildings

in Avadh) and Para A-124 (Applicable to the areas over which Act of 1950 applies).

*"**124. Arrangements of holdings in Agra.-**In Agra the arrangements of land within each patti or khewat-khata in the khatauni will be as follows:*

*PART-I-A*

*Xxxxxxxxxxx*

*(14) Culturable land-*

*(i) new fallow:*

*(ii) old fallow;*

*(iii) culturable waste-*

*(a) forest of timber trees-*

*(1) under the management of the Forest Department (including erstwhile private forests made over to Forest Department).*

*(2) Zamindari forests and those held by corporate bodies or local authorities.*

*(b) forests other trees, shrubs, bushes, etc.-*

*(1) under the management of the Forest Department including erst- while private forests-made over the Forest Department.*

*(2) Zamindari forests and those held by corporate bodies or local authorities.*

*c) permanent pastures and other grazing lands;*

*d) thatching grass and bamboo bushes;*

*(e) other culturable waste.*

*Note.(1) For purposes of classification under sub-class (iii), "timber tree" means tree the value of which mainly lies in its timber for building purposes and not in its fruit or like produce. Examples of timber trees are sakhu, sagaun, hasna, Deodar, halna, country mango (not qalmi), mahua, neem, etc., such trees as bargad, pakar, peepal, gular, etc., are not timber trees*

*(2) Sub-class (b) will consist of forests of babul, dhak, sihor, bankarunda etc.*

*(3) Sub-class (c) will include grazing lands within forest areas also.*

*(4) For sub-class (d) the examples of thatching grasses are bed, narkul, pat-war, kans, baid, etc.*

*(5) Groves other than those held by grove-holders-*

*(a) qalmi;*

*(b) others.*

***124-A. Arrangement of buildings in Avadh.-**In Avadh the arrangement of land within each patti or khewat-khata in the khatauni will be as follows:*

*PART-I-A*

*xxxxxxxxxx*

*(8) Culturable wastes land-*

*(i) new fallow;*

*(ii) old fallow;*

*(iii) culturable waste land-*

*(a) forests of timber trees-*

*(1) under the management of the Forest Department (including erstwhile private forests made over to Forest Department).*

*(2) Zamindari forests and those held by corporate bodies or local authorities;*

*(b) forests of other trees, shrubs, bushes, etc.*

*(1) under the management of the Forest Department (including erstwhile private forest made over to Forest Department).*

*(2) Zamindari forest and those held by corporate bodies or local authorities.*

*(c) permanent pastures and other grazing lands;*

*(d) thatching grass and bamboo bushes;*

*(e) other culturable waste.*

*Notes. (1) For purposes of classification under sub-class (iii), "timber tree" means a tree, the value of which mainly lies in its timber for building purposes and not in its fruit or like produce. Example of timber trees are sakhu, sagaun, hasna, haldua, deodar, country mango (not qalmi), mahua, neem, etc. Such trees as bargad, pakar, peepal, gular, etc, are not timber trees.*

*(2) Sub-class (b) (2) will consist of forests of babul, dhak, sihor, bankarunda, etc.*

*(3) Sub-class (c) will include grazing land within forests areas also.*

*(4) For sub-class (d) the examples of thatching grasses are bed, narkul, patwar, kans, baib, etc.*

*(5) Groves other than those held by grove-holders-*

*(a) qalmi;*

*(b) others.*

***A-124. Arrangement of holdings**.-The arrangement of land within each village in the khatauni shall be as follows:*

*PART-I*

*xxxxxxxxxxxxx*

*(5) Culturable land-*

*(i) new fallow;*

*(ii) old fallow;*

*(iii) culturable waste-*

*(a) Forests of timber trees-*

*(1) under the management of the Forests Department (including erstwhile private forests made over to Forests Department).*

*(2) vested in the [Gram Sabha].*

*(b) Forests of other trees, shrubs, bushes, etc.*

*(1) under the management of Forest Department (including erstwhile private forest made over to Forests Department).*

*(2) vested in the [Gram Sabha].*

*(c) permanent pasture and other grazing lands;*

*(d) thatching grass and bamboo bushes;*

*(e) other culturable waste.*

*Note. (1) For purposes of classification under sub-class (iii) above "timber trees" means tree the value of which mainly lies in its timber for building purposes and not in its fruit or like produce. Examples of timber trees are sakhu, sagaun, hasna, deodar, haldua, country mango (not qalmi), neem, sheesham, jamun, asna, mahua, tun mulberry kadam bamboo, imili, chir, cypress, babool, aonla, bel, kaitha, dhak, kikar arma, seedling mango and kanji (pongamiagalbra), etc. Such trees as bargad, pakar, peepal, gular etc. are not timber trees.*

*(2) Sub-class (b) (2) will consists of babool, dhak, sirhor, bankraunda, etc.*

*(3) Sub-class (c) will include grazing lands within forests areas also.*

*(4) For sub-class (d) the examples of thatching grasses are bed, narkul, patwar, kuns, baib, etc."*

12. The entry (14)(iii)(a)(1) in Para 124 and entry 8(iii)(a)(1) in Para 124-A and entry 5(iii)(a)(1) in Para A-124 indicates that the land with any of these entries would be the land under management of the Forest Department.

13. Further, according to the 'Note' appended to the provision(s), referred hereinabove, Sal (Sakhu) trees, which were/are situated and were about 80-100 year old at the time of submission of report dated 07.06.1999 by the Commissioner, Lucknow Division, Lucknow and at present the same would be about 105-125 year old, would be covered under expression *"Timber Tree"*.

14. In view of aforesaid, the entire Gata/Plot No. 21 area 431.61 acres in 1356 Fasli (1949 A.D.) was under the management/control of Forest Department, even if it is presumed that in 1356 Fasli (1949 A.D.) the land was recorded in the name of Raja Brijraj Bahadur Singh.

15. Now, the question is as to whether any right would be available to any person over the land of aforesaid nature or over the land with aforesaid category/entry i.e. 8(iii)(a)(1) in Para 124 or 5(iii)(a)(1) in Para A-124. This question has no more res-integra.

16. In the case of ***Gyanendra Singh and Another vs. Additional Commissioner, Agra Division, Agra and Others; 2003 (95) RD 286,*** while dealing with the matter related to Section 198(4) of the Act of 1950 this Court dismissed the petition after taking note of entry in the revenue record i.e. "Jungle Dhak" and Section 132 of the Act of 1950 and also the submissions of learned counsel for the petitioners that opportunity was not provided. As per this judgment, the land recorded as "Jungle Dhak" would be covered under Section 132 and accordingly no right would be available to any person over such type of lands.

*"5. Both the courts below have recorded finding that all the three plots were recorded as "Jangal Dhaka". The word "Jangal Dhaka" means Dhaka Forest, Dhaka is a kind of small tree having large leaves. He entry of the aforesaid plot clearly indicates that the said plots are a kind of forest recorded as Dhaka Forest. The use and utility of forest cannot be denied. Existence of forest are beneficial for human life and environment. There cannot be any denial that forest land is a land of public utility. Section 132 of U.P. Zamindari Abolition and Land Reforms Act mentions about the land in which bhumidhari rights shall not accrue. Section 132 of U.P. Zamindari Abolition and Land Reforms Act is extracted below:-*

*"132. Land in which (bhumidhari) rights shall not accrue.—Notwithstanding anything contained in Section 131, but without prejudice to the provisions of Section 19, (bhumidhari) rights shall not accrue in:*

*(a) pasture lands or lands covered by water and used for the purposes of growing singhara or other produce or land in the bed of a river and used for casual or occasional cultivation;*

*(b) such tracts of shifting or unstable cultivation as the State Government may specify by notification in the Gazette; and*

*(c) lands declared by the State Government by notification in the official Gazette, to be intended or set apart for taungya plantation or grove lands of a (Gaon Sabha) or a local authority or land acquired or held for a public purpose and in particular and without prejudice to the generality of this clause:-*

*(i) land set apart for military encamping grounds;*

*(ii) lands included within railway or canal boundaries;*

*(iii) lands situate within the limits of any cantonment;*

*(iv) lands included in sullage farms or trenching grounds belonging as such to a local authority;*

*(v) lands acquired by a town improvement trust in accordance with a scheme sanctioned under Section 42 of U.P. Town Improvement Act, 1919 (U.P. Act VII of 1919), or by a municipality for purpose mentioned in clause (a) or clause*

*(c) of Section 8 of the U.P. Municipalities Act, 1916 (U.P. Act VII of 1916); and*

*(vi) lands set apart for public purposes under the U.P. Consolidation of Holdings Act, 1953 (U.P. Act No. V of 1954)."*

*6. The sub-clause (3) of Section 132 includes land held for a public purpose on which bhumidhari rights shall not accrue. The aforesaid three plots being recorded as "Dhaka Jangal" were covered by land as enumerated in Section 132 and lease of bhumidhari rights with non-transferable right cannot be granted on the said plots. No error has been committed by the courts below in cancelling the lease granted in favour of the petitioners. The submission of petitioners is that other persons have also been granted lease of "Dhaka Jangal", hence petitioners have been discriminated in so far as the lease of other persons have not been cancelled and the petitioners have only been singled out for cancellation. The counsel for the petitioners has raised the submission based on discrimination. As noted above, lease of "Dhaka Jangal" is not permissible in accordance with Section 132 of U.P. Zamindari Abolition and Land Reforms Act and the fact that leases were granted to certain other persons cannot validate the lease of the petitioners which was in violation of Section 132 of U.P. Zamindari Abolition and Land Reforms Act. The plea of discrimination is not available in a case where the benefit which was taken by other persons cannot be said to be in accordance with law. Apex Court in Chandigarh Administration v. Jagjit Singh, (1995) 1 SCC 745, held that mere fact that the respondent has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination in case the order in favour of other persons is found to be contrary to law or not warranted in the facts of this case. Following was laid down in paragraph 8:-*

*"8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be correct, if it can be done according to law indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the*

*respondent authority to repeat the illegality; the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law…………."*

*7. Thus the submission of counsel for the petitioners that other persons have been granted leases of plots recorded as "Jangal Dhaka" is not relevant nor can validate the lease of petitioners. No error has been committed by the respondents in cancelling the lease of the petitioners.*

*8. The next submission of the petitioners is to the effect that Additional Collector is not Collector within the meaning of U.P. Zamindari Abolition and Land Reforms Act and has no jurisdiction to cancel the lease. Assuming without admitting that power to cancel the lease only vests with Collector, this Court will not exercise its jurisdiction under Article 226 of the Constitution to interfere with an order of Additional Collector, the effect of which is to restore the illegal lease granted to the petitioners. This Court while exercising jurisdiction under Article 226 of the Constitution will not exercise its jurisdiction in a manner the effect of which is to restore illegal order.*

9. *The Apex Court in Gadde Venkateswara Rao v. Government of Andhra Pradesh, AIR 1966 SC 828, has observed that while exercising jurisdiction under Article 226, High Court will not exercise its jurisdiction, the effect of which is to restore an illegal order.* The relevant paragraph of the aforesaid judgment is extracted below:

*"(17) The result of the discussion may be stated thus. The Primary Health Centre was not permanently located at Dharmajigudem. The representatives of the said village did not comply with the necessary conditions for such location. The Panchayat Samithi finally cancelled its earlier resolutions which they were entitled to do and passed a resolution for locating the Primary Health Centre permanently at Lingapalem. Both the orders of the Government, namely the order dated March 7, 1962, and that dated April 18, 1963, were not legally passed; the former, because it was made without giving notice to the Panchayat Samithi, and the latter, because the Government had no power under Section 72 of the Act to review an order made under Section 62 of the Act and also because it did not give notice to the representatives of Dharmajigudem village. In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government dated April 18, 1963? If the High Court had quashed the said order, it would have restored an illegal order, it would have given the health centre to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case."*

*10. Both the submissions of counsel for the petitioners being without any substance, the orders impugned in the writ petition need to interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India."*

17. This Court in the case of ***Sharad Kumar Dwivedi vs. State of U.P. & Ors. 2022 SCC OnLine All 466;*** took note of relevant provisions including Para A-124 of U.P. Land Records Manual, Section 117 and 132 of the Act of 1950 and Section 101 of U.P. Revenue Code, 2006 (in short

"Code of 2006") and also relevant pronouncements/reports on the issue including the judgment passed in the case of **Gyanendra Singh (supra)** and thereafter held that the land recorded as "Jungle Dhak" is a public utility land. The relevant part of the judgment reads as under:-

*"Relevant Provisions:—*

*35. Para A-124 of the U.P. Land Records Manual provides the classes of the tenure or categories of land, which reads as under:—*

*"A-124. Arrangement of holdings : - The arrangement of land within each village in the khatauni shall be as follows:—*

*Part I=*

*(1)*

*(1-A)*

*(1-B)*

*(2)*

*(3)*

*(4)*

*(5) Culturable Land—*

*(i)*

*(ii)*

*(iii) Culturable Waste—*

*(a) Forests of timber trees—*

*(1) under the management of Forests Department (including erstwhile private forests made over to Forests Department)*

*(2) vested in the Gram Sabha.*

*(b) Forests of other trees, shrubs, bushes etc.*

*(1) (1) under the management of Forests Department (including erstwhile private forests made over to Forests Department)*

*(2) vested in the Gram Sabha."*

*36. Section 117 of the U.P.Z.A. & L.R. Act, 1950 is in respect of the vesting of certain lands etc. in Gram Sabhas and other local authorities. Section 117(6) of the U.P.Z.A. & L.R. Act, 1950 reads as under:—*

*"117. Vesting of certain lands, etc. in Gaon Sabhas and other Local Authorities.*

*(1) ...*

*(2) ...*

*(6) The State Government may at any time, [by general or special order to be published in the manner prescribed], amend or cancel any [declaration, notification or order] made in respect of any of the things aforesaid, whether generally or in the case of any Gaon Sabha or other local authority and resume such thing and whenever the State Government so resumes any such things, the Gaon Sabha or other local authority, as the case may be, shall be entitled to receive and be paid compensation on account only of the development, if any, effected by it in or over that things:*

*Provided that the State Government may after such resumption make a fresh declaration under sub-section (1) or sub-section (2) vesting the thing resumed in the same or any other local authority (including a Gaon Sabha), and the provisions of sub-sections (3), (4) and (5), as the case may be, shall mutatis mutandis, apply to such declaration."*

*37. Section 132 of U.P.Z.A. & L.R. Act, 1950 provides the category of lands in which bhumidhari rights shall not accrue. Relevant provisions of Section 132 of the U.P.Z.A. & L.R. Act, 1950 read as under:—*

*"132. Land in which [bhumidhari] rights shall not accrue.- Notwithstanding anything contained in Section 131, but without prejudice to the provisions of Section 19, [bhumidhari] rights shall not accrue in—*

*(a) pasture lands or lands covered by water and used for the purpose of growing singhara or other produce or land in the bed of a river and used for casual or occasional cultivation;*

*……………..........*

*(c) lands declared by the Slate Government by notification in the Official Gazette, to be intended or set apart for taungya plantation or grove lands of a [Gaon Sabha] or a Local Authority or land acquired or held for a public purpose and in particular and without prejudice to the generality of this clause-*

*………………..*

*(vi) lands set apart for public purposes under the U.P. Consolidation of Holdings Act, 1953 (U.P. Act V of 1954).]"*

*38. Section 101 of the U.P. Revenue Code, 2006 permits the exchange of land by a Bhumidhar with prior permission in writing of the Sub-Divisional Officer. However, it further provides that the Sub-Divisional Officer shall refuse permission for exchange inter alia in respect of the land in which bhumidhari rights do not accrue. Section 101 of the U.P. Revenue Code, 2006 reads as under:—*

*"101 Exchange.- (1) Notwithstanding anything in section 77 of this Code, any bhumidhar may with prior permission in writing of the Sub-Divisional Officer exchange his land with the land- (a) held by another bhumidhar; or (b) entrusted or deemed to be entrusted to any Gram Panchayat or a local authority under section 59. (2) The Sub-Divisional Officer shall refuse permission under sub-section (1) in the following cases, namely- (a) if the exchange is not necessary for the consolidation of holdings or securing convenience in cultivation; or (b) if the difference between the valuation, determined in the manner prescribed, of the lands given and received in exchange exceeds ten per 52 cent of the lower valuation; or (c) if the difference between the areas of the land given and received in exchange exceeds twenty-five per cent of the lesser area; or (d) in the case of land referred to in clause (b) of sub-section (1), if it is reserved for planned use, or is land in which bhumidhari rights do not accrue; or (e) if the land is not located in same or adjacent village of the same tahsil : Provided that the State Government may permit the exchange with land mentioned in clause (d) aforesaid, on the conditions and in the manner, prescribed. (3) Nothing in this section shall be deemed to empower any person to exchange his undivided interest in any holding, except where such exchange is in between two or more co-sharers. (4) Nothing in the Registration Act, 1908 (Act No. 16 of 1908), shall apply to an exchange in accordance with this section."*

*Analysis:*

*39. It is a trite law that if a writ petition filed by a person raises question of public importance involving exercise of power by men in authority, then it is the duty of the Court to enquire into the matter. The legal fraud played by the public authority for benefit of the private persons at the expense of public at large cannot be condoned. In the present case, even if it is believed that the petitioner has some personal grudge or score to settle with opposite party no. 5 and his sons, the cause espoused by him in this writ petition is of greater public importance and, therefore, this Court in its order dated 18.3.2021 observed that looking at the facts of the case, this Court may treat this writ petition as Public Interest Litigation suo motu.*

*40. Supreme Court in the case of Akhil Bhartiya Upbhokta Congress v. State of Madhya*

*Pradesh, (2011) 5 SCC 29 in paragraph 80 held as under:—*

*"80. The challenge to the locus standi of the appellant merits rejection because it has not been disputed that the appellant is a public spirited organization and has challenged other similar allotment made in favour of Punjabi Samaj, Bhopal, That apart, as held in Shivajirao Nilangekar Patil v. Mahesh Madhav Gosavi, (1987) 1 SCC 227 even if a person files a writ petition for vindication of his private interest but raises question of public importance involving exercise of power by men in authority then it is the duty of the Court to enquire into the matter."*

*41. The State or its instrumentalities cannot give largesse to any person according to the sweet will and whims of the authorities of the State. Every action/decision of the State and its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy. Paragraph 65 of the said judgment reads as Under:—*

*"65. What needs to be emphasized is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefitted by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."*

*42. This Court in Gyanendra Singh v. Additional Commissioner, Agra Division, Agra, (2003) 95 RD 286 has held that the land recorded as "Jangal Dhak' is a forest land and is a public utility land and same cannot be transferred by way of lease, sale etc and no bhumidhari rights shall accrue in respect of the said land. These lands are saved under Section 132 of the U.P.Z.A. & L.R. Act, 1950. This Court considering the provisions of Section 132 of the U.P.Z.A. & L.R. Act, 1950 held that lands recorded as "Jangal Dhak' are covered by the lands enumerated under Section 132 U.P.Z.A. & L.R. Act, 1950 and the same cannot be transferred in favour of anyone.*

*43. This Court defined in the said judgment that "Jangal Dhak' means "Dhaka Forest'. Dhaka is a kind of small tree having large leaves. It has been held that the entry of the land as "Jangal Dhak' would mean that it is a forest land and forest is beneficial for human life and environment. Therefore, the land in the category of "Jangal Dhak' is a public utility land, in respect of which no bhumidhari right can accrue. Paragraphs 7 and 8 of the said judgment read as under:—*

*"7. The sub-clause (3) of Section 132 includes land held for a public purpose on which bhumidhari rights shall not accrue. The aforesaid three plots being recorded as "Dhaka Jangal" were covered by land as enumerated in Section 132 and*

*lease of bhumidhari rights with non-transferable right cannot be granted on the said plots. No error has been committed by the courts below in cancelling the lease granted in favour of the petitioners. The submission of petitioners is that other persons have also been granted lease of "Dhaka Jangal", hence petitioners have been discriminated in so far as the lease of other persons have not been cancelled and the petitioners have only been singled out for cancellation. The counsel for the petitioners has raised the submission based on discrimination. As noted above, lease of "Dhaka Jangal" is not permissible in accordance with Section 132 of U.P. Zamindari Abolition and Land Reforms Act and the fact that leases were granted to certain other persons cannot validate the lease of the petitioners which was in violation of Section 132 of U.P. Zamindari Abolition and Land Reforms Act. The plea of discrimination is not available in a case where the benefit which was taken by other persons cannot be said to be in accordance with law. Apex Court in Chandigarh Administration v. Jagjit Singh, (1995) 1 SCC 745, held that mere fact that the respondent has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination in case the order in favour of other persons is found to be contrary to law or not warranted in the facts of this case. Following was laid down in paragraph 8:*

*"8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be correct, if it can be done according to law indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent authority to repeat the illegality; the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law…………"*

*44. Thus, I do not find any substance in the submission of Sri. Mohd.*

*Arif Khan, learned Senior Advocate that the land in question, which was recorded as "Jangal Dhak' is not a public utility land and, therefore, there was no bar under Section 132 of the U.P.Z.A. & L.R. Act, 1950."*

18. In ***Writ - C No.1001953 of 2006 (Ramesh vs. Additional Commissioner, Lucknow And 2 Ors.)***, this Court held that the land recorded as "Jungle Dhak" would be covered under Section 132 of the Act of 1950 and according to this judgment, the land recorded as "Timber Trees" as also "Jungle Dhak" would be a public utility land and no right would be available to any person over such type of lands.

19. Undisputedly, the land earlier was recorded under category/entry 8(iii)(a)(1) of Para 124 of U.P. Land Records Manual and subsequently after enforcement of the Act of 1950, the entire land was recorded under categories/entries indicated in Para A-124 of U.P. Land Records Manual. It is for the reason that in 1359 Fasli (1952 A.D.), some portion of Gata/Plot No. 21 was recorded as 'Imarti Lakdi Ka Jungle', under category/entry 5(iii)(a)(1) and out of total area i.e. 431.46 acres of this land 35 acres were recorded under category/entry 5-A, which means "Occupiers of lands without title when there is no one already recorded in column 5 of the khasra" and earlier to the same i.e. in 1346 Fasli (1939 A.D.) and 1356 Fasli (1949 A.D.), the land was recorded under category 8(iii)(a)(1), which means "the land manged by Forest Department".

20. It would not be out of place to indicate here that in terms of Section 20-A inserted in Indian Forest Act, 1927, vide U.P. Act 23 of 1965, no right would be available to any person over any "Forest Land or Waste Land". Section 20-A is extracted hereinunder:-

***"20-A. Certain forest land or waste land when deemed to be reserved forest.***—*(1) Notwithstanding anything contained in this Act or in any other law for the time being in force, including the Merged States (Laws) Act, 1949 or the U.P. Merged States (Application of Laws) Act, 1950, or any order issued thereunder, any forest- land or waste-land in a merged State which immediately before the date of merger (hereinafter in this section referred to as the said date),-*

*(a) was deemed to be a reserved forest under any enactment in force in that State, or*

*(b) was recognized or declared by the Ruler of such State as reserved forest under any law (including any enactment, rule, regulation, order, notification, custom or usage having the force of law) for the time being in force, or*

*(c) was dealt with as a reserved forest in any administrative report or in accordance with any working plan or register maintained and acted upon under the authority of the Ruler.*

*shall be deemed to be and since the said date to have continued to be a reserved forest subject to the same rights or concession, if any, in favour of any person as were in force immediately before the said date.*

*Explanation I- A certificate of the State Government or of any officer authorized in his behalf to the effect that a report, working plan or register was maintained and acted upon under the authority of the Ruler shall be conclusive evidence of the fact that it was so maintained and acted upon.*

*Explanation II- Any question as to the existence or extent of any right or*

*concession referred to in this sub-section shall be determined by the State Government, whose decision, given after such enquiry, if any as it thinks fit shall be final.*

*Explanation III- 'Working plan' includes any plan, scheme, project, map, drawings and lay-outs prepared, for the purpose of carrying out the operations in the course of the working and management of forests.*

*(2) No right shall be deemed to have been acquired on or after the said date in or over any land mentioned in sub-section(I) except by succession or under a grant or contract in writing made or entered into by or on behalf of the State Government or some person in whom such rights was vested immediately before the said date and no fresh clearings since made for cultivation or for any other purpose (except clearings made in accordance with any concessions granted by the Ruler and in force immediately before the said date or in accordance with the rules made by the State Government in this behalf since the said date) shall be recognized as or deemed to be lawful, anything contained in this Act or any other law for the time being in force notwithstanding.*

*(3) The State Government may within five years from the commencement of the Indian Forest (Uttar Pradesh Amendment) Act, 1965, revise any arrangement of the nature specified in section 22, and pass any incidental or consequential, order, including any direction to the effect that any of the proceedings specified in the foregoing provisions of this Chapter be taken.*

*(4) In relation to any land mentioned in sub-section (1), the references in sections 24 and 26-*

*(a) to section 23 shall be construed as references to sub-section (2) ; and*

*(b) to rights admitted, recorded or continued under section 14 or section 15 shall be construed as references to rights of pasture or to forest produce admitted, recorded or continued in or under the corresponding enactment, law or documents referred to in sub-section (1).*

*(5) Without prejudice to any action that may be or may have been taken for ejectment, vacation of encroachment or recovery of damages in respect of any unauthorised occupation of or trespass over any land mentioned in sub-section (1), or for seizure, confiscation, disposal or release (on payment of value or otherwise) of any forest produce in respect of which any forest offence has been committed in relation to such land or of any tools, boats, carts, or cattle used in committing such offence, nothing in this section shall be deemed to authorize the conviction of any person for any act done before the commencement of the Indian Forest (Uttar Pradesh Amendment) Act, 1965, which was not an offence before such commencement."*

21. Regarding expression(s) 'Forest' and 'Forest Land', the Hon'ble Apex Court in the case of **T.N. Godavaraman Thirumulpad etc. vs. Union of India and Others; (1997) 2 SCC 267**, held as under:-

*"4. The Forest Conservation Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance; and therefore, the provisions made therein for the conservation of forests and for matters connected therewith, must apply to all forests irrespective of the nature of ownership or classification thereof. The word "forest" must be understood*

*according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act. The term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof. This aspect has been made abundantly clear in the decisions of this Court in Ambica Quarry Works v. State of Gujarat [(1987) 1 SCC 213] , Rural Litigation and Entitlement Kendra v. State of U.P. [1989 Supp (1) SCC 504] and recently in the order dated 29-11-1996 (Supreme Court Monitoring Committee v. Mussoorie Dehradun Development Authority [ WP (C) No 749 of 1995 decided on 29-11-1996] ). The earlier decision of this Court in State of Bihar v. Banshi Ram Modi [(1985) 3 SCC 643] has, therefore, to be understood in the light of these subsequent decisions. We consider it necessary to reiterate this settled position emerging from the decisions of this Court to dispel the doubt, if any, in the perception of any State Government or authority. This has become necessary also because of the stand taken on behalf of the State of Rajasthan, even at this late stage, relating to permissions granted for mining in such area which is clearly contrary to the decisions of this Court. It is reasonable to assume that any State Government which has failed to appreciate the correct position in law so far, will forthwith correct its stance and take the necessary remedial measures without any further delay."*

22. Upon conjoint reading of above indicated entries and note appended to the same as also the observation made in the judgment(s), referred above and the spirit of Section 20-A of the Act of 1927, this Court is of the view that no right would be available to any person over the 'land' if the same is recorded in terms of category/entry 14(iii)(a)(1) in Para 124 or 8(iii)(a)(1) in Para 124-A or 5(iii)(a)(1) in Para A-124 of U.P. Land Records Manual.

23. Now, the issue before this Court is as to whether any right would be available to the petitioner(s) based upon Section 20(b) of the Act of 1950 and the revenue entries indicated in (i) Khatauni of 1356 Fasli (1949 A.D.); (ii) indicated in questionairre (annexed as Annexure No. 3 to the petition) and (iii) Khatauni of 1359 Fasli (1952 A.D.).

24. The aforesaid is in view of the claim of the petitioners, which can be deduced from the following facts:-

25. As per petitioners, in 1356 Fasli (1949 A.D.), the land in issue i.e. Gata/Plot No. 21 area 431.61 acres was recorded in the name of Raja Brijraj Bahadur Singh under Category 8(3)1. Para 4 of Writ Petition, at the cost of repetition, is extracted hereinunder:-

*"4. That the disputed property was entered in the ownership of Raja Brijraj Bahadur of Jhandi as proprietor /khewatdar/Zamindar of Mohal Mustahkam village Alenganj Pargana Bhud District Kheri, before abolition of Zamindari in*

*Uttar Pradesh. Before 1356 F Gata no. 21 area 431.61 acr. was entered as owner with possession in the khewat khatauni of Raja Brijraj Bahadur of Jhandi in Ziman 8(3)1 of Non-ZA khatauni. The photocopy of the questionnaire from record room is being annexed herewith Annexure No. 3 to this writ petition."*

26. As per petitioners, in 1359 Fasli (1952 A.D.) on account of possession of over 31.35 acres of Gata/Plot No. 21 the names of predecessor-in-interest of petitioners were recorded and Gata/Plot No. 21 was re-numbered/sub-divided as Gata/ Plot No. 21, 21/2 to 21/7 and accordingly Gata/Plot No. 21 area 393.91 acres recorded under Category/Entry 8(iii)(a)(1) in Para 124-A, which is similar to category/entry 5(iii)(a)(1) in Para A-124 of U.P. Land Records Manual, and 31.35 acres of Gata/Plot No. 21 was recorded under Category 5-A in Para 124-A of U.P. Land Records Manual, which means *"Occupiers of lands without title when there is no one already recorded in column 5 of the khasra".*

27. Relevant details of entries (as appears from Annexure No. 4 to the petition), which is the copy of Khatauni of 1359 Fasli (1952 A.D.), wherein names of predecessors-in-interest of the petitioners were mentioned, are indicated as under:-

"नकल 'उद्धरण'- खतौनी-सन् फसली 1359
"महाल-मुस्तहकम"
ग्राम-एलनगंज
परगना-भूड
जिला-खीरी।

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1 2 3 4 5 6 7 8 9 10 11

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जिमन-(5)अ काबिजान आराज़ी बिला हकीयत जव खसरा के खाना 5 में किसी का इन्द्राज न हो।

89 डाल सिंह पुत्र मोमराज 1 21/2
7.85 ई: जंगल से
सिंह सा सा०टाग कॉप एक साल
90 गोपाल सिंह पुत्र सागर 1
21/3 8.60 ई: जंगल से
सा० टॉडा कांप सा०
91 बुद्ध पुत्र कम्मा सा० 1 21/4
2.50 ई: जंगल से
टॉडा काप एक साल
92 सुरता पुत्र बुद्ध सा० 1 21/5
6-0 ई: जंगल से
टॉडा काप एक साल
93 परम सिंह पुत्र मोम- 1 21/6
10-0 इमारती जंगल से
राज सिंह एक साल
94 अमरू पुत्र राम राम 1 21/7
2-60 ई: जंगल से
सा०टाडा काप एक साल"

28. In order to decide the issue aforesaid, the relevant part of the Khatauni of 1359 Fasli (1952 A.D.) i.e. where the division of Gata/Plot No.21 has been indicated, is also extracted hereinunder:-

29. From the persons recorded in Khatauni of 1359 Fasli (1952 A.D.) the petitioners purchased the land in issue, which in 1356 Fasli (1949 A.D.) was part of Gata/Plot No. 21 area 431.61 acre under Category 8(iii)(a)(1) of U.P. Land Record Manual, according to which, the land was under the control of Forest Department. Details of acquiring the right in the land in issue, as appears from Annexure No. 17 of this Writ Petition, are as under:-

*" धारा 24– यह कि निम्न क्रम के अनुसार आपत्तिकर्तागण निम्न भूमि के ठवदंपिकम च्नतबींमत वित टंसनंइसम ब्वदेपकमतंजपवद ूपजीवनज छवजपबम निम्न भूमि के संक्रमणीय भूमिधर हैं, और, आपत्तिकर्तागण के नाम इस भूमि पर दर्ज होने योग्य है।*

| नाम विक्रेता | पुरानी गाटा सं0 | नयी गाटा सं0 | रकवा | क्रेतागण | अन्य विवरण |
|---|---|---|---|---|---|
| श्रीमती कबूतरी देवी पत्नी हरी सिंह | 21/2 | 22ख | 2.20 एकड़ | महेश चन्द्र सक्सेना पुत्र श्री लाल बहादुर सक्सेना | दिनांक 17.03.1997 को भूमि मय भूमि पर खड़े पेड़ों के रजिस्टर्ड बैनामा द्वारा क्रय की |
| झाऊ सिंह पुत्र डाल सिंह, लाखन सिंह, अर्जुन सिंह, बलवन्त सिंह पुत्रगण नन्हू सिंह, विजय पाल पुत्र मान सिंह, ईश्वर चन्द्र व भारत सिंह पुत्रगण राम रतन, मुरली पुत्र तोताराम, मलखान सिंह, शंकर सिंह, ब्रम्हा सिंह, राम औतार, लछिमन, गंगाधर, महादेव पुत्रगण दयाल सिंह, व चन्द्रिका पुत्र हेतराम | 21/3 | 22ग | 6.60 एकड़ | महेश चन्द्र सक्सेना पुत्र श्री लाल बहादुर सक्सेना | दिनांक 09.06.1997 को भूमि मय भूमि पर खड़े पेड़ों के रजिस्टर्ड बैनामा द्वारा क्रय की |
| पुत्तू सिंह पुत्र गोपाली | 21/4 | 22 घ | 7.20 एकड़ का 1/2 भाग | विजयरानी शर्मा पुत्री श्री होरी लाल शर्मा | दिनांक 28.04.1997 को भूमि मय भूमि पर खड़े पेड़ों के रजिस्टर्ड बैनामा द्वारा क्रय की |
| भीकम पुत्र गोपाली | 21/4 | 22 घ | 7.20 एकड़ का 1/2 भाग | संजीव कुमार सक्सेना, व अनूप कुमार सक्सेना | दिनांक 28.04.1997 को भूमि मय भूमि पर खड़े पेड़ों के रजिस्टर्ड बैनामा द्वारा क्रय की |
| बलवन्त सिंह पुत्र परम सिंह | 21/5 | 22ङ | 8.30 एकड़ का 1/2 भाग | कमला सक्सेना पुत्री श्री मोहन लाल सक्सेना | दिनांक 04.07.1997 को भूमि मय भूमि पर खड़े पेड़ों के रजिस्टर्ड बैनामा द्वारा क्रय की |
| बलवन्त सिंह पुत्र परम सिंह | 21/5 | 22ङ | 8.30 एकड़ का 1/2 भाग | 8.30 एकड़ का 1/2 भाग | दिनांक 04.07.1997 को भूमि मय भूमि पर खड़े पेड़ों के रजिस्टर्ड बैनामा द्वारा क्रय की |
| कोमल व साहू पुत्रगण सुरेश, मुकेश पुत्र रघुवर | 21/6 | 22च | नन्हे लाल शर्मा पुत्र श्री भूपराम शर्मा | 5.0 एकड | थ्दनांक 28.04.1997 को भूमि मय भूमि पर खड़े पेड़ों के रजिस्टर्ड बैनामा द्वारा क्रय की |
| कलावती बेवा बुद्धा | 21/7 | 22छ | 2.10 एकड़ | नन्हे लाल शर्मा पुत्र श्री भूपराम शर्मा | दिनांक 28.04.1997 को भूमि मय भूमि पर खड़े पेड़ों के रजिस्टर्ड बैनामा द्वारा क्रय की |

30. The entries in revenue records favourable to the petitioners were undisputed till Forest Department raised its claim over the land in issue.

31. The Forest Department for the first time disputed this entry in the year 1995. On an objection being raised regarding the entries, the S.D.M, Gola Gokaran Nath, District-Kheri sought report

from the revenue Official/Tehsildar and in response, the report dated 16.05.1995 was submitted. This report says that present Gata No.22 (earlier Gata/Plot Nos.21/2 to 21/7) is not reserved forest. The report is annexed as Annexure No.10 to the present petition and being relevant, the same is reproduced hereinunder:-

*"उपरोक्त स्थिति का मैने भली भाँति निरीक्षण किया है। उपरोक्त वर्णित सम्बन्धित खातेदारों की उपरोक्त भूमि पर शाल आदि प्रजातियों के वृक्ष खड़े है जिन पर भी उनका ही स्वामित्व है। क्योंकि चकबन्दी के पूर्व के नम्बरों में भी जंगल दर्ज है और वर्तमान में भी जंगल दर्ज है।*

*इस प्रकार एक लम्बे अर्से से यथार्थ में उपरोक्त खातेदार अपनी उपरोक्त भूमि तथा उस पर खड़ी सम्पत्ति के काबिज व पैतृक स्वामी है। वे पट्टेदार नहीं अपितु श्रेणी 1 क संक्रमणीय भूमिधर के काश्तकार है।*

*प्रभागीय वनाधिकारी के पत्रांक 5210 दिनाँक 29.5.95 द्वारा राजि अधिकारी भीरा का कथन उपलब्ध वन व वन राजस्व अभिलेखानुसार निराधार सिद्ध हुआ है वर्तमान का 22 नं० विज्ञापित वन क्षेत्र में आरक्षित नहीं है।*

*अतः आज के दिनांक 21.2.95 के आदेशानुपालन में उपरोक्त भूस्वामित्वों को उक्त भूमि पर तथा उस पर खड़ी वृक्ष सम्पदा पर सीमांकन कार्यवाही इजरा अनुरूप दि० 31.3.95 को पुनः सत्यापित कब्जा सुनिश्चित कर दिया गया है। आवश्यक कार्यवाही हेतु पत्रावली सेवा में प्रेषित।"*

32. It reflects from the above quoted report that the same was prepared after taking note of the notifications dated 29.03.1954 and 26.04.1968 issued under Section 4 and 20 of the Act of 1927, respectively, which are also part of the record as Annexure No.8.

33. From a bare perusal of the report, quoted above and the notifications referred above, it is apparent that old Gata/Plot Nos.21/1 to 21/7 were not acquired for reserve forest under the Act of 1927. However, the admitted fact in the 1356 Fasli (1949 A.D.) and prior to that the total area i.e. 431.61 acre of Gata/Plot No.21 was recorded under Category/Entry 8(iii)(a)(1) and out of this, only over 31.35 acres, the petitioners are claiming their rights and rest of the land i.e. 393.91 acres belongs to the Forest Department undisputedly.

34. The S.D.M, District-Kheri, thereafter, by order dated 30.06.1995 rejected the claim of the Forest Department. The basis of rejection, as appears from the order of the S.D.M., Gola Gokaran Nath, District-Kheri, is the report of the Tehsildar dated 16.05.1995.

35. After the order dated 30.06.1995, the Forest Department again raised its claim over the land in issue and the claim of the Forest Department was allowed vide order dated 28.10.1999 passed by S.D.M, Gola, Gokaran Nath in Case No.118/Allenganj-Forest Department-Forged entry 99, dated 28.10.1999. The operative portion of order dated 28.10.1999 is extracted hereinbelow:-

*"अतः आदेश दिया जाता है कि खतौनी 1400-1405 फ० के खाता सं० 1, 7, 34, 57, 60 एवं 129 स्थित ग्राम ऐलनगंज परगना भ० से अंकित सभी मूल खातेदारों एवम् बनामादारों के नाम निरस्त करे भूमि नं० 22 ख से 22 छ की "इमारती लकड़ी के जंगजेर इंतजाम वन विभाग" के रूप में राजकीय भूलेखों में अंकित किया जाये। नायब तहसीलदार के वाद सं० 684, 686, 685-682, 755, 690 व 609 में पारित आदेश व नामान्तर वाद निरस्त किये जाते है। यदि 1406 फसली की खतौनी नई बनाई गयी हो तो यह आदेश भूमि नं० 22 ख से 22 छ पर प्रभावी होगा। आदेश का अंकन राजस्व अभिलेखों में किया जावे।"*

36. Being aggrieved by the order dated 28.10.1999, the petitioners approached the revisional authority by means of the Revision No.53 (LR) 1999-2000 (Mahesh Chandra Saxena vs. State of U.P/Forest Department) and this Revision was allowed vide order dated 11.10.2000. The operative portion of the order dated 11.10.2000 reads as under:-

*"६- उपर्युक्त विवेचना के आधार पर मैं इस निष्कर्ष पर पहुँचा हूँ कि उप जिलाधिकारी का आदेश दिनांक २८-१०-९९ विधिसम्मत नहीं है, जिसे निरस्त किया जाता है तथा निगरानी आंशिक रूप से स्वीकार करते हुए मामला विचारण न्यायालय को इस अभ्युक्ति के साथ प्रतिप्रेषित किया जाता है कि वह भू-राजस्व अधिनियम की धारा ३३/३९ के अन्तर्गत मुकदमा दर्ज करके संबंधित गाँव सभा को पक्ष बनाकर मामले का निस्तारण गुण-दोष के आधार पर इस आदेश की प्राप्ति के तीन माह के भीतर करें तथा यह भी आदेशित किया जाता है कि वह संबंधित मूल अभिलेख के जाँचोपरान्त उसकी फोटो-स्टेट कापी सत्यापित करके अपनी कस्टडी में रख लें तथा वह व्यक्तिगत रूप से यह भी देखेंगे कि गाँव सभा का पक्ष सही ढंग से प्रस्तुत हो। यदि अभिलेखों में फर्जी (forged) प्रविष्टि पाई जाती है तो संबंधित अधिकारी/कर्मचारी के विरूद्ध कार्यवाही की जाये तथा कृत कार्यवाही से परिषद् को भी सूचित किया जाये।"*

37. The operative portion of the order dated 11.10.2000, quoted above, indicates that the revisional authority interfered in the order dated 28.10.1999 passed by S.D.M. Gola Gokaran, whereby the claim of the Forest Department was allowed, and remanded the matter back for deciding afresh on merits after impleading Gaon Sabha as a party to the proceedings.

38. Thereafter, the petitioners challenged both the order(s) dated 28.10.1999 and 11.10.2000 by means of the Misc. Single No.-174 of 2001 (Mahesh Chandra Saxena And Others vs. State of U.P. and Others). The petition referred by the petitioners was finally allowed vide order dated 12.09.2014. The relevant portion of the judgment of this Court dated 12.09.2014 reads as under:-

*"3. Divisional Forest Officer (respondent-4) moved an application for deleting the names of the petitioners from the aforesaid khatas. It has been stated in the application that the land in dispute was Forest land and covered with dense forest of old 'sal' trees. The names of the petitioners/ their transferors were recorded by making forgery in the revenue records, over it. On this application, a report has been called for from Tahsildar, who submitted his report and Up-Ziladhikari, by the order dated 28.10.1999 deleted the names of the petitioners from the land in dispute holding that it were Forest land and the names of the transferors of the petitioners were recorded by making forgery in the revenue records. The petitioners filed a revision (registered as Revision No. 53 (LR) of 1999-2000) from the aforesaid order. The revision was heard by Board of Revenue U.P., who by order dated 11.10.2000 held that the petitioners failed to prove satisfactorily that after date of vesting how their transferors were recorded over the land in dispute. Gaon Sabha was not impleaded as party although after date of vesting, property appeared to have been vested in it and why it had failed to protect the public property. Up-Ziladhikari passed the order in violation of principles of natural justice. On these findings, the order of Up-Ziladhikari, dated 28.10.1999 was set aside and the matter*

*was remanded to Up-Ziladhikari for fresh decision on merit after impleading gaon sabha and giving the parties an opportunity to adduce their evidence and examining original record. Hence this writ petition has been filed.*

*4. A complaint was also made to State Government, in this respect. On which Principal Secretary, Forest Department, Govt. of U.P., by order dated 29.04.1999 called for a report from Commissioner, Lucknow. In pursuance of the order dated 29.04.1999, the Commissioner heard the matter and also made spot inspection and after examining the evidence of the parties as well as original revenue records prior to the consolidation operation, submitted his report dated 07.06.1999. The Commissioner, in his report found that in settlement khatauni of 1346 F, plot 21 (area 436.41 acre) (a part of which is now disputed land) was recorded in khata 66 in ziman 8 (3) as "Krishi Yogy Banjar Bhumi and Imarti Lakari Ke Van" in gair ehatimali mohal and quality of soil was mentioned as 'jangal'. In 1354 F an area of 831.46 acre of plot 21 was recorded in khata 170 as mustahkam in ziman 8 (3) as "Krishi Yogy Banjar Bhumi and Imarti Lakari Ka Jangal". Same entry was repeated in 1356 F khatauni in khata 211. For the first time, in 1359 F, plot 21 was sub-divided and (i) plot 21/1 (area 393.91 acre) was recorded in khata 98 in ziman 8 (3) (1) as "Imarti Lakari Ke Jangal", (ii) plot 21/2 (area 7.85 acre) was recorded in khata 89 in ziman 5-A as "Occupiers of land without title when there is no one already recorded in column 5 of khasra" in the name of Dal Singh, with period of cultivation of one year. (iii) plot 21/3 (area 8.60 acre) was recorded in khata 90 in ziman 5-A in the name of Gopal Singh, with period of cultivation of one year. (iv) plot 21/4 (area 2.50 acre) was recorded in khata 91 in ziman 5-A in the name of Buddhu, with period of cultivation of one year. (v) plot 21/5 (area 8.60 acre) was recorded in khata 92 in ziman 5-A in the name of Surta, with period of cultivation of one year. (vi) plot 21/6 (area 10.00 acre) was recorded in khata 93 in ziman 5-A in the name of Gopal Singh, with period of cultivation of one year. (vii) plot 21/7 (area 2.60 acre) was recorded in khata 94 in ziman 5-A in the name of Amru, with period of cultivation of one year. In khasra 1359 F area of plot 21/1 was recorded as 393.91 acre cutting 431.46 acre and its deducted area were recorded in plots 21/2 to 21/7 as mentioned in the khatauni, in the names of different persons and cultivation of barely was shown but in the remark column entry of "Imarti Lakari Ke Jangal" has been mentioned. The Commissioner further found that this entry was made in different hand writing than the hand writing of then patwari, who had prepared regular khasra. In goswara total area of barely crop was shown as 245.72 acre in plot 21. The names of the persons recorded over plots 21/2 to 21/7 were recorded as sirdar in 1360 F. Same entry continued in 1370 F-1372 F khatauni and maintained during consolidation. After consolidation new plot number 22-ka to 22-chha was recorded of old plots 21/1 to 21/7. The petitioners purchased the aforesaid land in 1997 and on the basis of sale deed their names were mutated.*

*5. The counsel for the petitioners submitted that the predecessors of the petitioners were in cultivatory possession over the land in dispute since 1358 F and their names were recorded in settlement khatauni 1359 F. They acquired sirdari right under Section 20 (b) read with Rule 177-A of U.P. Act No. 1 of 1951 and the Rules framed in it, being recorded*

*occupants in 1359 F. The village has undergone in to consolidation operation. Entry in their favour was maintained during consolidation. The predecessors acquired bhumidhari right under Section 131 as amended by U.P. Act No. 1 of 1977. The petitioners are bonafide transferees. Their names were also mutated in the proceedings under Section 34 of U.P. Land Revenue Act, 1901. Claim of the respondents, if any, is barred under Section 49 of U.P. Consolidation of Holdings Act, 1953. In any case, long standing entry coming since 1359 F and maintained during consolidation cannot be deleted by an administrative order that too without providing any opportunity of hearing, as held by Board of Revenue U.P. in Hira Lal Vs. Aharwa, 1966 RD 10, Bahadur Vs. State of U.P., 1980 RD 1 (FB) and this Court in Maha Lakshmi Land and Finance Company (P) Ltd. Versus Board of Revenue U.P., 1997 (15) LCD 273. He submitted that in the absence of any notification under Section 20 of Indian Forest Act, the land cannot be treated as Forest land and Forest Department of State of U.P. has nothing to do with the land in dispute. He submitted that in the absence of any notification under Section 117 of U.P. Act No. 1 of 1951, Gaon Sabha has nothing to do in the matter, as held by Supreme Court in U.P. State Sugar Corporation Ltd. Vs. Dy. Director of Consolidation, AIR 2000 SC 878. Gaon Sabha did not raise any objection against the petitioners, either before consolidation or during consolidation. Right of Gaon Sabha, if any, is barred under Section 11-A and 49 of U.P. Consolidation of Holdings Act, 1953, as held by Division Bench of this Court in Gaon Sabha Kudra Vs. Noor Mohd. Khan, 1975 RD 61 (DB). Board of Revenue has illegally directed for impleading Gaon Sabha and deciding the dispute afresh, which is merely harassment of the petitioners for nothing. Impugned orders are illegal, without jurisdiction and liable to be set aside.*

*6. I have considered the arguments of the counsel for the parties and examined the record. A perusal of the report of the Commissioner shows that in settlement khatauni of 1346 F, plot 21 (area 436.41 acre) was recorded in khata 66 in ziman 8 (3) as "Krishi Yogy Banjar Bhumi and Imarti Lakari Ke Van" in gair ehatimali mohal and quality of soil was mentioned as 'jangal'. In 1354 F an area of 831.46 acre of plot 21 was recorded in khata 170 as mustahkam in ziman 8 (3) as "Krishi Yogy Banjar Bhumi and Imarti Lakari Ka Jangal". Same entry was repeated in 1356 F khatauni in khata 211. For the first time, in 1359 F, plot 21 was sub-divided and (i) plot 21/1 (area 393.91 acre) was recorded in khata 98 in ziman 8 (3) (1) as "Imarti Lakari Ke Jangal", (ii) plot 21/2 (area 7.85 acre) was recorded in khata 89 in ziman 5-A as "Occupiers of land without title when there is no one already recorded in column 5 of khasra" in the name of Dal Singh, with period of cultivation of one year. (iii) plot 21/3 (area 8.60 acre) was recorded in khata 90 in ziman 5-A in the name of Gopal Singh, with period of cultivation of one year. (iv) plot 21/4 (area 2.50 acre) was recorded in khata 91 in ziman 5-A in the name of Buddhu, with period of cultivation of one year. (v) plot 21/5 (area 8.60 acre) was recorded in khata 92 in ziman 5-A in the name of Surta, with period of cultivation of one year. (vi) plot 21/6 (area 10.00 acre) was recorded in khata 93 in ziman 5-A in the name of Gopal Singh, with period of cultivation of one year. (vii) plot 21/7 (area 2.60 acre) was recorded in khata 94 in ziman 5-A in the name of Amru, with period of cultivation of one year. In khasra 1359*

*F, area of plot 21/1 was recorded as 393.91 acre cutting 431.46 acre and its deducted area were recorded in plots 21/2 to 21/7 as mentioned in the khatauni, in the names of different persons. Although cultivation of barely was shown but in the remark column entry of "Imarti Lakari Ke Jangal" has been mentioned. The Commissioner found that this entry was made in different hand writing than the hand writing of then patwari, who had prepared regular khasra. In goswara total area of barely crop was shown as 245.72 acre in plot 21, which does not tally with the entry of khatauni.*

*7. According to Forest Department of State of U.P., the entire area of old plot 21 is still dense forest of 'sal' timber trees. Agricultural activities are not going on in any part of it. According to the petitioners, land recorded in their names are agricultural land. Entry in ziman 5-A, in Awadh is for "occupiers of land without title, where there is no one already recorded in column 5 of the khasra. Entry in ziman 8 (a), in Awadh is for "Forest of timber trees". Even in khatauni 1359 F, in remark column, entry of "Imarti Lakari Ke Jangal" has been mentioned. If there had been dense forest then, there could have been no agricultural activities. The petitioners claim title under Section 20(b) of U.P. Act No. 1 of 1951, as their predecessors were "recorded occupants" in 1359 F khatauni. A special Bench consisting of five Hon'ble Judges of this Court in Basdeo vs. Board of Revenue, U.P. 1974 R.D. 188 (SB) and Supreme Court in Ram Harakh vs. Hamid Ahmad Khan (1998) 7 SCC 488 held that in order to get right under Section 20(b) of U.P. Act No. 1 of 1951, entry in 1359F must be genuine and made according to the provisions of Land Record Manual and not a fake entry. Till today, this issue has not been decided by any court/authority after hearing the parties. In case, this entry was not genuine, the property in dispute was vested in State of U.P. under U.P. Act No. 1 of 1951 and only on the basis of subsequent possession, no right can be derived on it.*

*8. Admittedly no proceeding for correction of land record was taken under U.P. Consolidation of Holdings Act, 1953 and only the prior entries were maintained. The counsel for the petitioners submitted that after consolidation, their right cannot be challenged in view of Section 49 of the Act, which is quoted below:-*

*"49. Bar to civil jurisdiction.--Notwithstanding anything contained in any other law for the time being in force, the declaration and adjudication of rights of tenure holders in respect of land lying in an area, for which a notification has been issued under sub-section (2) of Section 4 or adjudication of any other rights arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act, shall be done in accordance with the provisions of this Act and no Civil or Revenue Court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act."*

*9. Supreme Court in Dina Nath v. State of U.P., (2010) 15 SCC 218, while upholding the direction of this Court for holding inquiry in respect of the entries made during consolidation over government land held that the Court cannot be a silent spectator and is bound to perform its constitutional duty for ensuring that the public property is not frittered by unscrupulous elements in the power corridors and acts of grabbing public land are properly inquired into and appropriate remedial action taken.*

*10. In order to avoid bar of Section 49, it is appropriate that District Deputy Director of Consolidation may conduct an inquiry and examine the correctness of the records including prepared during consolidation in exercise of his jurisdiction under Section 48 of U.P. Consolidation of Holdings Act, 1953.*

*11. In the absence of any notification under Section 117 of U.P. Act No. 1 of 1951, Gaon Sabha has nothing to do in the matter, as held by Supreme Court in U.P. State Sugar Corporation Ltd. Vs. Dy. Director of Consolidation, AIR 2000 SC 878. However, under Section 6 (a) of U.P. Act No. 1 of 1951, forest was vested in State of U.P. and respondent-3 is a department of State of U.P. assigned with the responsibility of maintaining forest as such Forest Department of State of U.P. and State of U.P. are necessary parties and required to be heard along with the petitioners by District Deputy Director of Consolidation. Since, the village has undergone into consolidation operation as entry made by consolidation authorities cannot be corrected exercising powers under U.P. Land Revenue Act, 1901.*

*12. In view of the aforesaid discussion, the writ petition is allowed. The orders of Up-Ziladhikari, dated 28.10.1999 and Board of Revenue, U.P. dated 11.10.2000 are set aside. The matter is remanded to District Deputy Director of Consolidation Kheri to conduct a proper inquiry after giving opportunity of hearing to the parties, if necessary he may frame issue and remit the matter to Consolidation Officer for recording oral and documentary evidence of the parties and pass appropriate order. After receiving evidence and findings of Consolidation Officer he shall decide the matter after hearing the parties. Since the matter is lingering for a long time and issue of public property is allegedly involved, he shall decide the matter expeditiously."*

39. A perusal of the above quoted portion of the judgment of this Court dated 12.09.2014 indicates that this Court did not accept the claim of petitioners based upon Section 20(b) of the Act of 1950 and remanded the matter before the respondent No.2-District Magistrate/District Deputy Director of Consolidation, Lakhimpur Kheri, with direction to conduct a proper inquiry after giving opportunity of hearing to the parties, if necessary, he may frame issue and remit the matter back to respondent No.3-Consolidation Officer, for recording oral and documentary evidence of the parties and pass appropriate orders and thereafter decide the matter after hearing the parties.

40. After the order dated 12.09.2014, respondent No.2-District Magistrate/District Deputy Director of Consolidation, Lakhimpur-Kheri, proceeded in the matter, as appears from Annexure no.17 of the petition, which is a copy of the objection filed by the petitioners which was entertained by respondent No.2 on 10.12.2014.

41. Thereafter, respondent No.2 vide order dated 09.09.2015 sent the matter to the respondent No.3-Consolidation Officer, Antim Abhilekh Second, Lakhimpur-Kheri.

42. Before the respondent No.3 the evidence was adduced by the parties, which is evident from the impugned order(s), Para 33 and Annexure No.18 of the Writ Petition. Annexure No. 18 is the copy of affidavit of evidence of the witnesses of the Forest Department, namely Satya Prakash, Van Daroga, who was duly cross examined.

43. It is to be noted that the petitioners have not placed before this Court the evidence adduced from the side of petitioners, though under law, the petitioners are under obligation to place each and every material on record before this Court.

44. Based upon the evidence adduced by the parties respondent No.3 passed the order dated 16.10.2019, impugned herein, whereby a direction was issued to expunge names of the petitioners from the revenue records.

45. The order dated 16.10.2019 was challenged by the petitioners by means of an Appeal No.583/2019541043000575 (Mahesh Chandra & Others vs. Prabhagiya Vanadhikari & Others), which was disposed of on 19.07.2022. Thereafter, the petitioners approached this Court by means of Writ - B No.570 of 2022 (Mahesh Chandra Saxena and 5 others vs. Distt. Dy. Director of Consolidation/Collector, Lakhimpur Kheri And 5 Ors.), challenging the order(s) dated 09.09.2015 and 16.10.2019 passed by respondent No.2 and respondent No.3, respectively, as also consequential order dated 26.08.2021 passed by the respondent No.3-Consolidation Officer, Antim Abhilekh Second, Lakhimpur Kheri.

46. This Court, after considering the entire facts of the case, dismissed the petition vide final order dated 26.09.2022. The relevant part of order of this Court dated 26.09.2022 reads as under:-

*"In the light of the aforesaid directions the District Deputy Director of Consolidation passed the order dated 9.9.2015 which is annexed as Annexure-1 and thereafter the matter was considered by the Consolidation Officer by a detailed order dated 16.10.2019 which came to be assailed in appeal which was allowed on 26.8.2021. It is also to be noticed that the order dated 9.9.2015 whereby the District Deputy Director of Consolidation remanded the matter to the Consolidation Officer was never challenged by the petitioners at that point of time. Moreover, the petitioners participated in the proceedings and never raised any objections regarding jurisdiction. It is also to be noticed that being aggrieved against the order dated 16.10.2019 the petitioners preferred an appeal which came to be allowed and it is only thereafter when the Consolidation Officer by means of his report dated 7.9.2022 by which the entire matter has now again been remitted to the District Deputy Director of Consolidation and now the petitioners have approached this court assailing the entire orders and the exercise which has taken place. The court further finds that the matter is open to be considered before the District Deputy Director of Consolidation, Lakhimpur Kheri, where the date is fixed for 7.10.2022. Till date the petitioners have not raised any objection before any of the Consolidation Authority except by filing the instant writ petition. Once the initial remand order dated 9.9.2015 was not challenged and after having participated in the proceedings and at this later stage the petitioners have preferred this writ petition in the aforesaid background, this court is not inclined to entertain this petition, especially when the entire matter is open to be considered by the District Deputy Director of Consolidation, Lakhimpur Kheri, where the matter is listed on 7.10.2022.*

*It shall be open for the petitioner to raise all his grievances and objections before the said court and in case such*

*objections are raised, needless to say that the authority shall consider and decide the same in accordance with law, however, this court does not deem appropriate to interfere at this stage. Accordingly the petition is dismissed."*

47. After the aforesaid order of Writ Court dated 26.09.2022, respondent No.2 passed the impugned order dated 10.04.2023, after providing proper opportunity of hearing to the parties to the proceedings. The relevant portion of the impugned order dated 10.04.2023 reads as under:-

*"अधीनस्थ न्यायालय के समक्ष वन विभाग (प्रभागीय वनाधिकारी) के साक्षी डी०डब्लू०-2 ओम प्रकाश वन दरोगा ने अपने साक्ष्य हेतु शपथ पत्र की धारा 12 में स्थिति को स्पष्ट इस प्रकार स्पष्ट किया है कि भूखण्ड सं0-21 व 22 का पूरा भाग साखू (साल) का एक विशाल जंगल है जिस पर स्थित पेड़ों की उम्र अनुमानतः 80 से 100 वर्ष है। उल्लेखनीय है कि साल के वृक्ष स्वयं उगते हैं और सम्पूर्ण क्षेत्रफल पर वन विभाग का कब्जा है। चूंकि ग्राम ऐलनगंज परगना भूड जिला-खीरी की खतौनी 1356 फसली के खाता सं0-91 में दर्ज गाटा सं0-21 रकबा 431.46 एकड़ इमारती लकड़ी के जंगल के रूप में दर्ज है इस कारण भी भारतीय वन अधिनियम की धारा 20क (ए) के अन्तर्गत गाटा सं0-21 का सम्पूर्ण रकबा 431.46 एकड़ आरक्षित वन भूमि है। अधीनस्थ न्यायालय के समक्ष महेश चन्द्र सक्सेना ने हुई जिरह के पृष्ठ सं0-1 की नीचे से तीसरी व दूसरी लाइन में स्वयं स्वीकार किया है कि 1356 फ0 खतौनी में 21 नम्बर पर जंगल दर्ज है और उन्होंने जिरह के पृष्ठ स0-2 की नीचे से पाचवी व चौथी, तीसरी लाइन में स्वयं स्वीकार किया है कि हमारी विवादित भूमि के चारों तरफ वन विभाग के निजी पेड़ व भूमि है हमारी विवादित भूमि पर 2752 पेड खड़े है। अधीनस्थ न्यायालय के समक्ष महेश चन्द्र सक्सेना ने हुई जिरह के पृष्ठ सं0-1 की अन्तिम लाइन व पृष्ठ सं0-2 की पहली लाइन में स्वीकार करते हुये कहा है कि यहां पर मैं ये भी बता दूँ कि 21 नम्बर बड़ा है जिसका रकबा 431.46 एकड़ जंगल दर्ज है। महेश चन्द्र सक्सेना ने हुई जिरह के पृष्ठ सं0-3 की अन्तिम लाइन में स्वयं कहा है कि "ये कहना गलत है कि वन विभाग की भूमि नही है। उपरोक्त महेश चन्द्र सक्सेना द्वारा प्रस्तुत साक्ष्य से स्वतः स्पष्ट है कि विवादित भूमि आरक्षित वन भूमि (जंगल भूमि) है। अधीनस्थ न्यायालय के समक्ष नन्हें लाल शर्मा ने अपने बयान की तीसरी, चौथी व पांचवी लाइन में कहा है कि "मेरा विवादित गाटा सं0-22 ख से 22 छ तक है 22 ख के उत्तर में ग्राम समाज है उसकी गाटा संख्या मुझे नहीं मालूम है, 22 ख के पूरब में ग्राम समाज है गाटा सख्या नहीं पता है, 22 ख पर पेड़ लगे हैं।" बयान के ऊपर से 19वीं लाइन में भी कहा है कि विवादित भूमि पर भी पेड लगे हुये हैं।" बयान की ऊपर 21, 22, 23, 24वीं लाइन में कहा है कि "विवादित भूमि पर साल व कूकट के पेड़ लगे हैं। विवादित भूमि के चारों तरफ ग्राम समाज की जमीन पर पेड़ लगे हैं।" उक्त बयानों से पूर्णतयः स्पष्ट है कि विवादित भूमि व उसके चारों ओर की भूमि जंगल के स्वरूप में है। खेती नहीं होती है। इसलिये 1356 फ0 के खाता सं0-91 के गाटा सं0-21 रकबा 431.36 व 1359 फ० के खाता सं0-98 का गाटा 21 रकबा 431.46 एकड़ इमारती लकड़ी के जंगल के रूप में ठीक ही ही दर्ज है। इस प्रकार विवादित भूमि जंगल की भूमि है।" जिस पर वन संरक्षण अधिनियम 1980 के प्राविधानों के अन्तर्गत गैर वानिकी कार्य वर्जित हैं। शेष आपत्तिकर्तागण विजयरानी शर्मा, अनूप कुमार व संजीव कुमार, कमला सक्सेना ने अपना कोई बयान दर्ज नहीं कराया है और कोई भी साक्ष्य प्रस्तुत नहीं किया है और अधीनस्थ न्यायालय के समक्ष कभी भी उपस्थित नहीं हुए हैं। अधीनस्थ न्यायालय के समक्ष वन विभाग के*

साक्षी सत्यप्रकाश वन दरोगा एवं ओम कुमार सिंह वन दरोगा ने विवादित भूमि को अपने-अपने साक्ष्य में पूर्णतयः जंगल साबित किया है। 1359 फ० ग्राम ऐलनगंज परगना भूड जिला खीरी की प्रमाणित प्रतिलिपि अधीनस्थ न्यायालय के समक्ष प्रस्तुत थी, तब भी अपीलकर्तागण के निवेदन पर अधीनस्थ न्यायालय ग्राम ऐलेनगंज परगना भूड जिला-खीरी की 1359 फसली की खतौनी को अभिलेखागार माल से तलब कर अवलोकन किया और आर्डर शीट दिनांकित 18.07.2018 पर अपने मत में माना कि 1359 फसली के खाता सं0-98 में दर्ज गाटा सं0-21 के रकबा 431.46 एकड पर कटिंग हुई है इसलिये आपत्तिकर्तागण का कोई स्वत्व उत्पन्न नहीं होता है। धारा 20 भारतीय वन अधिनियम के प्राविधान के अन्तर्गत इस आराजी से सम्बन्धित सभी हकूक समाप्त हो जाते हैं। माननीय उच्चतम न्यायालय ने रिट पिटीशन सं0-202/1995 टी०एन० गोडावर्मन थिरूमलकपाद बनाम यूनियन आफ इण्डिया व अन्य में दिनांक 03.12.2010 को निर्णय व आदेश पारित करते हुये कहा है कि Land over 2 hectares in area with the minimum density of 50 trees per hectare would be considered as "Forest. "

माननीय उच्च न्यायालय इलाहाबाद लखनऊ पीठ लखनऊ के समक्ष प्रस्तुत रिट याचिका सं0-5690/2000 दयाशंकर आदि बनाम उत्तर-प्रदेश राज्य में माननीय उच्च न्यायालय ने निम्न आदेश पारित करते हुये दिनांक 21.11.2000 को रिट याचिका निरस्त कर दी।

*Article 48 of the Constitution of India mandates the State to make an endeavour to protect and improve the environment and safeguard the forest and wild life of the country. The writ petition is devoid of merit. It is accordingly dismissed.*

भारतीय वन अधिनियम 1927 पूर्ण संहिता है। भारतीय वन अधिनियम 1927 विशेष अधिनियम है, जिसमें आरक्षित वन भूमि घोषित करने का प्राविधान वर्णित है। वन संरक्षण अधिनियम 1980 के प्राविधानों के अनुसार आरक्षित वन भूमि पर गैर वानिकी कार्य वर्जित है एवं दण्डनीय अपराध है। AIR 1997 Supreme Court 1228 रिट याचिका सं0-202/95 टी०एन० गोडावर्मन थिरूमलकपाद बनाम यूनियन आफ इण्डिया में माननीय उच्चतम न्यायालय द्वारा पारित आदेश दिनांक 12.12.1996 द्वारा भी वन संरक्षण अधिनियम 1980 का कड़ाई से पालन करने के निर्देश दिये हैं। इसी क्रम में रिट याचिका (सी) संख्या-202/1995 टी०एन० गोडावर्मन थिरुमलकपाद व अन्य में योजित अन्य आई०ए० के साथ आई०ए० संख्या-2469/2009 में माननीय उच्चतम न्यायालय ने दिनांक 05.10.2015 को सुनवाई के उपरान्त आदेश पारित कर इसे माननीय राष्ट्रीय हरित अधिकरण प्रधान बेंच, नई-दिल्ली को अन्तरित कर दिया था जिसमें मा० राष्ट्रीय हरित अधिकरण ने दिनांक 04.05.2016 को निर्णय आदेश देते हुए कहा कि "वन एवं वन सम्पदा की सुरक्षा एवं संरक्षकता सुनिश्चित किये जाने हेतु एवं धारा 4 में विज्ञापित अथवा अन्य वन भूमि के गैर वानिकी उपयोग पर विभिन्न प्रशासनिक अथवा न्यायिक स्तरों द्वारा जारी आदेशों का प्रभाव निरस्त करने के सम्बन्ध में तथा उल्लंघन करने के लिए जिम्मेदार अधिकारियों के विरुद्ध कार्यवाही किये जाने का पारित किया है।

ए0आई0आर0 1996 सुप्रीम कोर्ट 2432 The State of U.P. Vs. Dy. Director of Consolidation & others में माननीय उच्चतम न्यायालय ने पैरा-9 व 10 में विधि व्यवस्था दी है कि-*The crucial question for consideration, however, is whether the Consolidation Authorities have the jurisdiction to go behind the notification under Section 20 of the Act and deal with the land which has been declared and notified as a reserve forest under the Act. It is necessary, therefore, to examine the scheme of Chapter II of the Act. Section 3 provides that the State Government may constitute*

*any forest land or waste land which is the property of the Government or over which the Government has proprietary rights, or to the whole or any part of the forest produce to which the Government is entitled, a reserved forest. Section 4 provides for the issue of a notification declaring the intention of the Government to constitute a reserved forest. Section 5 bars accrual of forest rights in the are covered by the notification under section 4 after the issue of the notification. Section 6, inter alia, gives power to the Forest Settlement Officer to issue a proclamation fixing a period of not less than three months from the date of such proclamation and requiring every person claiming any right mentioned in Section 4 or Section 5 within such period, either to present to the Forest Settlement Officer a written notice specifying or to appear before him, and state the nature of such right and the amount and particulars of the compensation (if any) claimed in respect thereof. Section 7 gives power to the Forest Settlement Officer to investigate the objections. Section 8 prescribes that the Forest Settlement Officer shall have the same powers as a Civil Court has in the trial of a suit. Section, inter alia, provides for the extinction of rights where no claim is made under Section 6. Section 11(1) lays down that in the case of a claim to a right in or over any land, other than a right of way or right of pasture, or a right to forest produce or water course, the Forest Settlement Officer shall pass an order admitting or rejecting the same in whole or in part. In the event of admitting the right of any person to the land, the Forest Settlement Officer, under Section 11(2), can either exclude such land from the limits of the proposed forest or come to an agreement with the ower thereof for the surrender of his rights or proceed to acquire such land in the manner provided by the Land Acquisition Act, 1884. Section 17 provides for appeal from various orders under the Act and Section 18(4) for revision before the State Government. When all the proceedings provided under Section 3 to 19 are over the State Government has to publish a notification under Section 20 specifying definitely the limits of the Forest which is to be reserved and declaring the same to be reserved from the date fixed by the notification.*

*It is thus obvious that the forest settlement officer has the powers of a civil court and his order is subject to appeal and finally revision before the state government. The act is a complete code in itself and contains elaborate procedure for declaring and notifying a reserve forest. Once a notification under section 20 of the act declaring a land as reserve forest in published, then all the rights in the said land claimed by any person come to an end are no longer available. The notification is binding on the Consolidation Authorities in the same way as a decree of the civil court. The respondents could very well file objections and claims including objection regarding the nature of the land before the Forest Officer. They did not file any objection or claim before the authorities in the proceedings under the Act. After the notification under Section 20 of the Act, the respondents could not have raised any objections qua the said notification before the Consolidation Authorities. The Consolidation Authorities were bound by the notification which has achieved finality."*

*Consalidation No-1268/1979 State of Uttar Pradesh Through the Divisional Forest Officer Vs. The Deputy Director of Consalidation U.P. and Others में माननीय उच्च न्यायालय इलाहाबाद में अपने निर्णय दिनांक 19.08.2013 में कहा है कि If*

*contesting respondents were aggrieved by preliminary notification under Section 4 of Forest Act they should have availed the remedies provided under the Act (Sections 6, 9, 17, 11 and 16). However, after final notification under Section 20 the Chapter is closed.*

*इसी प्रकार माननीय उच्चतम न्यायालय ने एस०एल०पी० सिविल संख्या-9837-9838/ईश्वर चन्द्र गुप्ता बनाम स्टेट आफ यू०पी० व अन्य को खारिज करते हुये अवैध कब्जेदारों को चार सप्ताह में वन भूमि खाली करने के आदेश पारित किये। उपरोक्त के अतिरिक्त सिविल अपील संख्या-744-759/1977 स्टेट आफ यू०पी० बनाम उप संचालक चकबन्दी में माननीय उच्चतम न्यायालय द्वारा पारित निर्णय दिनांक 8-7-1996 (RD 1996 Page No.-448, oa AIR 1996 SC 2432) में निम्नांकित व्यवस्था निर्धारित की गई है-*

*It is thus obvious that the Forest Settlement Officer has the powers of a civil court and his order is subject to appeal and finally revision before the State Government. The Act is a complete code in itself and contains elaborate procedure for declaring and notifying a reserve forest. Once a notification under Section 20 of the Act declaring a land as reserve forest in published, then all the rights in the said land claimed by any person come to an end are no longer available. The notification is binding on the Consolidation Authorities in the same way as a decree of the civil court. The respondents could very well file objections and claims including objection regarding the nature of the land before the Forest Officer. They did not file any objection or claim before the authorities in the proceedings under the Act. After the notification under Section 20 of the Act, the respondents could not have raised any objections qua the said notification before the Consolidation Authorities. The Consolidation Authorities were bound by the notification which has achieved finality."*

*उक्त वर्णित भूमि राष्ट्रीय सम्पत्ति है व माननीय उच्चतम न्यायालय के निर्णय व आदेश के क्रम में भारतीय वन अधिनियम की धारा 20 का गजट नोटिफिकेशन सिविल डिक्री के समान है एवं धारा-132(ग) उ०प्र० जमींदारी विनाश एवं भूमि व्यवस्था अधिनियम 1950 के अन्तर्गत सार्वजनिक हित की भूमि है, जिस पर आपत्तिकर्तागण का कोई स्वत्व उत्पन्न नहीं होता है। यही प्राविधान उत्तर- प्रदेश राजस्व संहिता की धारा 77 में वर्णित है।*

*उभय पक्षों की सुनवाई के उपरान्त पत्रावली का अवलोकन किया। पत्रावली पर उपलब्ध नकल खतौनी 1359 फसली के अवलोकन से स्पष्ट है कि गाटा सं० 21 का रकबा 431.46 एकड़ रहा, इस पर कटिंग करके इसका रकबा 393.91 एकड़ अंकित कर दिया गया। चूंकि गाटा सं०- 21 व 22 के बीच में स्थान उपलब्ध नहीं था इसलिये कूटरचना करके गाटा सं० 21/2 लगायत 21/7 तक की प्रविष्टियां अन्त में अंकित कर दी गयीं। पत्रावली पर उपलब्ध नकल खतौनी 1356 फसली के अवलोकन से स्पष्ट है कि गाटा सं०-21 का रकबा 431.46 एकड़ रहा, जो इमारती लकड़ी जंगल के नाम जिमन 8 के रूप में दर्ज है। पत्रावली पर उपलब्ध आयुक्त लखनऊ मण्डल लखनऊ की विस्तृत जांच आख्या के अवलोकन से यह तथ्य स्पष्ट है कि 1359 फसली ग्राम ऐलनगंज परगना भूड जिला खीरी की खतौनी में साजिश करके कूट रचना कर गाटा सं०- 21 का रकबा 431.46 एकड़ को काटकर 393.91 एकड़ कर दिया गया। गाटा सं०- 21 व 22 के बीच स्थान न होने के कारण खतौनी के अन्त में दूसरी हस्तलिपि से गाटा सं० 21/2 लगायत 21/7 तक की प्रविष्टियां साजिश करके दर्ज कर दी गयीं और आख्या से यह भी स्पष्ट है कि गाटा सं०-21 और 22 के भू-भाग में साखू का विशाल जंगल है जिस पर स्थित*

*पेड़ों की उम्र अनुमानतः 80 से 100 वर्ष है जिस पर वन विभाग का कब्जा है। जांच आख्या में खातेदारों की प्रविष्टियों को स्पष्ट रूप से साजिशी, संदिग्ध एवं कूटरचित कहा गया है। ग्राम ऐलनगंज परगना भूड़ जिला-खीरी की खतौनी 1356 फसली खाता सं०-91 में दर्ज गाटा संख्या -21 रकबा 431.46 एकड़, 1359 फसली खाता सं० -98 में दर्ज गाटा संख्या - 21 रकबा 431.46 एकड़ इमारती लकड़ी के जंगल के रूप में दर्ज है जो भारतीय वन अधिनियम की धारा 20ए के प्राविधान के अनुसार आरक्षित वन है एवं ए०आई०आर० 1997 सुप्रीम कोर्ट 1248 टी०एन०गोडावर्मन थिरुमलकपाद बनाम यूनियन आफ इण्डिया में माननीय उच्चतम न्यायालय द्वारा पारित आदेश दिनांक 12.12.1996 द्वारा वन संरक्षण अधिनियम 1980 का कड़ाई से पालन करने के निर्देश दिये हैं एवं साथ ही साथ फारेस्ट शब्द को परिभाषित करते हुये पैरा- 4 में कहा है कि The word "forest: must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act. The term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership or classification thereof.*

*इस प्रकार माननीय उच्चतम न्यायालय द्वारा वन की दी गयी परिभाषा के अनुसार भी वन भूमि है। जहां तक महेश चन्द्र सक्सेना आदि के द्वारा प्रस्तुत साक्ष्य एवं विधि व्यवस्था का प्रश्न है, तो वह सारे साक्ष्य 1359 फसली खतौनी में कूटरचना कर उसके क्रम में तैयार हुये हैं जिसका साक्षिक महत्व शून्य है। कूटरचित इन्द्राज के खातेदारों से महेश चन्द्र सक्सेना आदि द्वारा बयनामा कराया गया है, यहां पर यह भी उल्लेखनीय है कि क्रेता को वही अधिकार प्राप्त होता है, जो क्रय की हुई भूमि के विक्रेता के पास होता है। यहां पर महेश चन्द्र सक्सेना आदि के पक्ष में जो बयनामें खातेदारों द्वारा निष्पादित किये गये हैं, वह खातेदार विक्रेता अपना स्वत्व कूटरचना फर्जी तरीके से प्राप्त किये हैं ऐसी स्थिति में फर्जी व कूटरचित इन्द्राज व उसके क्रम में हुये बयनामों के आधार पर किसी भी प्रकार का अनुतोष नहीं दिया जा सकता है। विवादित भूमि वर्तमान समय में जंगल के रूप में है जिस पर साखू आदि के वर्षो पुराने पेड़ खड़े है। ऐसी स्थिति में अधीनस्थ न्यायालय चकबन्दी अधिकारी द्वितीय, लखीमपुर-खीरी द्वारा विवादित भूमि पर अंकित खातेदारों का नाम निरस्त कर आरक्षित वन के खाते में दर्ज करने का आदेश उचित एवं न्याय संगत है।*

*अतः उपरोक्त विवेचना के आधार पर चकबन्दी अधिकारी, अन्तिम अभिलेख द्वितीय, लखीमपुर-खीरी के निर्णय व आदेश दिनांकित 16.10.2019 की पुष्टि की जाती है। पत्रावली बाद आवश्यक कार्यवाही अभिलेखागार में संचित की जाये।"*

48. On the question aforesaid, indicated in Para 23 hereinbefore, the judgments referred by the learned counsel for the petitioners have already been indicated in the earlier paragraphs of this judgment and some other cases which are also relevant are required to be indicated at this stage.

49. The Hon'ble Apex Court in the case of **Bachan and Ors. vs. Kankar and Ors. (1972) 2 SCC 555;** observed as under:-

*"15. This Court in Sonawati v. Sri Ram [AIR 1968 SC 466(1968) 1 SCR 617 :] said that Section 20 of the U.P. Zamindari Abolition and Land Reforms Act, 1951 conferred certain rights upon*

*persons whose names were recorded in the revenue records in respect of agricultural land. In Sonawati case this Court found that there was strong evidence which was relied on by the Revenue Court that the name of Pritam Singh predecessor-in-interest of the appellants was surreptitiously entered in the Khasra. The first appellate court there did not at all consider that evidence. The surreptitious entry in Sonawati case was held by this Court to disentitle the appellants to any adhivasi right under Section 20 of the U.P. Zamindari Abolition and Land Reforms Act.*

*16. This Court recently in Ram Das v. Deputy Director of Consolidation, Ballia, [(1971) 1 SCC 460 : AIR 1971 SC 673] dealt with the contention of the appellants on the one hand who were recorded as Sir Khudkasht-holders of the plots in dispute and the contention of the respondents on the other who were entered as sub-tenants in respect of those plots in the year 1356 Fasli. Suits were filed between the parties. A compromise was entered into the suits. It was admitted by the respondents that the appellants were Bhoomidars and that the respondents had no interest. The further admission in the compromise was that the entry in the revenue records in favour of the respondents was fictitious. The respondents subsequently applied for setting aside the compromise decrees on the ground that they had been obtained fraudulently. During the pendency of the suits consolidation proceedings under the U.P. Consolidation of Holdings Act, 1953 commenced. The Consolidation Authorities held that the suits were not maintainable because on the date on which the suits were filed the respondents had become sirdars. The appellants filed a writ petition under Article 226 challenging the order of the Consolidation Authorities. The High Court held in that case relying on the earlier decisions of that Court that even if the entry was fictitious the respondents who were recorded as occupants would, under Section 20(b) of the U.P. Zamindari Abolition and Land Reforms Act, 1951 become adhivasi of the disputed land. This Court relying on the earlier decision in Sonawati case held that there was evidence to show that the entry was fictitious and the person whose name was entered on the record on the material date could not claim the right of an adhivasi.*

*17. The rulings of this Court establish that the decision of the learned Single Judge as well as that of the Division Bench of the Allahabad High Court is erroneous. Section 20 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 speaks of a person recorded as occupant to become adhivasi of the land and will be entitled to take or retain possession as mentioned in the section. One of the principal matters mentioned in the section is that the Khasra or Khatauni of 1356 Fasli is to be prepared under Sections 28 and 33 of the U.P. Land Revenue Act, 1901. The U.P. Land Records Manual in Chapter A-V in para A-55 to A-67 lays down the manner in which the Khasra or the field book showing possession is to be prepared by the Patwari in the areas to which Zamindari Abolition and Land Reforms Act, 1950 applies. There are detailed instructions about the manner in which the enquiry should be carried out about actual possession and change in possession and corrections in the map and field book, the form in which the khasra is to be prepared. The form of khasra is given in para A-80. The form shows that the Lekhpal has to prepare a consolidated list of entries after partial or proper investigation. Again, para A-70 to A-73 to*

*the U.P. Zamindari Abolition and Land Reforms Act show how entries have to be made in khataunis every year showing the nature of tenure of each holder. The khatauni is meant to be a record of tenure-holders. The manner of changes to be made there is laid down in para A-82 to A-83. Entries are to be checked. Extract has to be sent to the Chairman, Land Management Committee as contemplated in paragraph A-82 (iii). In this context Section 20(b)(i) of the U.P. Zamindari Abolition and Land Reforms Act which speaks of the record "as occupant" in the khasra or khatauni of 1355 Fasli refers to the khasra or khatauni being prepared in accordance with the provisions of the Land Revenue Act, 1961. Khasra is the field book provided for by Section 28 of the Land Revenue Act. Khatauni is an annual register prepared under Section 32 of the Land Revenue Act 1951. It has to be emphasised that the entry under Section 20 (b)(i) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 in order to enable a person to obtain adhivasi rights must be an entry under the provisions of law.*

*18. This Court has held that entries which are not genuine cannot confirm adhivasi rights. The High Court wrongly held that though the entry was incorrect it could not be said to be fictitious. It is too obvious to be stressed that an entry which is incorrectly introduced into the records by reason of ill-will or hostility is not only shorn of authenticity but also becomes utterly useless without any lawful basis.*

*19. The learned Single Judge of the Allahabad High Court held that the Deputy Director of Consolidation did not have the jurisdiction while dismissing the revision application in the consolidation proceedings to hold that the entry was fictitious. The Deputy Director of Consolidation pointed out that the entry was held to be fictitious by a civil court also. The Settlement Officer was the final Court of fact. The order of the Settlement Officer found that the entries relied on by the respondents were mala fide, contrary to rules and false. The view of the learned Single Judge confirmed by the Division Bench is antithetic to the basic principles that fraudulent or mala fide actions have no legal sanction.*

*20. The High Court erred in quashing the order of the Deputy Director of Consolidation and the order of the Settlement Officer. The High Court overlooked the evidence. The High Court relied on surreptitious entry as lawful entry. A fabricated entry is obviously a fictitious entry. In the present case, the entry was introduced by the Patwari by devious methods. Such entry is mendacious."*

50. In the case of **Mohd. Ramzan Khan vs. D.D.C., Allahabad and Others; 2009 SCC OnLine All 1111,** this Court observed as under:-

*"Entry of occupant in 1356 Fasli confers a right upon that person under Section 20(b) of the Act. Original petitioner and respondent No. 35 were not recorded in 1356 Fasli. Even in respect of that provision, the Supreme Court has held that an entry in 1356 Fasli may confer right upon the recorded person even if the entry is wrong, however if the entry is fraudulent or made without any basis it will not confer any right vide Wali Mohd. v. Ram Surat, AIR 1989 SC 2296 and "Chandrika Prasad v. Pullo" AIR 2000 SC 1785. Paras No. 4 & 5 of the earlier authority, which were quoted in Para-21 of the later authority also, are quoted below:*

*"4. The said section deals with the question as to who is entitled to take or retain possession of the land in question. The plain language of the aforesaid Cl. (i) of sub-sec. (b) of S. 20 of the said Act suggests that this question has to be determined on the basis of the entry in the Khasra or Khatauni of 1356 Fasli Year prepared under Ss. 28 and 33 respectively of the U.P. Land Revenue Act, 1901. An analysis of the said section shows that under sub-sec. (b) of S. 20 the entry in the Khasra or Khatauni of the Fasli Year 1356 shall determine the question as to the person who is entitled to take or retain possession of the land. It is, of course, true that if the entry is fictitious or is found to have been made surreptitiously then it can have no legal effect as it can be regarded as no entry in law but merely because an entry is made incorrectly that would not lead to the conclusion that it ceases to be an entry. It is possible that the said entry may be set aside in appropriate proceedings but once the entry is in existence in the Khasra or Khatauni of Fasli Year 1356, that would govern the question as to who is entitled to take or retain possession of the land to which the entry relates.*

*5. It was submitted by learned counsel for the appellants that if the entry was not correct it could not be regarded as an entry made according to law at all and the right to take or retain possession of the land could not be determined on the basis of an incorrect entry. He placed reliance on the decision of this Court in Bechan v. Kankar, (1973) 1 SCR 727 : (AIR 1972 SC 2157). In that judgment the nature of the entries in Khasra or Khatauni is discussed and it is also discussed as to how this entry should be made. This Court held that entries which are not genuine cannot confer Adhivasi rights. It has been observed that an entry under S. 20(b) of the said Act, in order to enable a person to obtain Adhivasi rights must be an entry under the provisions of law and entries which are not genuine cannot confer Adhivasi rights. In that judgment it has been stated that the High Court was wrong when it held that though the entry was incorrect, it could not be said to be fictitious. That observation, however, has to be understood in the context of what follows namely, that an entry which is incorrectly introduced into the records by reason of ill-will or hostility is not only shorn of authenticity but also becomes utterly useless without Any lawful basis. This judgment, in our view, does not lay down that all incorrect entries are fictitious but only lays down that a wrong entry or incorrect entry which has been made by reason of ill-will or hostility cannot confer any right under S. 20(b) of the said Act. This decision is clarified by a subsequent judgment of this Court in Vishwa Vijai Bharti v. Fakhrul Hasan, (1976) Suppl SCR 519 : (AIR 1976 SC 1485) where it has been held as follows (at p. 1488 of AIR):*

*"It is true that the entries in the revenue record ought generally, to be accepted at their face value and courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine not forged or fraudulent, entries. The distinction may be fine but it is real. The distinction is that one cannot challenge the correctness of what the entry in the revenue record states but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title."*

*Accordingly, I do not find least error in the impugned orders. Original*

*petitioner and respondent No. 35 could not justify the entries of their names in the revenue records of 1358 & 1359 Fasli."*

51. In the case of **Gujj Lal and Ors. vs. Dy. Director of Consolidation, Firozabad and Ors., 2015 SCC OnLine All 8063,** this Court in relation to the entry in the revenue record observed as under:-

*"8. I have considered the arguments of the Counsel for the parties and examined the record. Section 57 of U.??? Land Revenue Act, 1901, attaches presumption of correctness of settlement year khatauni. Khatauni of 1356-F and 1359-F are settlement year khatauni. The respondent filed khatauni 1348-F and 1349-F and proved that joint family property has been partitioned between Vovid and descendants of Shyama, who were brothers by decree of Sub-Divisional Officer dated 6.12.1941, passed in partition Suit No. 42/5, which was incorporated in khata 47 of 1348-F. According to partition decree, 2.73 acre land came in share of Indrapal, 2.73 acre land came in share of Ninnu, Sarnam and Mihilal jointly and 5.45 acre land came in share of Vovid. It has also been noted in khatauni 1348-F that Charani and Shripat being daughter's sons of Vovid were his heirs. According to the partition decree, khatauni 1349-F was prepared, in which, the names of Charani and Shripat sons of Rate were recorded in khata 21, consisting eight plots of an area of 5.45, which had come in the share of Vovid in partition suit. Same plots with same area were recorded in khata 11 of 1356-F khatauni, in which along with Charani and Shripat, names of Ninnu, Sarnam and Mihilal sons of Summer were also recorded and this entry continued later on. Thus the respondent has proved that land which was came in exclusive share of Vovid was inherited by him but names of Ninnu, Sarnam and Mihilal were wrongly recorded over it along with their names in 1356-F khatauni without any basis. Thus presumption of correctness stood rebutted from the evidence of the respondent. Now burden of proof shifted upon the petitioners to prove that their names were correctly recorded.*

*9. The petitioners took plea that Charani and Shripat were unable to pay rent of the land in dispute to zamindars as such they co-opted Ninnu, Sarnam and Mihilal as co-sharers of ½ share in the land in dispute with the consent of zamindar. Section 33 of U.P. Tenancy Act, 1939, which was applicable at the relevant time provides as follows—*

*Section 33. Interest of other tenants.—(1) The interest of a tenant holding on special terms in Oudh, of an ex-proprietary tenant, of an occupancy tenant, of a hereditary tenant, and of a non-occupancy tenant is heritable, but is not transferable otherwise than in accordance with the provisions of this Act.*

*(2) Notwithstanding in forgoing provisions of this section shall render illegal—*

*(a) a sub-lease of a holding as hereinafter provided.*

*(b) a sale of the interest of a tenant under the provisions of section 251.*

*(c) a release or transfer of an interest in favour of a co-tenants:*

*Provided that no person shall be deemed to be a co-tenant notwithstanding that he may have shared in the cultivation of the holding, unless he was a co-tenant from the commencement of the tenancy, or has become such by succession or has been specifically recognized as such in writing by the land holder.*

*10.Thus under law, a written consent of zamindar was necessary for co-*

*option. No such written consent of zamindar was produced by the petitioners. Theory of the petitioners that they had been through out paying rent of their half shares has also not been proved by them as the petitioners have filed 4 rent receipts, out of which one of the year 1358-F, one of the year 1359-F and two were of the year 1397-F. Apart from it, there are noting in khatauni 1356-F and 1359-F that original khataunis were in torn condition, which itself create a doubt regarding its correctness. Thus the findings that the petitioners could not prove that they were co-opted as co-tenant or paying rents of half share or were in possession of the land in dispute, do not suffer from any illegality. An illegal and unauthorized entry in khatauni cannot become a legal entry only on the ground that it has been perpetuated for a long time due to negligence of revenue authority or right owner as such on its basis no right can accrue to any one.*

*11. Supreme Court in Vishwa Vijay Bharati v. Fakhrul Hassan, [1976 RD 237 (SC).] held that it is true that the entries in the revenue record ought, generally, to be accepted at their face value and Courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent, entries. The distinction may be fine but it is real. The distinction is that one cannot challenge the correctness of what the entry in the revenue record states but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title. This judgment has been followed in Wali Mohhd. v. Ram Surat, [1989 RD 403 (SC).] Again in Vikram Singh Junior High School v. District Magistrate (Fin. & Rev.), [2002 (93) RD 278 (SC).] it has been held that the entry in the revenue record must have a legal basis. Further there was no adjudication of dispute as regards continuance of the wrong entry. The appellant could not have claimed any title over the land in dispute merely on the basis of wrong entry which continued in its favour through negligence or failure of the Revenue Officer or the Consolidation Officer to correct the record, in pursuance of the order of the Board of Revenue which had attained finality. In the consolidation proceedings, the Collector is also the District Deputy Director of Consolidation under the U.P. Consolidation of Holdings Act and is authorized to correct any wrong entry continued in the consolidation record in that capacity in the exercise of power under section 48. of the U.P. Con-solidation of Holdings Act.*

*12. A Special Bench of 5 Hon'ble, Judges in Basdeo v. Board of Revenue, U.P., [1974 RD 188 (DB).] and Supreme Court in Bechan v. Kankar, [1972 RD 219 (SC).] and Ram Harakh v. Hamid Ahmad Khan, [(1998) 7 SCC 484.] held that in order to get right under section 20 of U.P. Act No. 1 of 1951 on basis of entry of "recorded occupant" in 1356-F and 1359 F, entry must have been made according to the provisions of Land Records Manual and genuine. In the present case, it has been found that the entry of the names of the petitioners was not a genuine entry as such under law no right accrued to them on the basis of unauthorized entry.*

*13. There is difference between "fraud" and "fabricated entry". Supreme Court in Reliance Salt Ltd. v. Cosmos Enterprises, [2007 (66) ALR 653 (SC) : 2007 (50) AIC 82.] held that "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with*

*intent to deceive another party thereto or his agent, or to induce him to enter into the contract—*

*"(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*

*(2) the active concealment of a fact by one having knowledge or belief of the fact;*

*(3) a promise made without any intention of performing it;*

*(4) any other act fitted to deceive;*

*(5) any such act or omission as the law specially declares to be fraudulent.*

*Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."*

*14. Supreme Court in Bachan v. Kankar, [1972 RD 219 (SC).] held that fabricated entry is an entry which is incorrectly introduced into the records by reason of ill-will or hostility is not only shorn of authenticity but also becomes utterly useless without any lawful basis.*

*15. Thus case law relied upon by the petitioners, on the proposition of "fraud" has no application in this case. Only this much was required to be examined that entry in favour of the petitioners was genuine or fabricated and unauthorized. It has been found that entry of the names of the petitioners in khata in dispute was unauthorized. There is no illegality in the order of Deputy Director of Consolidation. In view of aforesaid discussions, the writ petition has merit and is dismissed.*

*16.Petition Dismissed."*

52. On the question/issue, indicated in Para 23 of this judgment, this Court considered the (i) facts of the case, (ii) documents on record particularly questionnaire (Annexure No.3) and Khatauni of 1359 Fasli (1952 A.D.) (Annexure No.4), relied upon by the petitioners, and also Khatauni of 1356 Fasli (1949 A.D.), indicated in Para 28 of this judgment and which is also part of written submission dated 01.04.2024 filed by the petitioners, (iii) provisions indicated above and (iv) pronouncements on the issue of extending the benefit of Section 20(b) of the Act of 1950 including the judgments passed in the case of **Smt. Sonawati (Supra) and Ram Avadh (Supra)**, relied upon by learned counsel for the petitioners.

53. Upon due consideration, this Court is of the view that the petitioners are not entitled to benefit of Section 20(b) of the Act of 1950. It is for the following facts and reasons:-

(a) Entries indicated in the documents (Questionnaire and Khatauni of 1359 Fasli), relied upon by the petitioners, are not genuine. The same, to the view of this Court, are bogus, forged, fictitious and fabricated and have been made surreptitiously. It is in view of the following reasons:-

(i) In the 1356 Fasli (1949 A.D.), the land in dispute was recorded as *"Imarati Lakdi Ka Jungle"* (Timber Trees), as indicated in entry (8) (iii)(a)(1) in Para 124-A of U.P. Land Records Manual and in this year the total area was 431.61 acres and in the Khatauni of 1356 Fasli (1949 A.D.) the land in dispute was not recorded in the name of Raja Brijraj Bahadur Singh, (the basis of claim of predecessor-in-interest of petitioner and the petitioners).

(ii) From the certified photocopy of the Khatauni of 1359 Fasli (1952 A.D.), (annexed as Annexure No. 4 to the writ petition), it is evident that area of Gata/Plot No. 21 i.e. 431.46 acres mentioned in Khatauni of 1356 Fasli (1949 A.D.) was reduced by making correction/cutting to 393.91 acres and this correction/cutting was made without any order of the competent Revenue Official and it bears signature of someone, whose designation has not been disclosed.

(iii) After reducing the original area i.e. 431.46 acres to 393.91 acres different Gata(s)/Plot(s) were carved out as Gata No(s). 21, 21/2, 21/3, 21/4, 21/5, 21/6 & 21/7 in the names of Daal Singh S/o Mom Raj Singh, Gopal Singh S/o Sagar, Buddha S/o Kamma, Surta S/o Buddha, Param Singh S/o Mom Raj Singh and Amru S/o Ram Ram, (the basis of claim of predecessor-in-interest of petitioner and the petitioners), respectively, showing Barley (Jow) crop against Gata No(s). 21/1 to 21/7, respectively, under Ziman 5-A entry, which finds place in Para A-124 of U.P. Land Records Manual, and the same says that *"Occupiers of lands without title when there is no one already recorded in column 5 of the khasra"* and this was also carried out without any order in this regard.

(iv) Entry i.e. 8(iii)(a)(1) in Para 124-A of U.P. Land Records Manual and the note appended to the same itself indicate that the same was under the control of Forest Department meaning thereby under the control of State Government.

(v) The alleged entry of 1356 Fasli (1949 A.D.) in favour of Raja Brijraj Bahadur Singh, as indicated in questionnaire, is forged one and the fact that questionnaire itself is forged/fabricated and bogus document is evident from the fact that in the year 1999 the age of trees was found to be between 80-100 year and accordingly in the 1356 Fasli (1949 A.D.) or 1359 Fasli (1952 A.D.) the age of the trees must be between 40-60 year and to impeach/controvert the same and also the findings related to existence of trees over the land in issue, which in fact was admitted by Mahesh Chandra Saxena and Nanhey Lal Sharma (Petitioner No. 4) during their examination and the same is evident from the impugned order dated 10.04.2023, nothing has been placed on record.

(vi) The benefit of Section 20(b) of the Act of 1950 would be available if the entry was/is genuine and in this case, the entry of 1359 Fasli (1952 A.D.) itself was/is bogus and fraudulent and as such, no right would be available to the petitioners based upon the sale deed as their basis itself is not a valid document in the eye of law. Reference in this regard can be made to the maxim(s) ***'Sublato Fundamento Cadit Opus'***, which means *'foundation being removed, the structure falls'*, ***'Nemo dat quod non habet'*** which means *'no one can give what they do not have'.*

54. For the reasons aforesaid, this Court is not inclined to interfere in the impugned order(s) 10.04.2023 and 16.10.2019 passed by respondent No.2-District Magistrate/District Deputy Director of Consolidation, Lakhimpur Kheri and respondent No.3-Consolidation Officer, Antim Abhilekh Second, Lakhimpur Kheri, respectively, on the grounds pressed by the learned counsel for the petitioners including the ground that respondent No.2 has failed to act in terms of order of remand of this Court dated 12.09.2014 as if the order(s) are interfered on this ground, then in that event the bogus/forged entries favourable to the petitioners would revive in the revenue records.

55. Having observed above, this Court finds no force in the present petition. It is accordingly ***dismissed.*** Costs made easy.

56. The Court records the valuable assistance given by Ms. Urmish Shankar, Research Associate, attached with me in drafting this judgment and finding out case laws applicable in the present case.

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**(2024) 7 ILRA 234**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 03.07.2024**

**BEFORE**

**THE HON'BLE CHANDRA KUMAR RAI, J.**

Writ B No. 14553 of 1981

**Mewa Lal ...Petitioner**
**Versus**
**D.D.C. & Ors. ...Respondents**

**Counsel for the Petitioner:**
S.L. Yadav

**Counsel for the Respondents:**
N.S. Chaudhary, Abhishek Kumar Tripathi, Anil Kumar Dubey, G.C. Tiwari, G.C. Dwivedi, K. Shahi, N.C. Chaudhary, R.S. Kushwaha, S.C. Satya Mohan, V. Shahi, V. Singh

**A. U.P. Zamindari Abolition and Land Reforms Act, 1951 – U.P. Land Reforms (Supplementary) Act, 1952 – U.P. Consolidation of Holdings Act, 1953-** To claim the status of an Asami or Adhivasi under Section 3 of the U.P. Land Reforms (Supplementary) Act, 1952, the claimant must prove lawful "cultivatory possession" of the land during 1359 Fasli. A trespasser who enters land forcibly or without lawful right cannot claim such possession. A person cannot acquire the status of an Adhivasi against a Bhumidhar merely by forceful occupation of land after 1358 Fasli. **(Para 13)**

**B. Petitioners filed objections under Section 9-A(2) of the U.P. Consolidation of Holdings Act, 1953,** claiming to have been Shikami tenants who became Adhivasi and later Sirdar after the date of vesting. They sought the expunging of the respondents' names from the disputed plots (Nos. 376 and 377), asserting long-standing possession prior to vesting. Respondents claimed Bhumidhar rights through sale deed executed in 1963.*Held :-* Entries in the "remark column" (Khana Kafiyat) were not made as per Paragraph 87 of the U.P. Record Manual and could not be relied upon to determine rights. Deputy Director of Consolidation rightly held that the judgment under Section 229B of the U.P. Zamindari Abolition and Land Reforms Act could not be relied upon in consolidation proceedings due to the abatement of the original proceedings. Revisional court properly exercised its jurisdiction under Section 48 of the U.P. Consolidation of Holdings Act by considering evidence from the Section 229B proceedings where relevant.**(Para 15, 16)**

**Writ Petition dismissed.** (E-5)

**List of Cases cited :-**

1. M/S South Indian Bank Ltd & ors. Vs Naveen Mathew Philip & anr. (2023) 4 S.C.R. 18

2. Syed Yakoob Vs K.S. Radha Krishnan & ors. ii. (1964)5S.C.R. 64

3. Bhagwati Deen Vs Sheetladin & ors. 2022(156)RD602

4. Mukhtar Ali & ors. Vs D.D.C. Fatehpur & ors. Neutral Citation No.- 2019:AHC:60861

5. Sonawati & ors. Vs Sri Ram & ors. 1968 RD 151

6. Lakshmania Vs D.D.C. Deoria & ors. 2020 (148) RD 114

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Upendra Nath Yadav, learned counsel for the petitioner, Mr. Raghvendra Pratap Singh, Advocate holding brief of Mr. Abhishek Kumar Tripathi, learned counsel for the contesting respondent and Mr. Tarun Gaur, learned Standing Counsel for the State-respondents.

2. Brief facts of the case are that plot no.376 & 377 situated at Village-Narainpur, Manwarpara, Pargana-Nagar West, Tahsil- Haraya, Basti was recorded in the name of respondent nos.2 & 3, namely, Prabhakar Singh & Sudhakar Singh sons of Uma Shankar Singh in the basic year of consolidation operation. Petitioner nos.1, 2 & 3 filed objection under Section 9-A (2) of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "U.P.C.H. Act") in respect to plot no.377 and petitioner nos.4 to 7 filed objection in respect to plot no.376 alleging that they are Shikami tenant of Ram Anjor Singh and after date of vesting they became Adhivasi later on Sirdar. It is further alleged that right of main tenant extinguished before he executed sale deed dated 3.1.1963 in favour of respondent nos.2 & 3 and petitioners continued in possession since prior to the date of vesting till the start of consolidation operation hence name of respondent nos.2 & 3 be expunged and petitioners be recorded as Sirdar of the plot in question. The suit under Section 229B of U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as "U.P.Z.A. & L.R. Act) filed by petitioners were ultimately abated. Respondent nos.2 & 3 claimed right of bhumidhar on the basis of sale deed executed on 31.1.1963 by Ram Anjor Singh. The issues were framed before Consolidation Officer and parties lead evidence in support of their cases. Consolidation Officer vide order dated 8.9.1975 disposed of the objection directing to record the name of petitioners as Sirdar declaring their share after expunging the name of respondent nos.2 & 3. Appeals under Section 11 (1) of U.P.C.H. Act were filed by respondent nos.2 & 3 against the order of Consolidation Officer dated 8.9.1975 which were registered as Appeal Nos.73 & 74. Settlement Officer of Consolidation vide order dated 21.11.1980 dismissed the aforementioned appeals. Respondent nos.2 & 3 filed two revisions under Section 48 of U.P.C.H. Act against the order of Settlement Officer of Consolidation which were registered as Revision No.498 & 499. The aforementioned revisions were heard and allowed vide order dated 2.11.1981 setting aside the orders of Consolidation Officers and Settlement Officer of Consolidation as well as declared the respondent nos.2 & 3 as bhumidhar of the plot in question hence this writ petition on behalf of the petitioners challenging the impugned revisional order dated 2.11.1981 passed by respondent no.1/ Deputy Director of Consolidation, Basti.

3. This Court admitted the writ petition on 1.12.1981 and stayed the operation of the impugned order dated 2.11.1981. On the stay vacation application filed on behalf of respondent nos.2 & 3, the interim order dated 1.12.1981 was confirmed subject to condition that the petitioners shall deposit Rs.750/- annually till the decision of the writ petition. According to petitioners they are depositing Rs.750/- annually till date.

4. Learned counsel for the petitioners submitted that the petitioners acquired Adhivasi & Sirdari right after the date of vesting and right of Ram Anjor (main tenant) came to an end, as such, Ram

Anjar had no right to execute the sale deed in favour of respondent nos.2 & 3 in respect to plot in question. He further submitted that no case has been setup by contesting respondents that the petitioners are mortgage hence entry of Bil Ewaj Sood was fictitious. He further submitted that the petitioners actual cultivatory possession in respect to the plot in question is fully proved from the entry of 1359 fasli, as such, petitioners Adhivasi right & Sirdari right after date of vesting is fully established. He further submitted that in view of oral statement of Ram Anjor himself that he has been issuing rent receipt to petitioners there was no necessity to issue P.A.- 10 to main tenant. He further submitted that Consolidation Officer & Settlement Officer of Consolidation has rightly ordered to record the name of the petitioners as Sirdar on the basis of oral and documentary evidence on record but Deputy Director of Consolidation has exceeded his revisional jurisdiction in holding otherwise that petitioners are entitled to be recorded as Sirdar over the plot in question, as such, impugned revisional order is liable to be set aside. He further placed the revenue entry of the plot in support of his argument. He further placed reliance upon the judgment of this Court passed in Writ- B No.2111 of 1976 (Pritam Singh vs. D.D.C. & Others) dated 12.9.2023.

5. On the other hand, learned counsel for respondent nos.2 & 3 submitted that interpolations have been made in the Khasara & Khatauni of 1359 fasli which is proved by Registrar Kanungo, as such, no right will accrue to petitioners in respect to plot in question. He further submitted that the sale deed executed in favour of respondent nos.2 & 3 was neither illegal nor void, as such, petitioners are not entitled to be recorded over the plot in dispute. He further submitted that the suit filed under Section 229B of U.P.Z.A. & L.R. Act was ultimately abated due to consolidation operation, as such, no right can be claimed by petitioners on the basis of judgment and decree passed under Section 229-B of U.P.Z.A. & L.R. Act which has been ultimately abated. He also submitted that at the time of partal, respondent nos.2 & 3 have been found in possession of the plot in dispute. He further submitted that the petitioners have not initiated any proceeding for Adhivasi right, as such, petitioners are not entitled to be recorded over the plot in question. He further submitted that the petitioners have manipulated certain entry in collusion of Lekhpal, as such, petitioners are not entitled to any relief in respect to the plot in dispute. He further submitted that the Consolidation Officer & Settlement Officer of Consolidation have not decided the dispute considering the evidence on record but Deputy Director of Consolidation after considering the evidence on record has found that petitioners were not Sikami tenants, as such, they cannot acquire Sirdari rights by operation of law. He further submitted that finding of fact has also been recorded by Deputy Director of Consolidation that P.A.-10 was neither issued to Ram Anjor Singh nor to respondent nos.2 & 3 and the rent receipt alleged to be issued by Ram Anjor Singh in favour of petitioners is collusive and manipulated. He further submitted that the proceeding under Section 240A & 240B of U.P.Z.A. & L.R. Act were never initiated with respect to disputed plots, as such, no right will accrue to petitioners in respect to disputed plots. He further placed reliance upon the following judgments of Hon'ble Apex Court as well as of this Court in support of his argument:

*i. (2023) 4 S.C.R. 18 M/S South Indian Bank Ltd & Others Vs. Naveen Mathew Philip & Another.*

*ii. (1964)5S.C.R. 64 Syed Yakoob vs. K.S. Radha Krishnan and Others.*

*iii. 2022(156)RD602 Bhagwati Deen Vs. Sheetladin and Others.*

*iv. Neutral Citation No.- 2019:AHC:60861 Mukhtar Ali & Others vs. D.D.C. Fatehpur and Others.*

6. I have considered the argument advanced by learned counsel for the parties and perused the records.

7. There is no dispute about the fact that the Consolidation Officer in the proceeding under Section 9-A (2) of U.P.C.H. Act has ordered vide order dated 8.9.1975 to record the name of petitioners as Sirdar after expunging the names of respondent nos.2 & 3. There is also no dispute about the fact that the appeals filed by respondent nos.2 & 3 against the order of Consolidation Officer were dismissed by Settlement Officer of Consolidation vide order dated 21.11.1980. There is also no dispute about the fact that revisions filed by respondent nos.2 & 3 were allowed by Deputy Director of Consolidation vide order dated 2.11.1981 setting aside the orders of Consolidation Officer & Settlement Officer of Consolidation as well as respondent nos.2 & 3 were declared as bhumidhar of the plot in dispute.

8. On the basis of rival submission of learned counsel for the parties the issues which are to be examined are as to whether the petitioners can be treated as Shikami tenant of the plot in question at the relevant point of time on the basis of revenue entry relied upon by the petitioners accordingly adhivasi / sirdar of the plot in question as well as the exercise of revisional jurisdiction under Section 48 of U.P.C.H. Act is in accordance with law.

9. In order to appreciate the controversy involved in the matter the perusal of Section 20 of U.P.Z.A. & L.R. Act will be relevant which is as under:

*"20. - [Every person who-*

*(a) on the date immediately preceding the date of vesting was or has been deemed to be in accordance with the provisions of this Act]-*

*(i) except as provided in [sub-clause (i) of Clause (b)][Substituted by U.P Act No. 20 of 1954.], a tenant of sir other than a tenant referred to in Clause (ix) of Section 19 or in whose favour hereditary rights accrue in accordance with the provisions of Section 10; or*

*(ii) except as provided in [sub-clause (i) of Clause (b)] [Substituted by U.P Act No. 20 of 1954.], a sub-tenant other than a sub-tenant referred to in proviso to sub-section (3) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 (U.P. Act X of 1947), or in sub-section (4) of Section 47 of the United Provinces Tenancy Act, 1939 (U.P. Act XVII of 1939) of any land other than grove land,(*

*b) was recorded as occupant,-(i) of any land [other than grove land or land to which Section 16 applies or land referred to in the proviso to sub-section (3) of Section 27 of the U.P. Tenancy (Amendment) Act, 1947][Substituted by U.P. Act No. 20 of 1954.]in the khasra or khatauni of 1356-F prepared under Section 28 [33] [Substituted by U.P Act No. 20 of 1954, for '32'.] respectively of the U.P. Land Revenue Act, 1901 (U.P. Act III of 1901), or who was on the date immediately preceding the date of vesting entitled to*

*regain possession thereof under Clause (c) of sub-section (1) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 (U.P. Act X of 1947); or*

*(ii) of any land to which Section 16 applies, in the [khasra or khatauni of 1356 fasli prepared under Sections 28 and 33 respectively of] [Substituted by U.P Act No. 20 of 1954.] the United Provinces Land Revenue Act, 1901 (U.P. Act III of 1901), but who was not in possession in the year 1356-F;*

*shall, unless he has become a bhumidhar of the land under sub-section (2) of Section 18 or an asami under Clause (h) of Section 21, be called adhivasi of the land and shall, subject to the provisions of this Act, be entitled to take or retain possession thereof.*

*Explanation I. - Where a person referred to in Clause (b) was evicted from the land after June 30, 1948, he shall notwithstanding anything in any order, be deemed to be a person entitled to regain possession of the land.*

*Explanation II. - Where any entry in the records referred to in Clause (b) has been corrected before the date of vesting under or in accordance with the provisions of the U.P. Land Revenue Act, 1901 (U P. Act III of 1901), the entry so corrected shall for the purposes of the said clause, prevail].*

*[Explanation III. - For the purposes of Explanation II an entry shall be deemed to have been corrected before the date of vesting if an order or decree of a competent Court requiring any correction in records had been made before the said date and had become final even though the correction may not have been incorporated in the record.*

*Explanation IV. - For purposes of this section 'occupant' as respects any land does not include a person who was entitled as an* intermediary to the land or any share therein in the Year 1356 fasli.][Added by U.P. Act No. 20 of 1954.]"

10. In order to examine the plea of petitioners regarding S hikami tenant the revenue entry of the plot in question will be relevant. The Khasara entry of plot nos. 376 & 377 are annexed as Annexure Nos.10 to 14 to the writ petition. Annexure Nos.10, 11 & 12 are the Khasara entry of plot no.376, which are as under:

| Khasra Number | Fasli Year | Name of Kastkar | Plot Number | Khana Kafiyat |
|---|---|---|---|---|
| 376 | 1358 | Ram Anjor & Kunwar Bhadur Singh | 1119-19 | ------ |
| 376 | 1359 | Ram Anjor & Kunwar Bhadur Singh | 1119-19 | Sabha Singh |
| 376 | 1361 | Ram Anjor & Kunwar Bhadur Singh | 1119-19 | Sabha Singh |
| 376 | 1362 | Ram Anjor & Kunwar Bhadur Singh | 1119-19 | Sabha Singh |
| 376 | 1363 | Ram Anjor & Kunwar Bhadur Singh | 1119-19 | Sabha Singh |
| 376 | 1364 | Ram Anjor & Kunwar Bhadur Singh | 1119-19 | Sabha Singh97 4.10.1956 |
| 376 | 1365 | Ram Anjor & Kunwar Bhadur Singh | 1119-19 | Sabha Singh 136 10.10.1957 |
| 376 | 1366 | Ram Anjor & Kunwar Bhadur Singh | 1119-169 | Sabha Singh 8912.10.1958 |
| 376 | 1367 | Ram | 1119- | Nirahoo |

| | | Anjor & Kunwar Bhadur Singh | 19 | 7 9.10.1959 |
|---|---|---|---|---|
| 376 Nirahoo | 1371 | Ram Anjar | 1119-19 | 59 22.9.1963 |
| 376 | 1372 | Prabhakar Singh & Sudhakar Singh sons of Uma Shankar Singh | 1119-19 | Ghrahoo, Nirhoo, Nar Singh & Rajendra 76 12.10.1964 |

11. Annexure No.14 to the writ petition is the khasara entry of plot no.377, which are as under:

| Khasra Number | Fasli Year | Name of Asal Kastkar | Name of Shikami Kastkar | Area | Khana Kafiyat |
|---|---|---|---|---|---|
| 377 | 1357 | Ram Anjor & Indra Bahadur | | 113-2 | |
| 377 | 1358 | Ram Anjor & Indra Bahadur | Bhawani Prasad | 113-12 | Ram Anjor Sonar "K.W. Sood" |
| 377 | 1359 | Ram Anjor & Indra Bahadur | | 113-9 | Ram Anjor Sonar "K.W. Sood" |
| 377 | 1361 | Ram Anjor & Indra Bahadur | | 113-12 | Ram Anjor Sonar |
| 377 | 1363 | Ram Anjor & Indra Bahadur | | 42-12 | Ram Anjor Sonar |
| 377 | 1364 to 1368 | Ram Anjor | | 113-12 | Ram Anjor Sonar |

12. The finding of fact which has been recorded by revisional Court with respect to plot nos.376 & 377 considering the revenue entry including the khasara entry which are annexed along with writ petition as well as quoted above will be relevant for perusal, which is as under:

"न्यायालय श्री जनार्दन उपाध्याय उ०स०च० बस्ती
पुनरीक्षण सं० 498 प्रभाकर आदि बनाम मेवालाल आदि
प्रभाकर आदि बनाम निरहू
ग्राम नरायनपुर मनवरपार
परगना नगर पश्चिम
त० हरैया, जिला-बस्ती

10. जहाँ तक गाटा स० 376 का संबंध में मौखिक साक्ष्य का संबंध है केवल निरहू सिंह को परीक्षित कराया गया है। जो स्वयं पक्ष्य है इसलिये उनका साक्ष्य स्वतन्त्र नही है। उन्होने 8-5-74 के बयान में अ नी आयू 30वर्ष बताई है जिसका अर्थ यह है कि जमीदारी बिनास के समय वे केवल 8 वर्ष के थे। उन्होने जिरह मे स्वीकार किया है कि जब उनकी पिता ने रामअजोर सिंह से खेत लिया उस समय वे मौजुद नही था। इस प्रकार उनके बयान से भी शिकमी पर खेत लेने बात विलकुल सिद्ध नही होती। इस प्रकार मौखिक तथा अधि लेखित साक्ष्य किसी से भी गाटा सं० 376 पर शिकमी ओर अधिवासर से सीरदार होने का केस बिलकुल सिद्ध नही होता है। ओर अधिनस्थ नयायालयो ने निरहु सिंह आदि को गाटा सं० 376 की सीरदार और भूमिधर मानकर गलती की है। वास्तव में यह भूखण्ड रामअजोर सिंह तथा और बैनामे से प्रभाकर और सुधाकर इसके भुमिधर हो चुके है।

11. जहाँ तक गाटा सं० 377 का प्रश्न है 1357 फ० की खतौनी में यह भुखण्ड भी रामअजोर सिह व कुवर बहादुर की जमीन 6 की आराजी दर्ज है। 1357फ० से 1379 फ० के खसरो की उनके दाखिल की गई है जिनके अनुसार 1357 फ० तथा 358 फ० में विवादित भुखण्ड स० 377 राम अजोर और कुवर बहादुर की जनम 6 की आराजी दर्ज है। और उस पर किसी का कोई कब्जा दर्ज नही है। 1359 फ० में कैफियत के खाने में काविज रामअजोर सोनार बावजूद सूद लिखा हुआ है। 1361 फ० मे केस खसरे मे भी केप्युिित के खाने मे काबिज रामअजोर सोनार व बावजूद सूद लिखा हुआ है। इस संबंध मे उल्लेखनीय बात यह है कि 1358 फ० के संबंध मे दो खसरे कर नकले दाखिल की गई है। जिसमे कैफियत के खाने में गाटा स० 377 प्रार्थी का कोई कबजा दर्ज नही है किन्तु दूसरे मे कैफियत के खाने मे रामअजोर सोनार का कब्जा बावजूद सूद 1358 फ० मे भी दर्ज है यह दोनो नकले

तहसीलदार हर्रेय वदार क्रमशः दि० 11-12-63 और 13-2-3 को जारी की गई है। और परस्पर विरोधी है। इस प्रकार राम अजोर सुनार कबजा 1361 फ० तक 1381 तक कैफियत के खाने मे दर्ज है। 1367 फ० मे इस भूखन्ड पर मेवा का नाम कबजे मे दर्ज है और 1368 फ० में काबिज मेवालाल और रामलाल दर्ज है। यह इन्द्राज 1372 फ० तक दोहराया गया है। फिर 1373 फ० 7 से 1370 फ० तक कबजे का कोई इन्द्राज नही है। एक कच्ची रसीद दाखिल की गई है जिसके द्वारा 27-6-51 को रामअजोर सिह ने गाटा सं० 372/37 का 8 रु० लगान वसूल किया है। और रसीद पर अपनी अंगुठा निसानी बनाई है। रामअजोर सिह अब मर चुके है। 226बी के मुकदमे मे रामअजोर सिंह के बयान दि० 26-10-65 की प्राप्ति प्रतिलिपि दाखिल की गई है जिसमे रामअजोर सिह ने स्वीकार किया है कि इस रसीद पर उनकी अगुठा निसानी है। और यह रसीद उन्होने मेवा के पिता को दी थी। उजरने अपने इस बयान मे यह भी स्वीकार किया है कि मेवा के अलावा उन्होने अन्य किसी को रसीद नही दी। इसके आधार पर अधिनस्थ न्यायालयो ने मेवा लाल तथा उनके पिता रामअजोर सुनार को रामअजोर सिह द्वारा सिकमी पर भूमि उठाने की बात को सही नही माना है किन्तु रामअजोर सिंह का उक्त साक्ष्य निम्नलिखित कारणों से विश्वासनीय नही है

1- रामअजोर सिंह ने अपने उक्त बयान मे यह भी स्वीकार किया है कि उन्होने अभीराजी बनाम उमाशंकर ना मुकदमे उमाशंकर प्रभाकर और संधाकर के पिता को विरुद्ध गवाही दी है। इससे यह स्पष्ट है कि रामअजरो सिह से तथा पुनरीक्षण करता गण के पिता उमाशंकर सिह से बैनामा के बाद किसी कारण शत्रुता हो गई थी। जिसके फलस्वरूप मन केवल इस मुकदमे मे बल्कि दुसरे रामअजोर सिह ने उमाशंकर सिह के विरुद्ध बयान दिया था इससे स्पष्ट है कि उक्त वयान पुनरीक्षण करतागण के पिता से दुश्मनी के कारण रामअजोर सिंह ने दिया था।

2- 1358 फ० 1359 फ० और 1361 फ० के खसरे मे मेवालाल तथा उनके पिता राम अजोर सुनार का कबजा बावजूद सूद लिखा हुआ है। जिससे स्पष्ट है कि मेवालाल आदि का कबजा शिकमी का कबजा नही था बल्कि रीकदाता का कब्जा मुर्तअहल के साथ था। इस प्रकार रामअजोर सिह का साक्ष्य अभिलेखीय साक्ष्य से गलत सिद्ध होता है। और यह तथ्य गलत साबित होते है कि रामअजोर सिह ने सिकमी पर जमीन उठाई थी।

3- स्वंय मेवालाल ने अपनी जिरह दि० 14-2-74 के अन्त में यह स्वीकार किया है कि रामअजोर सिह और उमाशंकर सिंह के बीच आपस में बनामे के बाद खिलाफत अर्थात शत्रुता हो गई। इस प्रकार स्वंय मेवालाल के बयान से ही रामअजोर सिंह की शत्रुता उमाशंकर से सिद्ध हो जाती है।

4- धारा 220 बी के मुकदमे मे मेवालाल के बयान दि० 17-2-64 की नकल दाखिल की गई है। जिसमें मेवालाल ने कहा है कि रसीद पर रामसुन्दर सिंह ने उनके सामने अंगुठा लगाया था। किन्तु जो रसीद दाखिल की गई है उस पर रामसुन्दर सिंह की कोई अगुठा निसानी नही है।

12- उपयुक्त कारणो से मे रामअजोर सिह के बयान को विश्वासनीय नही मानता। और उक्त रसीद फरजी सिद्ध होता है। उक्त रसीद के लेखक तथा गवाह रामसोहरत तिवारी तथा केशव प्रसाद मिश्र जिनके हस्ताक्षर रसीद पर है को परीक्षित नही कराया गया है। अतः उक्त रसीद सिद्ध नही है।

13- जहां तक मौखिक साक्ष्य का प्रश्न है मेवा लाल आदि की ओर से पहले गवाह राम लौट है जिन्होने 14-2-74 को बयान दिया है कि उन्हे होश संभाले केवल 8 वर्ष हुये इसका यह स्पष्ट अर्थ हुआ कि 1966 के पहले और क्या हुआ। इस संबंध मे उनके बयान का कोई मुल्य नही है। वे यह भी कहते है कि सीवाय इस खेत के वे गाँव के अन्य किसी खेत का खसरा न० नही जानते। और यहाँ तक कि अपने खेतो के खसरा न० भी नही जानते। इससे स्पष्ट है कि इस गवाह को कोई ही है। और इसका साक्ष्य अविश्वासनीय है। दूसरे गवाह स्वंय मेवालाल है जो पक्ष है उसका साक्ष्य स्वतन्त्र नही है। मेवालाल और उनके गवाह रामलाल ने खेत की जो चौहद्दी बताई है वह एक दुसरे से नही मिलती। इस प्रकार दोनो गवाहो के साक्ष्य एक दुसरे के विरुद्ध होने के कारण विश्वासनीय नही है। इसके अतिरिक्त अन्य कोई स्वतन्त्र साक्षी इस केस मे पेश नही किया गया है।

14. उपयुक्त विवरण से यह स्पष्ट है कि विवदित भूमि रामअजोर सिंह ने करजा के सूद में एवज मे राम अजोर सोनार को दी थी। और इस प्रकार राम बजोर सोनार और उसके पुत्रगण मेवालाल आदि का कब्जा केवल कर्ज देने वाले मुर्तहीन का अनुमतिपर्ण कबजा मात्र था जिसके आधार पर मेवालाल आदि को विवादित भूमि पर कोद अधिकार प्राप्त नही हुआ। विवादित भूमि सिकमी पर इन लोग का नही उठाई गई थी क्योकि सिकमी पर भूमि उढरनक का जो साक्ष्य है वह विश्वासनीय नही है। बल्कि अभिलेखीय साक्ष्य मे सूद पर भूमि दिये जाने की बात को सिद्ध करता है इसका दूसरा प्रमाण यह है कि 1359 फ० से 1362 फ० की खतौनी की कोई नकल ऐसी नही दाखिल की गई है जीसमे मेवालाल आदि विवादित भेमि के शिकमी या अधिवासी अंकित हो। इससे भी स्पष्ट है कि यह लोग सिकमी या अधिवासी नही थे। 1362 फ० की खतौनी का नकल मे भी जबकि रामअजोर सिंह के अन्य भूखण्डो पर लोगो को अधिवासी से सीरदारी अधिकार दिये गये है गाटा सं० 367 पर मेवालाल आदि को न तो अधिवासर माना गया और न कोई अधिकार ही दिया गया। 1362 फ० मे अन्य अधिवासियो की तरह मेवालाल आदि ने अधिवासी से सीरदार जिनके लिये कोई आपत्ति नही की और धारा 240 के अन्तर्गत कोई कार्यवाही नही हुई। 1963 मे पुनरीक्षणकर्ता गण के बैनामा लेने के बाद तब प्रतिउत्तरदातागण ने अपने को अधिवासी से सिरदार कहना प्रारंभ किया। इस प्रकार शिकमी से अशिवासी और सिरदार होने का बात

*बिलकुल गलत सिद्ध होती है। जहाँ तक वीपरीत कब्जे का प्रश्न है ऐसा कोई केय प्रतिउत्तरदातागण का नही है। अतः प्रतिउत्तरदातागण को विवदित भेमि पर सिरदार तथा भेमिधरी अधिकार देकर अधिनस्थ न्यायालयों ने गलती की है। और उसके आदेश निरस्त होने योग्य है।*

*आदेश*

*दोनो पुनरीक्षण स्वीकार कर लिये जाते है। तथा अधिनस्थ न्यायालयो के निर्णयो को निरस्त करते हुये दोनो भूखण्डों को पुनरीक्षण करतागण की भूमिधरी घोषित किया जाता है। तदनुसार अभिलेखों में अमलदरामद की जाय। इस आदेश की एक एक आदेश की एक एक प्रति दोनो पत्रावलियो पर रखी जाय।*

*तद० 2-11-1981*
*ह० जनार्दन उपाध्याय*

*उप संचालक चकबन्दी बस्ती"*

13. On the point of entry of 1356 & 1359 fasli the judgment of the full Bench of Hon'ble Apex Court reported in ***1968 RD 151 (Sonawati and Others Vs. Sri Ram and Others)*** will be relevant in which it has been held that a person cannot acquire status as 'adhivasi' against bhumidhar merely by occupying land after 1358 fasli by force. Paragraph nos.9, 10 & 11 of the judgment rendered in Sonawati (supra) are relevant for perusal, which are as under:

*"9. The scheme of s. 3 of the U.P. Land Reforms (Supplementary) Act, 1952 is different from the scheme of s. 20(b) of the U.P. Zamindari Abolition and Land Reforms Act 1 of 1951. Whereas under Act 1 of 1951 the entry is made evidence without further enquiry as to his right of the status of the person who is recorded as an occupant under s. 3 of the U.P. Land Reforms (Supplementary) Act, 1952, a person who claims the status of an asami or an adhivasi must establish that he was in "cultivatory possession" of the land during the year 1359 Fasli. The expression "cultivatory possession" is not defined in the Act, but the Explanation clearly implies that the claimant must have a lawful right to be in possession of the land, and must not belong to the classes specified in the explanation. "Cultivatory possession" to be recognized for the purpose of the Act must be lawful, and the whole year 1359 Fasli. A trespasser who has no right to be in possession by merely entering upon the land forcibly or surreptitiously cannot be said to be a person in "cultivatory possession" within the meaning of s. 3 of U.P. Act 31 of 1952. We are of the view that the Allahabad High Court was in holding in Ram Krishna v. Bhagwan Baksh Singh [1961] A.L.J. 301 that a person who through force inducts himself over and into some land and succeeds in continuing his occupation over it cannot be said to be in cultivatory possession of that land so as to invest him with the rights of an asami or an adhivasi, and we are unable to agree with the subsequent judgment of a Full Bench of the Allahabad High Court in Nanhoo Mal v. Muloo and others I.L.R. [1963] All. 751 that occupation by a wrongdoer without any right to the land is "cultivatory possession" within the meaning of s. 3 of the U.P. Act of 31 of 1952.*

*10. A person who has no right to occupy land may rely upon his occupation against a third person who has no better title, but he cannot set up that right against the owner of the land. It must be remembered that by s. 3 of U.P. Act 31 of 1952 the Legislature conferred right upon persons in possession of land against the tenure holders, and in the absence of any express provision, we are unable to hold that it was intended by the Act to put a premium upon forcible occupation of land by lawless citizens. We have no doubt therefore that by forcibly occupying the land after 1358 Fasli, Pritam Singh could not acquire as against the bhumidhar of the land rights of an adhivasi by virtue of s. 3 of U.P. Act 31 of 1952.*

*11. Counsel for the appellants contended that the finding recorded by the First Appellate Court that Pritam Singh was in "cultivatory possession" in 1359 Fasli was binding upon the High Court in Second Appeal. For reasons already set out, possession of a person in wrongful occupation cannot be deemed cultivatory possession. Again the Appellate Judge in arriving at his conclusion ignored very important evidence on the record, and on that account also the conclusion was not binding on the High Court. Pritam Singh's name was recorded in the khasra for the year 1359 Fasli as sub-tenant "without settlement of rent." Pritam Singh did not offer to give evidence at any stage of the trial before the Assistant Collector, and it was not his case that he had entered into any contact of sub-tenancy with Tota Ram and Lajja Ram. The entry which records him as a sub-tenant of Tota Ram and Lajja Ram for the year 1359 Fasli is on his own case untrue. There is further no oral evidence in support of the case of Pritam Singh that he was in actual "cultivatory possession" of land and the entry relied upon by him does not support his case. To get the benefit of s. 3 of U.P. Act 31 of 1952, it had to be established that Pritam Singh was in actual cultivatory possession of the land and that fact is not established by direct evidence of possession, nor is it established by the entry relied upon by him. The conclusion of the learned Appellate Judge that Pritam Singh was in "cultivatory possession" was partially founded on the conclusion recorded by him that in 1356 Fasli Pritam Singh was in possession of the land. We have already pointed out that in so concluding he misread the khasra entry for 1356 Fasli and gave no effect to the khasra Barahsala which showed that Pritam Singh was not in possession of the land till the end of 1358 Fasli. The learned Judge also inferred that because it was stated by Sir Ram the first plaintiff and his witness Maharaj Singh that no crops were cultivated during the Kharif season and as the khasra for 1359 Fasli showed that Bajra was sown in one of the plots in 1359 Fasli and gram was raised in all the plots, Pritam Singh must have been in possession as a sub-tenant and must have cultivated the land in the Kharif season of 1359 Fasli. This was, in our judgment, a far-fetched inference. The Appellate Judge also did not refer to other evidence to which pointed attention was directed in support of his conclusion, by the Assistant Collector Agra : for instance, Banwari Lal, Naib Registrar examined on behalf of the plaintiffs had clearly stated that Pritam Singh was not in possession of the land prior to 1359 Fasli and that Tota Ram who was examined as a witness stated that Pritam Singh was not in possession of the land and he had not given the land to Pritam Singh on lease, and that he did not receive rent from Pritam Singh. We are unable, therefore, to hold that a conclusion arrived at only from an entry in the revenue records which does not prima facie support the case of Pritam Singh, that he wrongfully trespassed upon the land and cultivated it may be regarded as conclusive in Second Appeal. The High Court was, in our judgment, right in reaching the conclusion that Pritam Singh was not in "cultivatory possession" of the land in 1359 Fasli within the meaning of s. 3 of Act 31 of 1952."*

14. The procedure for making entries of sub-tenants and others in Column- 6 of the Khasra has been provided under Paragraph no.87 of the U.P. Land Record Manual, which is as under:

***"87. Entries of sub-tenants and others (Column 6)**.- (i) In Column 6*

*of the khasra will be entered the persons of the following description:*

*(a) Tenants under permanent tenure-holders in Agra, Class 16 of the khatauni.*

*(b) Tenants of sir, tenant of khudkasht of 1333-34 Fasli admitted in 1335 Fasli or subsequently and tenants of khudkasht of not less than 12 year's standing in 1309 Fasli and still so recorded [in Agra Class (17) and in Avadh Class (10) of the khatauni].*

*(c) Tenants under rent-free grantees at a favourable rate of rent [in Agra Class (18) and in Avadh Class (10-A) of the khatauni].*

*(d) Sub-tenants [in Agra class (19); and in Avadh class (11) of the khatauni].*

*(e) Occupiers of land without the consent of the person whose name is entered in Column 5 of the khasra [in Agra Class (20) and in Avadh Class (12) of the khatauni].*

*(ii) In any case in which a person whose name was recorded in Column 6 in the preceding year is still entitled to have his name recorded in the same column, it would be sufficient to record his name, in black ink, with the word "badastur" (as before) appended at the end.*

*(iii) If there was no entry in Column 6 of the khasra in the preceding years and in Lekhpal finds at the time or partal some person belonging to one of the classes mentioned in sub-paragraph (i) in cultivatory occupation of the land, he will enter in Column 6 in red ink the name, parentage and rent, if any, of such person together with his status:*

*Provided that he shall not record any such person as belong the classes (a), (b), (c) or (d) of sub-paragraph (i) unless he is satisfied by an inquiry from the parties concerned that a contractual relation of landholder and tenant exist between them. If he is not so satisfied, he shall record the person as belonging to class (e) pending such inquiry; the Lekhpal shall note the name and parentage of such person in the remarks Column of the khasra.*

*(iv) If any entry already exists in Column 6 of the khasra and the Lekhpal finds at the partal that some person other than the recorded person is in cultivating occupation of the land, then following contingencies may arise:*

*(a) The recorded person is dead and the occupier claims as an heir. In this case the Lekhpal shall proceed as provided in paragraph 82.*

*(b) The occupier claims as sub-tenant of the recorded person. The Lekhpal shall proceed as provided in paragraph 88.*

*(c) The occupier claims to be sajhi or marifatdar of a person belonging to class (a) or (c) of sub-paragraph (1). The Lekhpal shall proceed as provided in paragraph 83. A sajhi of marifatdar of a parson belonging to class (b), (d) or (e) of sub-paragraph (i) shall be ignored.*

*(d) The occupier claims to be recorded in Column 6 to the exclusion of the recorded person. The Lekhpal shall proceed as follows:*

*(i) If the recorded person belongs to classes (b), (d) or (e) of sub-paragraph (i), the Lekhpal will substitute the name of the actual occupier in place of the name of the recorded person but he shall not enter the name in class (b) or class (d) unless the condition laid down in the proviso to sub-paragraph (iii) are fulfilled. If he finds that a contractual relationship has not arisen between the occupier and the person entitled to subject he will treat the occupier as belonging to class (e).*

*(ii) If the recorded-person belongs to class (a) or (c) of sub-paragraph (i), the Lekhpal shall provisionally enter in red ink the name of the actual occupier in the remarks Column of the khasra and shall proceed, as far as possible, as laid down in sub-paragraphs (b) to (d) of paragraph 84, provided that in a case falling under class (d) the name and other particulars of the actual occupier with the words "Qabiz Dawedar" shall be entered below the name and other particulars of the person already recorded in Column 6.*

*(v) A cross mark shall be made at the time of rabi partal, in red ink, so as to occupy the whole space in Column 6 against any plot which has not been held by person of the classes mentioned in sub-paragraph (i) in either crop and no entry shall subsequently be made in the Column without the written order of the '[Revenue Inspector] or higher authority. Such an order if made by the '[Revenue Inspector], shall be written out by him in the remarks Column of the khasra and shall be signed and dated by him."*

15. In the instant matter entry which has been made in the remark column/ khana kafiyat that is not according to the provisions contained under Paragraph no.87 of the U.P. Record Manual, as such, no reliance can be placed upon the entry of the plot nos.376 & 377 as mentioned in the khasra annexed along with writ petition as well as quoted in the earlier paragraph of this judgment in order to claim Adhivasi right/ Sirdari right.

16. So far as the judgment passed under Section 229-B of U.P.Z.A. & L.R. Act are concern, the proceedings of the suit under Section 229-B of U.P.Z.A. & L.R. Act had abated due to consolidation operation, as such, no reliance can be placed upon the judgment passed under Section 229-B of U.P.Z.A. & L.R. Act. The Deputy Director of Consolidation has rightly held that judgment passed under Section 229B of U.P.Z.A. & L.R. Act cannot be relied upon in the consolidation proceeding due to abatement of the proceeding. The revisional Court has however examined the some of the evidence which were adduced in the suit under Section 229B of U.P.Z.A. & L.R. Act, which is correct exercise of revisional jurisdiction under Section 48 of U.P.C.H. Act.

17. The Consolidation Officer and Settlement Officer of Consolidation have decided the matter without considering the provisions of Section 20 of U.P.Z.A. & L.R. Act as well as the principle laid down by Hon'ble Apex Court in ***Sonawati (Supra)***, as such, the orders passed by Consolidation Officer & Settlement Officer of Consolidation have been rightly set aside by revisional Court under Section 48 of U.P.C.H. Act considering the revenue entry of the plot in question w.e.f. 1356 fasli as well as other evidence on record.

18. So far as jurisdiction under Section 48 of U.P.C.H. Act is concern, the legislature has made amendment under Section 48 of U.P.C.H. Act by inserting explanation-3 with effect from 10.11.1980 by U.P. Act no.3 of 2002 by which power has been given to revisional Court to examine the correctness, legality or propriety of any order which includes the power to examine any finding whether of fact or law as well as re-appreciate any oral or documentary evidence. In the instant matter revisional order was passed on 2.11.1981 against the appellate order dated 21.11.1980, as such, amended provisions of

Section 48 of U.P.C.H. Act will be applicable.

19. This Court in the case reported in ***2020 (148) RD 114, Lakshmania Vs. D.D.C. Deoria and Others*** has considered the scope of Section 48 Explanation 3 of U.P.C.H. Act. Paragraph No.44 of the judgment rendered by this Court in Lakshmania (supra) will be relevant for perusal which is as under:

*"44. In this case, the objections were filed in the year 1981, and, therefore, the amended provisions of Section 48, operative retrospectively, would squarely apply. Under the amended statute, the Revisional Court has been conferred with unique powers by virtue of the added Explanation 3 to go into the correctness, legality or propriety of an order passed by an Authority below, whether on fact or law, and includes the powers to appreciate any oral or documentary evidence. Thus, to the understanding of this Court, in view of the added Explanation by U.P. Act no. 3 of 2002, retrospectively w.e.f. 10.11.1980, the Revisional Court is in no manner inhibited from examining any question of fact or law, or appreciating evidence whether documentary or oral, virtually like any other Court of fact and law. It is a unique position that the Revisional Authority enjoys, under Section 48 of the Act, conventionally not associated with the exercise of revisional jurisdiction."*

20. The plea of Shikami tenant, Adhivasi right, Sirdari right on the basis of alleged entry in the revenue record in respect to plot nos.376 & 377 setup by the petitioners has failed, as such, respondent nos.2 & 3 are entitled to be recorded as bhumidhar on the basis of sale-deed executed on 31.1.1963 by Ram Anjor Singh in favour of respondent nos.2 & 3 as held under the impugned revisional order dated 2.11.1981.

21. Learned counsel for the petitioners has not pressed the plea of the adverse possession, as such, issuance of P.A. 10 is not required to be considered.

22. Considering the entire facts and circumstances of the case, there is no illegality in the impugned judgement dated 2.11.1981 passed by respondent no.1/ Deputy Director of Consolidation, Basti.

23. The writ petition stands ***dismissed.***

24. It is further directed that entire amount deposited by the petitioners with effect from 1983 under the interim order of this Court dated 20.9.1983 be released in favour of respondent nos.2 & 3 within period of six weeks from the date of production of certified copy of this order before the authority concern.

25. No order as to costs.

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**(2024) 7 ILRA 245**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 09.07.2024**

**BEFORE**

**THE HON'BLE MRS. SANGEETA CHANDRA, J.**
**THE HON'BLE BRIJ RAJ SINGH, J.**

Writ C No. 4456 of 2024

**Shiv Kumar ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Deepanshu Dass, Lalta Prasad Misra

**Counsel for the Respondents:**
C.S.C., Ratnesh Chandra

**A. Doctrine of Election - approbate and reprobate -** It is trite law that a party cannot be permitted to approbate and reprobate at the same time. This principle is rooted in the doctrine of election, which is a facet of the law of estoppel. A party cannot blow hot and cold simultaneously. Any party taking advantage of an instrument must accept all its terms. A person cannot assert the validity of a transaction to gain an advantage and later challenge it as void to secure another benefit**. (Para 37)**

**B.** Initially, Flat No. R–152 was allotted to Late Ram Pyare Panika, and a Hire Purchase Agreement was executed between him and the Lucknow Development Authority (L.D.A.), requiring him to deposit ₹3,70,200 along with quarterly installments of ₹18,500. Possession of the flat, valued at ₹6,27,000, was delivered solely for residential purposes, with a sale deed to be executed upon full payment of the sale consideration. However, the full amount was not deposited. Subsequently, on the application of Late Ram Pyare Panika, Flat No. R–152 was exchanged for House No. 5/367, and a request for a refund of the amount paid for Flat No. R–152 was made. On 01.06.1999, Late Ram Pyare Panika executed a notarized will in favor of the petitioner. Petitioner represented to the L.D.A. to transfer the allotment of the said flat in his favor, realize the balance sale consideration, and register the sale deed in his name, which was rejected by the impugned order. **Held**: No right, much less an alienable right, accrued to Late Ram Pyare Panika to have a sale deed or will executed in favor of the petitioner concerning Flat No. R–152. The Hire Purchase Agreement explicitly stated that possession was granted solely for residential purposes and that the allottee could not mortgage, sell, or create third-party interests until the execution of the sale deed by L.D.A. after receiving the full sale consideration. Late Ram Pyare Panika, having failed to pay the entire sale consideration and having opted to exchange the flat with an H.I.G. house, forfeited any rights under the initial agreement. His subsequent request for a refund further negates any claim over the flat. **(Para 40)**

**Writ Petition dismissed.** (E-5)

**List of Cases cited**:

1. Puran Singh & ors. Vs St. of Pun., 1975 (4) SCC 518

2. Ram Rattan & ors. Vs St. of U.P., 1977 (1) SCC 188

3. Rame Gowda (D) by L.R.s Vs M. Varadappa Naidu, 2004 (1) SCC 768

3. Horam Vs Rex, AIR 1949 All 564

4. Jugalkishore Saraf Vs Raw Cotton Company Ltd., AIR 1955 SC 376

5. Verschures Creameries Ltd. Vs Hull and Netherlands Steamship Co. Ltd.

6. R.N. Gosain Vs Yashpal Dhir, 1992 (4) SCC 683

7. Bhagwat Saran (Through L.R.) Vs Purushottam & ors., 2020 (6) SCC 387

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. This petition has been filed praying for quashing of order dated 08.05.2024 passed by the Vice-Chairman, Lucknow Development Authority (hereinafter referred to as "opposite party no.3"), where he has rejected the representation of the petitioner with respect to Flat no.- 152, Ist Floor, Rupayan Gomti Nagar, Lucknow and also praying for a mandamus to be issued to the opposite party no. 2 to enter the name of the petitioner in place of his predecessor-in-interest as allottee of the said Flat and to take balance of the sale consideration from the petitioner and execute a sale deed in his favour and not to allot/settle/sell the said Flat in favour of

any other person and not to disturb the possession of the petitioner over the said Flat.

2. The brief facts of the case as mentioned in writ petition are that one Sri Ram Pyare Panika, Ex-Member of Parliament had applied for allotment of a three bedroom Flat, type "Rupayan", in a residential colony called Nehru Enclave in Gomti Nagar developed by the opposite party no. 2, the Lucknow Development Authority (hereinafter referred to as 'the L.D.A.') and deposited Rs.30,000/- initially on 28.03.1989. He was allotted Flat no. 152, "Rupayan" on Ist floor at an estimated cost of Rs.4,25,000/- payable in quarterly installments of Rs.17,500/-. Sri Ram Pyare Panika deposited some installments thereafter. By a letter dated 28.07.1994, he was informed that the price of the Flat had increased to Rs.6,42,000/- until the said date, the amount deposited by him came to Rs.3,31,250/-. Later on a Hire Purchase Agreement was entered into between the L.D.A. and Sri Ram Pyare Panika on 15.09.1994 requiring him to deposit Rs.3,70,200/-, additionally, in quarterly installments of Rs.18,500/-. Suddenly, a dispute arose between L.D.A. and the Army, which claimed that Nehru Enclave was built upon land, which belonged to the Army. Army personnel occupied all vacant Flats of the said scheme, in 1999 and Sri Ram Pyare Panika decided to withdraw from the said scheme and wrote to L.D.A. to refund the amount deposited by him.

3. It is the case of the petitioner that allotment of Sri Ram Pyare Panika was never cancelled and the amount deposited by Sri Ram Pyare Panika could not be refunded to him as a dispute arose between UCO Bank and the L.D.A. as to the amount deposited by Sri Ram Pyare Panika. UCO Bank informed the L.D.A. that it had no record regarding payments made by Sri Ram Pyare Panika and recommended that the claim of Sri Ram Pyare Panika be settled on the basis of original challans submitted by him. The petitioner was at the time living with and taking care of Sri Ram Pyare Panika. Since Sri Ram Pyare Panika no longer wanted the said Flat, on account of litigation between L.D.A. and, he on receipt of Rs.5,00,000/- from the petitioner, executed a duly notarized agreement to sell on 01.06.1999, in favour of the petitioner to sell the Flat in question. As the sale deed was not executed by L.D.A. in favour of Sri Ram Pyare Panika, he also executed a notarized Will on the same day that is on 01.06.1999 in favour of the petitioner. Sri Ram Pyare Panika died on 24.10.1999, and he could not deposit the rest of the installments towards the Flat in question. The petitioner who is in possession of the Flat has been repeatedly representing to the L.D.A. to transfer the allotment of the said Flat in his favour and to realise the balance of the sale consideration and register the sale deed in his favour, but the L.D.A. has been threatening him that he shall be evicted forcibly from the Flat in question.

4. It has been alleged by the petitioner that he was served a notice on 27.06.2023 and again on 25.09.2023, with regard to certain dispute relating to the Flat in question raised by a neighbour, and the L.D.A. recognized and acknowledged his possession over the property yet it is not executing a sale deed in his favour. On the other hand, the money deposited by Sri Ram Pyare Panika has illegally been credited in the name of one Vipin Bakshi and the Flat in question has been allotted in his favour as per the information available on the website, of the L.D.A.

5. The petitioner being aggrieved filed a writ petition, challenging such action of the L.D.A., namely, *Writ-C No. 117 of 2024, Shiv Kumar Vs. State of UP and Others*. In the counter affidavit filed by the L.D.A., it was stated that the entry of Flat no.- R–152, in the name of Vipin Bakshi was found to be incorrect and accordingly, orders have been passed for expunging the entry made in favour of Vipin Bakshi. The petition was finally disposed of by this Court by an order dated 26.02.2024, directing the opposite party no. 3 to decide the representation of the petitioner and till such decision is taken, it was restrained from taking any action against the petitioner regarding his proposed eviction. Now the representation of the petitioner has been decided by the opposite party no.3, rejecting the same without taking into account Section 5 of the Transfer of Property Act, which provides that a living person may convey property in the present or in the future, to one or more other persons, and also ignoring the provisions of Section 18 of the Registration Act, 1908, which requires that registration of Will which creates, declares or assigns any right/ title or interest in any immovable property in the present or in the future, is completely optional.

6. It has further been argued by the learned counsel for the petitioner that the impugned order mentions about application of children of Late Ram Pyare Panika for refund of money which was never communicated to the petitioner by the opposite party no.3. No copy of such application was supplied to the petitioner. As a result, the petitioner could not reply to this aspect of the matter and without affording any opportunity to the petitioner, in this regard, the petitioner's claim was rejected. Also, it has been argued that in the impugned order dated 08.05.2024, it has been mentioned that the allotment of Sri Ram Pyare Panika was converted from Flat No.- R-152, Nehru Enclave, Gomti Nagar to House No. 5/367 Viram Khand, Gomti Nagar. However, neither the original allotment order dated 05.10.1990, nor the Hire Purchase Agreement dated 15.09.1994 was cancelled. Also, no allotment order was issued for the house allotted in exchange or any agreement to sell was entered with Sri Ram Pyare Panika with respect to House No. 5/367. In fact, Sri Ram Pyare Panika refused to accept House No. 5/367, as is evident from his letter dated 26.07.1997. Sri Ram Pyare Panika never deposited any money in respect to House No. 5/367, and had asked for refund of money which he had earlier deposited for Flat No.- R–152, but the same was never refunded to him. Therefore, Sri Ram Pyare Panika continued in possession of Flat No.R–152.

7. It has further been argued by the learned counsel for the petitioner that the impugned order dated 08.05.2024 stated that the agreement to sell dated 01.06.1999 and the Will dated 01.06.1999 are unregistered, and therefore are doubtful, forged and fabricated documents, and as such cannot be relied upon. It ignores Section 18 of the Registration Act, 1908. The validity of the documents i.e. the Agreement to Sell and the Will dated 01.06.1999 cannot be decided by any Administrative Authority. It is only the competent Civil Court which can test the validity and legality of such documents. Even an unregistered Agreement to Sell can be acted upon through a Suit for Specific Performance. Under Section 18 of the Registration Act, 1908, registration of Will is optional and even unregistered Will is admissible and executable. Even if the

notarized Agreement to Sell is ignored, the petitioner is entitled to retain possession of the Flat on the basis of the Will dated 01.06.1999. Devolution of property or rights through Will is not a transfer of the same, and in view thereof the devolution of allotment, possession, and substitution in Agreement to Sell the same, is not a transfer and under law it is permissible. It has been argued that the directions issued in the impugned order dated 08.05.2024 to vacate the Flat in question within 15 days or else the same shall be got vacated forcibly and further direction to the petitioner to pay the rent of the Flat since 1999 and a direction to concerned officials to refund the deposited amount to the family of Late Ram Pyare Panika is wholly illegal and arbitrary and without jurisdiction. The family of Late Ram Pyare Panika has no claim or right over the consideration deposited by Sri Ram Pyare Panika, and the petitioner alone can claim the same on the basis of the Will executed in his favour by Sri Ram Pyare Panika. On the basis of the said Will, it has been also argued that the allotment of Flat no.- R–152 has already devolved upon the petitioner, and the consideration already paid by Sri Ram Pyare Panika ought to be entered in the name of the petitioner, and L.D.A. is legally bound to take the balance consideration for sale of the said Flat from the petitioner and execute the sale deed in his favour.

8. The Counsel for the petitioner has placed reliance upon judgements of the Supreme Court in the case of ***Puran Singh and others Vs. State of Punjab, 1975 (4) SCC 518; Ram Rattan and others Vs. State of U.P., 1977 (1) SCC 188;Rame Gowda(D) by L.R.s Vs. M. Varadappa Naidu, 2004 (1) SCC 768;*** to argue that even a trespasser cannot be dispossessed except in accordance with due procedure in law.

9. The Counsel for the petitioner has read out Paragraph-12 of *Puran Singh* (supra) where the Supreme Court observed that where a trespasser was in settled possession of the land, he could not be evicted except in due course of law, and he is further entitled to resist or defend his possession, even against the rightful owner who tries to dispossess him. The only condition laid down by the Court was that the possession of the trespasser must be settled possession. The Court explained that the settled possession must be extended over a sufficiently long period of time and acquiesced in by the true owner. The possession of a trespasser must be effective, undisturbed and to the knowledge of the owner or without any attempt at concealment, but the Supreme Court further observed that an occupation of the property by a person as an agent or a servant at the instance of the owner will not amount to actual physical possession. The nature of possession in such cases which may entitle a trespasser to exercise the right of private defence of property and person should contain the following attributes: –

(1) that the trespasser must be in actual physical possession of property over a sufficiently long period;

(2) that the possession must be to the knowledge either express or implied of the owner or without any attempt at concealment, which contains an element of *Animus Possidendi.* The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

(3) the process of dispossession of the true owner by the trespasser must be

complete and final, and must be acquiesced in by the true owner; and

(4) that one or usual test to determine the quality of settled possession, in the case of cultivable land would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession, in which case the trespasser will have a right of private defence, and the true owner will have no right of private defence.

The Supreme Court relied upon textbooks of English jurists for example 'Salmond', where it was observed:–

*"In English law possession is a good title of right against anyone who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessor and except the true owner himself."*

Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title, even against the owner himself. Even a wrong doer who is deprived of his possession, can recover it from any person whatsoever, simply on the ground of his earlier possession. Even the true owner who takes his own, maybe forced in this way to restore it to the wrongdoer and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed to recourse of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by judgement according to law.

10. The law in India, as it has developed, accords with the jurisprudential thought as propounded by Salmond. However, the courts have mostly quoted Latin maxim:-*"possessio contra omnes valet praeter eur cui ius sit possessionis".* (He that hath possession hath right against all but him that hath the very right).

11. The Supreme Court in almost all the aforecited cases has referred to the observations made by the Allahabad High Court in ***Horam Vs. Rex, AIR 1949 Alld 564*****;** wherein a distinction was drawn between the trespasser in the process of acquiring possession and the trespasser, who had already accomplished or completed his possession, wherein the true owner may be treated to have acquiesced in; while the former can be obstructed and turned out by the true owner, even by using reasonable force, the latter, may be dispossessed by the true owner only by having recourse to the due process of law for a re-acquiring possession over his property.

12. Per contra, Sri Ratnesh Chandra appearing for the L.D.A. has referred to Annexure-16 to the writ petition, which is a counter affidavit filed by the L.D.A. in earlier petition Writ-C No. 117 of 2014; and pointed out that initially Flat No. R–152 was allotted in favour of Late Ram Pyare Panika and a Hire Purchase Agreement was executed in his favour and possession was also delivered to him. Subsequently, on an application being given by Sri Ram Pyare Panika, in place of Flat no. R–152, Nehru enclave, Gomti Nagar, he was allotted House No. 5/367, Viram Khand, Gomti Nagar. While making adjustment of payments already received by L.D.A. for Flat no. R-152 in exchange of House No. 5/367, Viram Khand, Gomti Nagar, Lucknow, Sri Ram Pyare Panika was also provided with the calculation

sheet for making payment in respect of House No. 5/367. A copy of the calculation sheet in respect of House No. 5/367, Viram Khand, as well as the order of adjustment in respect of House No. 5/367, Viram Khand, Gomti Nagar has been filed as an Annexure to the said counter affidavit.

13. Sri Ratnesh Chandra has also pointed out page 139 of the paperbook which is a letter dated 30.11.1996, and it refers to request by Sri Ram Pyare Panika made on 03.09.1996 praying for allotment of HIG House No. 5/367 in Viram Khand, Gomti Nagar in place of Flat R-152, Nehru Enclave, Gomti Nagar. It refers to an order passed by the then Vice Chairman on 10.11.1996 accepting such request and directing conversion/exchange. Rest of the terms and conditions of such allotment would remain the same as before. The cost of such house was indicated as Rs.7,49,718/- and Sri Ram Pyare Panika was directed to deposit the same latest by 31.12.1996 or else penal interest would be charged. At page 141 of the paperbook is the letter dated 03.09.1996, written by Sri Ram Pyare Panika. He has mentioned that he had been allotted Flat No.152 Nehru Enclave and had also been given possession thereof, but the Army, having taken possession had put a lock on it, as a result, it would be difficult to reside in the same as civic amenities were also not available. Sri Ram Pyare Panika referred to his Reserved Category status and poor financial condition and asked for allotment of House No. 5/367 in Viram Khand Phase-V, Gomti Nagar in its place.

14. Also, Sri Ratnesh Chandra has pointed out page-143 of the paperbook, which is a letter written again by Sri Ram Pyare Panika on 26.07.1997, saying that he had been allotted a house in Viram Khand in place of Flat in Nehru Enclave, but the sale consideration was very high, which he could not pay, therefore, he prayed that the amount he had already deposited be returned with interest to him so that he can make efforts to arrange a residence for himself. In pursuance of such application dated 26.07.1997, the refund voucher was prepared in respect of House No. 5/367, Viram Khand, Gomti Nagar and was submitted to the Branch Manager UCO Bank, but in the Challan Nos. 8579, 8591, 8592, 13877, and 12516, which were mentioned in the refund order, the name of Sri Ram Pyare Panika was not shown nor there was any mention of deposit of any amount by Sri Ram Pyare Panika. Hence, the bank returned the said vouchers without making any payment to Sri Ram Pyare Panika . As per challan available of various dates in the office of the L.D.A., payment of Rs.2,37,500/- alone was done by Sri Ram Pyare Panika in pursuance of the allotment of Flat No.R-152, Nehru Enclave. It has been admitted also in the counter affidavit that although refund vouchers were prepared, but were returned by UCO Bank, therefore, no refund could be made to Sri Ram Pyare Panika and he died soon thereafter.

15. On the basis of the counter affidavit and the order impugned dated 08.05.2024, it has been argued by Sri Ratnesh Chandra that the petitioner is claiming that Sri Ram Pyare Panika had executed a Will in his favour on 01.06.1999, and also an unregistered Agreement to Sell on the same day, but since Sri Ram Pyare Panika had himself made an application on 26.07.1997, for getting the said Flat R-152 Nehru Enclave exchanged with House No. 5/367, Viram Khand, Gomti Nagar, and the said house was also allotted to him against which he

also made certain payments, Sri Ram Pyare Panika had no right to execute any Agreement to Sell, or any Will in favour of the petitioner by claiming himself to be the owner of the Flat in question. As soon as House No. 5/367 Viram Khand was allotted on request of Sri Ram Pyare Panika in place of Flat No. R-152 Nehru Enclave, all rights of Panika were extinguished from Flat No.R–152, Nehru Enclave, Gomti Nagar, Lucknow. Sri Ram Pyare Panika was incompetent to enter into any agreement to sell or even bequeath the said Flat through a Will in favour of the petitioner or anyone else.

16. It has also been pointed out from Paragraph-22 of the counter affidavit that Sri Ram Pyare Panika was informed at the time of delivery of possession of the Flat in September, 1994 of the terms and conditions contained in the Hire Purchase Agreement and that he was required to make payment of Rs.3,70,200/- along with interest at the rate of 21% in quarterly installments of Rs.21,425/-. However, the same was not deposited. Sri Ram Pyare Panika instead initially sought exchange of Flat in question with HIG house and later on sought refund of the past payment made by him for the flat. Also, reliance was placed on letters dated 24.04.1993 and 28.07.1994 filed along with the said counter affidavit, mentioning therein the tentative/estimated cost of the Flat, category name Rupayan, of Rs.4,25,000/-, which was later on increased to Rs.6,42,000/-. In the letter dated 18.07.1994, payment of only Rs.3,31,250/- was admitted since the date of its allotment on 23.06.1989, by the Property Officer, Gomti Nagar for L.D.A.

17. It has further been argued by Shri Ratnesh Chandra that in fact, there was no Agreement to Sell as alleged by the petitioner in his petition and also in his representation made to the opposite party No. 3. The alleged agreement to sell which has been filed by the petitioner as annexure-9 to the petition is in fact, a notarized Sale Deed as it clearly mentions at the top of the document "Vikray Vilekh Patra". The said notarized and unregistered sale deed has been read out in its entirety by the counsel for the respondent. It says that Sri Ram Pyare Panika is the owner and in possession of Flat No. R-152, which is free from all encumbrances and for the sale of which he has a legal right and he has decided to sell it off for a sale consideration of Rs.5,00,000/- to Shiv Kumar, son of Kamta Prasad, resident of Teliyarganj, Allahabad. It further recites that such Rs.5,00,000/- has been accepted in cash and possession of the Flat has been given to the purchaser and that Sri Ram Pyare Panika's legal heirs would have no right or interest in the same. It also says that the purchaser would have the right on the basis of said sale deed to get his name mutated in the revenue records as owner and in possession. It has been argued that at the time, when the said sale deed was executed by Sri Ram Pyare Panika, he had no right/ title or interest over the property and such unregistered notarized sale deed ought to be impounded as it allegedly transfers immovable property without payment of requisite Registration fees and Stamp duty.

18. It has also been argued that when Sri Ram Pyare Panika had sold off the Flat in question to the petitioner, he could not have bequeathed it on the same day to the petitioner, hence, the opposite party no. 3 was entitled to presume that the Will could not be relied upon by the petitioner to create any right/ title or interest in the property. Referring to page 140 and 141 of

the paperbook, it has been argued that once allotment of Flat in question had been exchanged for allotment of HIG House No. 5/367, Viram Khand and Sri Ram Pyare Panika, having discovered that he could not pay for the said HIG house, had asked for refund of his money along with interest in July, 1997, he could not have claimed to be the owner and in possession of Flat R–152. The petitioner cannot claim that since the L.D.A. did not refund the amount deposited by Sri Ram Pyare Panika, the Flat in question belonged to him and he could validly transfer the same in favour of the petitioner. The question as to whether L.D.A. had refunded the money deposited by Sri Ram Pyare Panika is a question which Sri Ram Pyare Panika's legal heirs alone can raise.

19. It has also been argued that although in the order dated 08.05.2024 reference has been made of by the opposite party No. 3 of Sri Ram Pyare Panika's children asking for refund of money deposited by Sri Ram Pyare Panika , the petitioner has not impleaded any of them and he claims that he does not know them, although he had been allegedly living with Sri Ram Pyare Panika and taking care of him and moved by his love and affection, Sri Ram Pyare Panika had bequeathed the Flat in question to him. It has also been argued that refund vouchers were indeed prepared, but they did not contain any description of money deposited by Sri Ram Pyare Panika, and therefore, the bank had returned such vouchers and by the time actual refund could be initiated again, Sri Ram Pyare Panika had already died. Sri Ratnesh Chandra has also argued that the petitioner claims to have been sold or bequeathed the Flat in question in 1999, but he made no effort to get such sale deed/will deed executed till filing of the Writ-C No. 117 of 2024: *Shiv Kumar Vs. State of U.P. and others.* The petitioner waited for almost twenty five years before staking his claim on the basis of these alleged documents. In the said petition L.D.A. filed counter affidavit, disputing the claim of the petitioner regarding subsisting allotment in favour of Sri Ram Pyare Panika. They also stated that a wrong entry had been made on the portal with regard to allotment of the Flat in question in favour of Vipin Bakshi, which has been ordered to be corrected. The earlier writ petition was disposed of without entering into the merits of the controversy with the direction to decide the petitioner's representation. Now the representation has has been decided by the opposite party No.3, and in the garb of decision on the said representation, a fresh cause of action has been sought to be created. When the initial writ petition was filed, it was a delayed petition with no explanation for such delay regarding putting forth a dead / stale claim. It has also been argued by the learned counsel for the L.D.A. that writ jurisdiction is an equitable jurisdiction and should not be exercised in favour of a person who is in possession of public property without any right/ title or interest created in his favour by the L.D.A. Sri Ram Pyare Panika had made certain payments to L.D.A. and not full sale consideration for Flat R-152 Nehru Enclave and his children can at best on the basis of such payments having been made by their father ask for refund along with interest.

20. The learned counsel for the petitioner in rejoinder has reiterated the claim of the petitioner and has argued that this Court has to see (a) whether the rights and interest of Sri Ram Pyare Panika stood extinguished after 24.07.1997, when he asked for refund of his money under compulsion as a dispute had been created

by the Army regarding the ownership of the land on which such Flats had been raised by the L.D.A.?; (b) whether on 01.06.1999 when Sri Ram Pyare Panika had made out a Sale deed and Will in favour of the petitioner, he had any alienable right or interest in the property?; (c) whether admitting possession of the petitioner for twenty five years, L.D.A. can forcibly evict the petitioner under the provisions of the U.P. Urban Planning and Development Act of 1973?; (d) whether the findings recorded in the impugned order are arbitrary and perverse?.

21. It has been argued on the basis of Sri Ram Pyare Panika's application for allotment of alternative house in exchange for Flat R–152, that such application was made under duress and compulsion as the Army had taken over all the vacant Flats in Nehru Enclave. The allotment letter approving such exchange asked Sri Ram Pyare Panika to deposit Rs.7,49,718/- latest by 31.12.1996, Sri Ram Pyare Panika could not deposit the money and asked for a refund only out of compulsion as he could not arrange such a huge amount in such a short period of time. The L.D.A. admitted that Rs.3,31,250/- had been deposited till 18.07.1994, by Sri Ram Pyare Panika. They did not return such money. They also did not cancel the allotment of Flat No. R–152, therefore, at the time when Sri Ram Pyare Panika executed the Sale deed and the Will in favour of the petitioner his allotment was intact. Part performance of the contract between L.D.A. and Sri Ram Pyare Panika was also admitted. The agreement entered into between L.D.A. and Panika on 15.09.1994 also stated that his/dependents and legal heirs would be entitled to succeed to such property. Since refund was not made, and the possession of the Flat in question, was still with Sri Ram Pyare Panika, he was entitled to alienate the property by means of either a Will or a Sale deed. Under the Transfer of Property Act, any interest that the seller has in any immovable property, either in the present or in the future, can be transferred by him to the purchaser. One of the residents in the colony had complained about use of garage of Flat R–134, Nehru Enclave by the petitioner to the L.D.A. and the L.D.A. had issued a Show Cause Notice to the petitioner on 27.06.2023 admitting his possession over Flat R–152. Similarly, a joint inspection of the property was done and the Executive Engineer had asked the petitioner to remove the temporary shed he had constructed on the terrace by notice dated 25.09.2023. It has been argued on the basis of such notices, copies of which have been filed as annexures to the petition that the L.D.A. knew since long that the petitioner is in possession over Flat R–152, and even if he was a trespasser, he cannot be removed without following due process of law.

22. Reiterating the argument made earlier that even an unregistered agreement to sell can be enforced by filing a Suit for specific performance, it has been argued that not only present interest in the property can be sold but also future interest in property can be sold through an agreement to sell as per Section 5 and Section 6 of the Transfer of Properties Act. It has also been argued that the Will made out by Sri Ram Pyare Panika on 01.06.1999, in favour of the petitioner has neither been challenged by Sri Ram Pyare Panika's children nor by L.D.A.. Hence it would be binding till it is set aside by competent Civil Court.

23. Reference has been made again to Section 18 of the Registration Act, 1908, and it has been argued that even an

unregistered Will can be acted upon. It has been again reiterated that relinquishment of right of Sri Ram Pyare Panika can only come to be when refund of his money would have been made by L.D.A. and since the petitioner was living with him and taking care of him he had a right to such money and interest there on having accrued in his favour which interest the petitioner is not claiming but he is claiming his right to the property bequeathed by Sri Ram Pyare Panika to him instead. It would therefore be appropriate that this Court directs the L.D.A. to either take remaining sale consideration from the petitioner and execute a sale deed in his favour of the Flat in question or allot him some other vacant Flat which is available with L.D.A. as is evident from information available on their website regarding proposal to auction such vacant properties.

24. Learned Counsel for the petitioner has placed reliance upon ***Jugalkishore Saraf Vs. Raw Cotton Company Ltd., AIR 1955 Supreme Court 376***, and paragraph 53 thereof. Justice Bhagwati, while giving his concurring opinion with regard to whether the Respondent Company could step into the shoes of the decree holder under Order XXI Rule 16 of the C.P.C. made certain observations about Section 5 of the Transfer of Property Act.

25. Justice H.N. Bhagwati, while delivering his concurring opinion explained Section 5 of the Transfer of Property Act. He observed that "Transfer of Property" is an act by which the transferor conveys property in present or in future, to the transferee. A transfer of a decree by assignment in writing may be affected by conveying the decree in the present or in future, to the transferor, but for the transfer to operate in future, the decree which is the subject matter of the transfer must be in existence at the date of the transfer. The words "in present or in future" qualify the word conveys and not the word property in the Section and it has been held that a transfer of property that is not in existence operates as a contract to be performed in the future which may be specifically enforced as soon as the property comes into existence. Justice Bhagwati placed reliance upon observations made by the Privy Council in an English case where it observed:-

*"But how can there be any transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed in future and upon the happening of a contingency, of which the purchaser may claim a specific performance, if he comes to court showing that he has himself done all that he was bound to do."*

It is only by operation of the equitable principle that as soon as the property comes into existence and is capable of being identified, equity taking as done that which ought to be done fastens upon the property, and contract to assign thus becomes a complete equitable assignment. The decree not being in existence at the time of the transfer cannot be said to have been transferred by the assignment in writing and the matter resting, merely in a contract to be performed in future, which may be specifically enforced as soon as the decree was passed, and there would be no transfer automatically in favour of the 'transferee' of the decree when passed. It would require a further act on the part of the 'transferor' to completely effectuate the transfer, and if

he did not do so, the only remedy for the transferee would be to sue for the specific performance of the contract to transfer. There would therefore be no legal transfer or assignment of the decree to be passed in future by virtue of the assignment in writing executed before the decree came into existence, and the only way in which the transferee could claim that the decree was transferred to him by assignment in writing would be by the operation of the equitable principle above enunciated, and the contract to assign having become a complete, equitable assignment of the decree.

26. The Judgement in *Jugalkishore* Saraf (supra) is inapplicable to the facts of the case as we shall discuss later in this judgement.

27. The learned Counsel for the petitioner has argued that even an unregistered Will can be enforced and has placed reliance upon judgement rendered by a Coordinate Division Bench in a matter under Article 227 No. 8279 of 2022*: Pramila Tiwari versus Anil Kumar Mishra and 4 others.*

28. We do not dispute the proposition of law pronounced by the Coordinate Bench in *Pramila* Tiwari (supra). However, we have our own view about the applicability of the said judgement to the facts of the instant case.

29. Having heard the learned counsel for the petitioner and the respondent, we have carefully examined the pleadings and also the documents brought on record by the contesting parties.

30. It is evident from the allotment letter issued to Late Ram Pyare Panika that a 3 BHK Flat at an estimated cost of Rs.4,25,000/- was initially allotted on 23.06.1989. Later on another letter was issued on 28.07.1994, indicating the revised estimated cost of the Flat as Rs. 6,42,000/- and admitting payment of Rs. 3,31,250/- being made, till July 1994. Sri Ram Pyare Panika , however, prayed for exchange of Flat allotted to him with HIG House at Viram Khand Phase-V through his letter dated 03.09.1996. Such request was granted by the then Chairman of L.D.A. in November, 1996, and information regarding the same and the cost of such HIG house was communicated to Sri Ram Pyare Panika on 13.11.1996. Sri Ram Pyare Panika, however, could not pay the higher value and asked for refund of his money along with interest. Such letter has been admitted by the petitioner himself.

31. In the counter affidavit filed by the L.D.A. in the earlier petition, it has been stated that refund vouchers were also prepared, but the bank would not ascertain the amount deposited by Sri Ram Pyare Panika, and therefore, returned the said vouchers. It was not as if the L.D.A. did not initiate refund or that it had no intention to return the amount deposited by Sri Ram Pyare Panika, however, Sri Ram Pyare Panika died, before such a refund could actually be given to him. Sri Ram Pyare Panika having relinquished his right to the Flat by his letter dated 03.06.1996, could not have made out any sale deed in favour of the petitioner for the Flat in question. However, he did execute an unregistered notarized document describing it as a Sale Deed (Vikray Vilekh Patra) having taken sale consideration of Rs.5,00,000/- allegedly from the petitioner for the said Flat. Inexplicably, he also allegedly executed a Will in favour of the petitioner for the same Flat. The petitioner is claiming

his rights on the basis of such Sale deed which he claims to be only an agreement to sell, and the Will which he argues can be acted upon, even if it is unregistered.

32. Learned counsel for the petitioner has also placed great reliance upon the agreement entered by L.D.A. with Sri Ram Pyare Panika on 15.09.1994, at the time of giving possession of the Flat in question. It has been argued that such agreement has never been cancelled. It is binding upon L.D.A.

33. On careful examination of the Hire Purchase Agreement signed between the parties on 15.09.1994, we find it mentions the date of allotment as 05.10.1990 and the cost of the Flat as Rs. 6,27,000/- of which Rs.2,56,800/- had been paid and the remaining Rs. 3,70,200/- had to be paid in quarterly installments along with penal interest at the rate of 21% amounting to Rs.21,425/- for each such installment. Only After such payment of Rs.6,27,000/- of sale consideration was made a sale deed would be executed. It also states that possession had been given only for the purpose of residence; until execution of sale deed no construction/changes be brought about in the property by the allottee; the allottee had to make payments of all taxes and dues on such property. It also states that the seller could cancel such allotment at any point of time and Clause 10 states clearly that the agreement would not create any lien/ right, title or interest or ownership in the property. Also, Clause 11 states that during the subsistence of the agreement, the purchaser would not have any right to either mortgage / hypothecate or sell such property.

34. The petitioner is relying upon clause no.-13 of the said Hire Purchase Agreement to say that the legal heirs of the purchaser in case of his death would have all the rights which the purchaser had in the property had he remained alive. It has been argued that since allotment was not cancelled by the L.D.A., the petitioner being the successor through unregistered Will executed by Sri Ram Pyare Panika is entitled to all the rights which Sri Ram Pyare Panika would have had had he been alive.

35. The question before this Court is whether the petitioner can be allowed to rely on one of the clauses of the said Hire Purchase Agreement while ignoring the rest of them. Sri Ram Pyare Panika did not make payments of all the quarterly installments and at the time of his making request to the Chairman L.D.A. for exchange of said Flat with HIG house situated in Viram Khand Phase-V only Rs.3,31,250/- had been paid by him. His request was respected and he was allotted the HIG house in Viram Khand, but its price was naturally greater than the price for the First floor Flat in Nehru Enclave. On receiving letter issued by the L.D.A. for making payment of the estimated cost of the house Sri Ram Pyare Panika expressed his inability and asked for refund. He, therefore, relinquished his right to the Flat in question when he made a request for allotment of HIG house in exchange. His request having been granted, the limited rights that Sri Ram Pyare Panika had acquired in pursuance of such letter dated 30.11.1996 were with respect to the HIG house allotted to him in Viram Khand. Even those rights stood extinguished once Sri Ram Pyare Panika asked for refund of the money deposited by him through his letter dated 26.07.1997. Had full payment

been made by Sri Ram Pyare Panika of the Flat in question in pursuance of the Hire Purchase Agreement, then alone, some alienable right could have been said to have accrued in his favour to bequeath the property which he was likely to have become owner, upon the petitioner through an unregistered Will. The right created through the Hire Purchase Agreement was only a contingent right subject to the condition of making full payment of sale consideration along with penal interest thereon.

36. The argument made by the learned counsel appearing for the petitioner that since no refund was made to Sri Ram Pyare Panika, he had a subsisting right over the Flat in question which he could transfer by way of Sale deed, or by Will in favour of the petitioner cannot be countenanced as such a right allegedly arising out of the Hire Purchase Agreement ignores Clauses 10 and 11 thereof. The petitioner cannot be allowed to approbate and reprobate on the basis of the same document. He cannot be allowed to take advantage of one of the clauses of such agreement and ignore the other clauses thereof.

37. The law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election, which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage;" as observed by Lord Justice Scrutton in **Verschures Creameries Ltd vs. Hull And Netherlands Steamship Co Ltd.**

38. According to Halsburys Laws of England (4th Edn.) Volume 16, as quoted by the Supreme Court in ***R N Gosain v Yashpal Dhir 1992 (4) SCC 683,*** in Para 10; *"after taking an advantage under an order, a party may be precluded from saying that it is invalid and asking to set it aside."*

39. In ***Bhagwat Saran (through L.R.) Vs. Purushottam and Others, 2020 (6) SCC 387***, the Supreme Court observed in paragraph 26 and 27 that *"it is trite law that a party cannot be permitted to approbate and reprobate at the same time. This principle is based on the principle of doctrine of election. The doctrine of election is a facet of law of estoppel. A party cannot blow hot and blow cold at the same time. Any party which takes advantage of any instrument must accept all that is mentioned in the said document. In respect of Wills, this doctrine has been held to mean that a person who takes benefit of a portion of the Will cannot challenge the remaining portion of the Will..."*

40. This Court, hence is of the considered opinion that no right much less an alienable right accrued in Late Ram Pyare Panika to have executed a Sale deed or a Will in favour of petitioner with regard to flat in question, allotment of which was followed by a Hire Purchase Agreement which specifically laid down that possession was being given only for the purpose of residence to the allottee and he would not have any right to mortgage, sell or create any third party interest in such property till Sale deed is executed by L.D.A. on receipt of full sale consideration. The entire sale consideration having not been paid by Late Ram Pyare Panika and his having opted for exchange of allotment

of the flat in question with an H.I.G. house, which request was allowed by the then Vice Chairman of L.D.A.; Late Ram Pyare Panika also did not make any payment for such H.I.G. house and instead opted for refund of amount paid by him for Flat R-152, Nehru Enclave.

41. The order impugned in the writ petition although mentions the sale deed executed by Late Ram Pyare Panika as an Agreement to Sell, cannot be set aside only on this ground. The substance of the order being otherwise sound in law, this Court finds no good ground to issue a writ of Certiorari, which is even otherwise a discretionary writ which cannot be issued as a matter of course.

42. The writ petition is ***dismissed*** with the liberty to the respondents to take possession of Flat R-152 in accordance with procedure prescribed in law.

Judgement and order has been pronounced today under Chapter-VII Rule 1 (2) of the Allahabad High Court Rules, 1952.`

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**(2024) 7 ILRA 259**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 08.07.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Writ C No. 4983 of 2024

**The Oriental Insurance Company Ltd. & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sumit Kumar Srivastava

**Counsel for the Respondents:**
C.S.C., Dhruv Kumar

**A. Insurance Law – Mukhyamantri Kisan Evam Sarvhit Bima Yojana –Claim – Claimant's husband died in a fire accident – Insurance company rejected the claim on the ground that income certificate was not furnished – However, Permanent Lok Adalat allowed the claim – Validity challenged by Company – Held, in case of insurance contract, it is necessary that the essential conditions of the Insurance policy are fullfilled. However, those essential conditions are to be construed liberally and has to be substantially fulfilled – Submission of Income certificate is a necessary condition and therefore, its submission is mandatory. However, the time limit prescribed for submission is merely a technical and directory provision and cannot be a basis of rejection of the claim. (Para 14 and 15)**

**B. Interpretation of statute – Liberal construction – Social justice oriented legislation should always receive a liberal construction – The insurance scheme namely Mukhyamantri Kisan Evam Sarvhit Bima Yojana (MKSBY) being a welfare scheme whose terms have to be interpreted taking into consideration the hardships and welfare of the insured. (Para 12)**

**Writ dismissed.** (E-1)

**List of Cases cited:**

Om Prakash Vs Reliance General Insurance, (2017) 9 SCC 724

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

1. Heard Sri Sumit Kumar Srivastava, learned counsel for the petitioner as well as learned Standing Counsel for respondent nos. 1 and 2 and Sri Dhruv Kumar, learned counsel appearing for respondent no. 3. Rejoinder affidavit filed today is taken on record.

2. By means of present writ petition the petitioner has challenged the order 01.04.2024, passed by the Permanent Lok Adalat, Lucknow in PLA Case No. 28 of 2018 whereby the claim of respondent no. 3 made under the Mukhyamantri Kisan Evam Sarvahit Bima Yojana (MKSBY) has been allowed and the petitioner Insurance Company has been directed to pay an amount of Rs.5,00,000/- which is the insured amount to respondent no. 3 alongwith legal expenses of Rs.5000/- and Rs.1000/- per week Penalty from the date of rejection of claim till its actual payment has been awarded.

3. It has been submitted by learned counsel for the petitioner that the husband of respondent no. 3 had met a fire accident wherein he received serious burn injuries on 04.01.2017 and was admitted to PGI, Safai, where be succumbed to injuries on 16.01.2017. Postmortem was also conducted and Punchnama was also recorded with regard to aforesaid incident. Respondent no. 3 is the wife of deceased Sandeep who was working as agricultural labourer and used to make earning out of working in fields owned by other persons. The deceased was daily labourer and was the bread earner of the family and there is no dispute with regard to this fact. At the time of death of deceased he was aged about 25 years and it is stated that his annual income was Rs.36,000/-.

4. It is in the aforesaid circumstances an application was made to the petitioner seeking compensation under the MKSBY Scheme, but the same was duly considered and rejected by the petitioner on 10.11.2017 on account of two facts, firstly, that the deceased was not a farmer and secondly that income certificate as required under the said scheme has not been furnished.

5. The respondent no. 3 being aggrieved by the rejection of her claim and having no other forum, filed an application before the Permanent Lok Adalat, Lucknow *(hereinafter referred to as "the PLA")*. The PLA duly considered the entire facts of the case and after framing the issues and receiving evidence and considering contentions of all the parties, allowed the claim of respondent no. 3. The petitioner in the present writ petition has challenged the said order on the ground that the income certificate of the deceased was filed only during the proceedings before the PLA and not at any time prior to the same.

6. It is stated that as per terms of the Policy income certificate had to be filed within 45 days of the death of the insured and the respondent not having filed the certificate were not entitled to receive any claim in this regard. In support of his submissions the petitioner has relied upon the Samajwadi Kisan Evam Sarvahit Bima Yojna form, which according to the petitioner had been issued by the State Government itself.

7. Learned counsel for the respondents on the other hand has opposed the writ petition by submitting that the Scheme has been launched by the State Government taking into account the socio-economic condition of rural-agricultural and marginal farmers and land less labourers known as Samajwadi Kisan Evam Sarvahit Bima Yojna for their benefit so that the poor and marginal farmers and agricultural labourers can be benefited on account of any accidental death occurring to the bread earner of the family. The main object of the scheme is a preventive

measure to save the entire family from becoming destitute and accordingly, it is in pursuance to the aforesaid scheme that respondent no. 3 had moved her claim before the petitioner-Insurance Company on account of death of her husband who died due to burn injuries on 16.01.2017.

8. Perusal of provisions as well as the form annexed alongwith the Samajwadi Kisan Evam Sarvahit Bima Yojna do provide eligibility conditions for a person to be paid compensation of Rs.5,00,000/- on death of the bread earner. As per conditions as laid down in the form, details of deceased have to be provided and also that he had been earning less than Rs.75,000/- per month.

9. Learned counsel for the respondent no. 3 while contenting the claim has submitted that in the written statement filed by the petitioner itself it is stated that income of the applicant-claimant was disclosed rather then income of the deceased. Income of the claimant was shown to be less then Rs.75,000/- per month. Even in the form which has been relied upon by the petitioner there is no mention of the fact that income of the deceased has to be given.

10. In any view of the matter it is not the case of the petitioner that either the deceased or the claimant or the entire family was earning more than Rs.75,000/- per month. This aspect of the matter has also been looked into by the Permanent Lok Adalat and they have recorded a finding that the claimant was fully covered under the Mukhyamantri Kisan Evam Sarvahit Bima Yojana (MKSBY), as the deceased was earning about Rs.3000/- per month and annual income of Rs.36,000/-.

11. With regard to objection in the rejection letter dated 10.11.2017, that the deceased was not a farmer, there is no material available with the petitioner to support the said reasoning. Neither before the Permanent Lok Adalat nor before this Court there is any material available to record a different finding that the deceased was not a farmer.

12. The court is of the considered view that welfare, beneficent aur social justice oriented legislation should always receive a liberal construction. The insurance scheme namely Mukhyamantri Kisan Evam Sarvhit Bima Yojana (MKSBY) being a welfare scheme whose terms have to be interpreted taking into consideration the hardships and welfare of the insured.

13. Hon'ble Supreme Court in the case of **Om Prakash v. Reliance General Insurance, (2017) 9 SCC 724** while dealing with the issue regarding rejection of claim by the Insurance Companies, has held as under:

*"10. The decision of the insurer to reject the claim has to be based on valid grounds. Rejection of the claims on purely technical grounds in a mechanical manner will result in loss of confidence of policy-holders in the insurance industry. If the reason for delay in making a claim is satisfactorily explained, such a claim cannot be rejected on the ground of delay. It is also necessary to state here that it would not be fair and reasonable to reject genuine claims which had already been verified and found to be correct by the investigator. The condition regarding the delay shall not be a shelter to repudiate the insurance claims which have been otherwise proved to be genuine."*

14. In case of insurance contract, it is necessary that the essential conditions of the Insurance policy are fullfilled. However, those essential conditions are to be construed liberally and has to be substantially fulfilled.

15. In this case, submission of Income certificate is a necessary condition and therefore, its submission is mandatory. However, the time limit prescribed for submission is merely a technical and directory provision and cannot be a basis of rejection of the claim.

16. In the aforesaid circumstances, this Court is of the considered view that the Permanent Lok Adalat has rightly come to the conclusion that the deceased was fully covered by the scheme issued by the State Government and that he was the sole bread earner of the family and was earning less than Rs.75,000/- per month.

17. In view of above, this Court does not find any infirmity in the impugned order calling for interference under Article 226/227 of the Constitution of India.

18. The writ petition being devoid of merits is **dismissed.**

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**(2024) 7 ILRA 262**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.07.2024**

**BEFORE**

**THE HON'BLE MANJIVE SHUKLA, J.**

Writ C No. 10821 of 2024

**C/M Sri Mahaveer Inter College, Jauhari Nagar, Mainpuri ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Yogesh Kumar Saxena

**Counsel for the Respondents:**
C.S.C.

**U.P. Intermediate Education Act, 1921 - Section 16(A) - Amendments to the Scheme of Administration - Regulation 6 of Chapter VII of the Regulations - Conversion of Society into Trust - Societies Registration Act, 1860, Section 13 - Dissolution of Society - Held: The Joint Director, Secondary Education, does not have jurisdiction to oppose the conversion of the society into a trust under the amended Regulation 6 of the U.P. Intermediate Education Act, 1921. The Joint Director also does not have jurisdiction to test the validity of the resolution dissolving the society or the trust's registration. Any amendments to the Scheme of Administration of the College must be approved as per the provisions of Section 16(A) of the U.P. Intermediate Education Act, 1921 – In the instant case more than 3/4th members of the general body of the Society passed a resolution for dissolution of the Society and registration of a trust - the Joint Director in the garb of decision over the approval of the amendments sought to be incorporated in the Scheme of Administration of the College tested the validity of the resolution by which the Society has been dissolved and decision to form the trust has been taken - Impugned order quashed - matter remitted to the Joint Director, to reconsider the amendments proposed in the Scheme of Administration of the College strictly in accordance with the provisions made in Section 16(A) of the Act of 1921 (Para 14)**

**Allowed.** (E-5)

**List of Cases cited:**

Committee of Management, Maharshi Kapil Muni Shiksha Samiti & anr. Vs St. of U.P. & anr. 2021 (2) ADJ 517

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Sri Yogesh Kumar Saxena, learned counsel appearing for the petitioner and learned Standing Counsel appearing for Respondents No. 1 to 3.

2. Petitioner through this writ petition has assailed the order dated 01.03.2024 passed by the Joint Director, Secondary Education, Agra Region, Agra whereby, approval sought by the petitioner for amendments in the Scheme of Administration of Sri Mahaveer Inter College, Jauhari Nagar, Mainpuri has been declined.

3. Facts of the case, in brief, are that Sri Mahaveer Vidyalaya, Jauhari Nagar, Esthan Post-Jauhari Nagar, District Mainpuri was a Society registered under the provisions of the Societies Registration Act, 1860. The said Society was managing the affairs of an institution namely Sri Mahaveer Inter College, Jauhari Nagar, Mainpuri. The Scheme of Administration of the College was duly approved by the Joint Director of Secondary Education, Agra Region, Agra. Regulation 6 of Chapter VII of the Regulations framed under the U.P. Intermediate Education Act, 1921 has been amended with the prior approval of His Excellency, the Governor of the State of U.P. and thereby Regulation 6(B) has been added wherein it has been provided that those Intermediate Colleges which are being run by the Society registered under the Societies Registration Act, 1860, 3/4th of the members of the general body of the Society can convert the Society into trust and the said trust must be registered. More than 3/4th members of the general body of the Society in its meeting held on 15.05.2022 took decision to dissolve the Society and for registration of the trust. Thereafter the trust has been registered on 28.05.2022 in the office of the Sub-Registrar, Tehsil Sadar, District Mainpuri. Information about the dissolution of the Society and registration of the trust was duly forwarded to the Deputy-Registrar, Firms, Societies and Chits, Agra Region, Agra and the District Inspector of Schools, Mainpuri on 18.06.2022. The petitioner forwarded all the requisite papers and resolution for making amendments in the Scheme of Administration of the College thereby replacing the Society by the trust, to the District Inspector of Schools, Mainpuri who forwarded papers to the Joint Director, Secondary Education, Agra Region, Agra with his positive recommendation for approval of the amendments sought in the Scheme of Administration of the College.

4. The Joint Director, Secondary Education, Agra Region, Agra raised certain queries and due reply was submitted by the petitioner. Since the Respondent No. 2 did not take any decision regarding approval of the amendments sought to be incorporated in the Scheme of Administration of the College, petitioner filed Writ-C No. 38150 of 2023 which was finally disposed of by a Co-ordinate Bench of this Court with a direction to the Joint Director to consider and decide petitioner's matter in a fixed time frame. The Joint Director, Agra Region, Agra has passed the impugned order dated 01.03.2024 and thereby has declined to grant approval for the amendments sought by the petitioner to be incorporated in the Scheme of Administration of the College on the ground that the proposed amendments are not in the interest of the College.

5. Learned counsel appearing for the petitioner has argued that once Regulation

6 of Chapter VII of the Regulations framed under the U.P. Intermediate Education Act, 1921 (hereinafter referred to as "the Act of 1921") provides that 3/4th members of the general body of the Society can take decision to convert the Society into trust and in the present matter, more than 3/4th members of the general body of the Society which was running the College has taken decision to dissolve the Society and convert it into the trust, the Joint Director, Secondary Education, Agra Region, Agra cannot decline to approve the amendments in the Scheme of Administration of the college consequent to conversion of the Society into the trust.

6. Learned counsel appearing for the petitioner has relied on judgement rendered by a Co-ordinate Bench of this Court in the case of ***Committee of Management, Maharshi Kapil Muni Shiksha Samiti and Another Vs. State of U.P. and Another 2021 (2) ADJ 517*** and has submitted that in the said judgement, it has been held that under Section 13 of the Societies Registration Act, 1860, 3/5th members of the general body of the Society can resolve for dissolution of Society and once the said resolution is passed, the Society automatically stands dissolved. Learned counsel appearing for the petitioner further submits that once the Society in question has been dissolved in terms of the provisions made in Section 13 of the Societies Registration Act, 1860 and consequentially trust has been registered, there cannot be any occasion for the Joint Director, Secondary Education, Agra Region, Agra to deny approval for the consequent amendments in the Scheme of Administration of the College.

7. Learned counsel appearing for the petitioner has also contended before this Court that dissolution of the Society is governed by the provisions of Societies Registration Act, 1860 and further conversion of the Society into the trust has been permitted by making amendment in Regulation 6 of Chapter VII of the Regulations framed under the Act of 1921 therefore, the Joint Director does not have any jurisdiction to adjudicate over the validity of dissolution of the Society and consequent registration of the trust. Learned counsel appearing for the petitioner has further contended that from bare perusal of the impugned order dated 01.03.2024, it can easily be inferred that the Joint Director, in-fact has travelled beyond his jurisdiction and has tried to test the validity of the resolution whereby the Society has been dissolved and the trust has been created.

8. It has also been vehemently argued that there is no dispute by any of the members of the erstwhile Society or by any of the trustee in the amendments sought to be incorporated in the Scheme of Administration of the College consequent to the change of Society into trust, therefore, there cannot be any occasion for the Joint Director to deny the approval of the said amendments, accordingly impugned order dated 01.03.2024 is unsustainable in the eyes of law.

9. Per-contra, learned Standing Counsel appearing for the respondents has argued that the resolution for dissolution of the Society in question and its conversion into trust has not been passed in a proper manner and further 3/4th members of the general body of the Society have not given their affidavits showing their intention to convert the Society into trust, therefore, the Joint Director of Education, Agra Region, Agra has rightly passed the impugned order

dated 01.03.2024 and thereby has declined to grant approval to the proposed amendments in the Scheme of Administration of the College.

10. I have considered the rival arguments advanced by the learned counsels appearing for the parties and I find that Regulation 6 of Chapter VII of the Regulations framed under the Act of 1921 has been amended with the prior permission of His Excellency, the Governor of the State of U.P. and thereby under Regulation 6(B), it has been provided that 3/4th members of the general body of the Society running an Intermediate College can convert it into a trust. For ready reference, amended Regulation 6 is extracted as under:

*" **विनियम-6(क)-** यथावत ।*

***विनियम-6(ख)-** जिन संस्थाओं को परिषद द्वारा सोसाइटी रजिस्ट्रेशन एक्ट -1860 के अधीन मान्यता प्रदान की गई है, उनकी प्रबंध समिति की आम सभा की सहमति से सोसाइटी को ट्रस्ट के रूप में परिवर्तित किया जा सकता है। इसके लिये आम सभा के कुल सदस्यों में से तीन चौथाई सदस्यों की लिखित सहमति अनिवार्य होगी। इस निमित उन्हें सोसाइटी से ट्रस्ट के नाम रजिस्ट्री कराना अनिवार्य होगा ।*

*विनियम-6 (ग)- प्रदेश में आवास विकास परिषद अथवा विकास प्राधिकरणों द्वारा संचालित अथवा संचालित किये जाने वाले विद्यालयों को सोसाइटी अथवा ट्रस्ट के माध्यम से मान्यता प्रदान की जा सकती है । विद्यालय की सोसाइटी यदि यह उचित समझती है कि ट्रस्ट के माध्यम से विद्यालय को संचालित करने में सुविधा होगी तो सोसाइटी की आम सभा के 3/4 सदस्यों की लिखित सहमति से सोसाइटी को ट्रस्ट में परिवर्तित किया जा सकता है । इस निमित्त उन्हें सोसाइटी से ट्रस्ट के नाम भू-खंड का दोबारा रजिस्ट्री कराना अनिवार्य होगा ।"*

11. This Court is of the view that once appropriate amendment has been made in Regulation 6 of Chapter VII of the Regulations framed under the Act of 1921, the Joint Director, Secondary Education does not have any jurisdiction to oppose the conversion of the Society into the trust.

12. This Court finds that provision for dissolution of Society has been made in Section 13 of the Societies Registration Act, 1860 wherein it is provided that 3/5th members of the general body of the Society can resolve for dissolution of the Society and the dissolution of Society shall take place with immediate effect. For ready reference, Section 13 of the Societies Registration Act, 1860 is extracted as under:

***"13. Provision for dissolution of societies and adjustment of their affairs.-***

*Any number not less than three-fifths of the members of any society may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities according to the rules of the said society applicable thereto, if any, and if not, then as the governing body shall find expedient, provided that, in the event of any dispute arising among the said governing body or the members of the society, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction of the district in which the chief building of the society is situate; and the Court shall make such order in the matter as it shall deem requisite:*

*Provided that no society shall be dissolved unless three-fifths of the members shall have expressed a wish for such*

*dissolution by their votes delivered in person or by proxy, at a general meeting convened for the purpose:*

*Provided that [whenever any Government] is a member of, or a contributor to, or otherwise interested in any society registered under this Act, such society shall not be dissolved [without the consent of the Government of the [State] of registration.]"*

13. The provisions made in Section 13 of the Societies Registration Act, 1860 have been considered by a Co-ordinate Bench of this Court in its judgement rendered in the case of ***Committee of Management, Maharshi Kapil Muni Shiksha Samiti and Another (Supra)*** and it has been held that once 3/5th members of the general body of the Society have resolved to dissolve the Society, dissolution of the Society takes place with immediate effect and it does not require any approval or confirmation by the Deputy Registrar, Firms, Societies and Chits. Relevant paragraphs of the judgement are extracted as under:

*"5. Counsel for the petitioner has relied upon the provisions of Section 13 of the Act. There appears to be no such provision, as such, I consider it appropriate to discuss the scope of Section 13 containing a provision for dissolution of societies and adjustment of their affairs. The provision for dissolution of societies and adjustment of their affairs is contained in Section 13, which is as under:*

***"13. Provision for dissolution of societies and adjustment of their affairs.?Any number not less than three-fifths of the members of any society may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities, according to the rules of the said society applicable thereto, if any, and if not, then as the governing body shall find expedient, provided that, in the event of any dispute arising among the said governing body or the members of the society, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction of the district in which the 'registered office of the society'* (* as amended vide Uttar Pradesh Act 52 of 1975 w.e.f. 10.10.1975) is situate; and the Court shall make such order in the matter as it shall deem requisite:***

***Provided that no society shall be dissolved unless three-fifths of the members shall have expressed a wish for such dissolution by their votes delivered in person, or by proxy, at a general meeting convened for the purpose:***

***Provided that [whenever any Government] is a member of, or a contributor to, or otherwise interested in any society registered under this Act, such society shall not be dissolved [without the consent of the Government of the [State] of registration.]"***

*6. The State of Uttar Pradesh has amended the Societies Registration Act insofar its applicability in the State of Uttar Pradesh is concerned and Section 13A and Section 13B have been incorporated in the Act providing for dissolution of the society in manner other than a voluntary dissolution as provided under Section 13 of the Act, which is quoted hereinabove.*

*7. Section 13A and 13B amended by virtue of U.P. Act No. 52 of 1975 are quoted as under:-*

***"13A. Power of Registrar to apply for dissolution:- (1) Where in the***

***opinion of Registrar, there are reasonable ground to believe in respect of a society registered under this Act that any of the grounds mentioned in clauses (a) to (e) of sub-section (1) of Section 13B exists he shall send to the society, a notice calling upon it to show cause within such time as may be specified in the notice why the society be not dissolved.***

***(2) if on or before the date specified in the notice or within such extended period as the Registrar may allow, the society fails to show any cause or if the cause shown is considered by the Registrar to be unsatisfactory, the Registrar, may move the Court referred to in section 13 for making an order of the dissolution of the society.***

***13B. Dissolution by court:- (1) On the application of the Registrar under section 13 A or under section 24 or on an application made by not less than one tenth of the members of a society registered under this Act, the Court referred to in section 13 may make an order for the dissolution of the society on any of the following grounds, namely:-***

***(a) that the society has contravened any provision of this Act or of any other law for the time being in force and it is just and equitable that the society should be dissolved:***

***(b) that the number of the members of the society is reduced below seven;***

***(c) that the society has ceased to function for more than three years preceding the date of such application;***

***(d)that the society is unable to pay its debts or meet its liabilities; or***

***(e) that the registration of the society has been cancelled under Section 12 D on the ground that its activities or proposed activities have been or will be opposed to public policy.***

***(2) Without prejudice to the provisions of sub-section (1) or of Section 12D, the Court may on an application of the District Magistrate in this behalf make an order for the dissolution of a society on the ground that the activities of the society constitute a public nuisance or are other wise opposed to public policy.***

***(3). When an order for the dissolution of a society is made under sub-section (1) or sub-section (2), all necessary steps for the disposal and the settlement of the property of the society, its claims and liabilities and any other adjustment of its affairs take place in manner as the Court may direct."***

*8. Thus, in the scheme of the Act with regard to dissolution, it is clear that the dissolution of a society can take place by three modes, the first being a voluntary dissolution as provided under Section 13, wherein the requirement is that there has to be a resolution passed by number of members, who are not less than three-fifth of the member of any society and as soon as such resolution is passed, the dissolution happens forthwith or at any time i.e. agreed upon in the resolution. After the dissolution which happens on the passing of the resolution further steps are required to be taken for disposal and settlement of the property of the society, its claims and liabilities according to the Rules of the said society applicable thereto.*

*9. A perusal of Section 13 of the Act also makes it clear that an inbuilt mechanism is provided for contingencies that may arise in the event of any dispute arising among the said governing body or the members of the society or with regard to the affairs which have to be referred to the Principal Court of original civil jurisdiction of the district in which the registered office of the society is situate*

*and such, Court is empowered to pass requisite orders.*

*10. A plain reading of the said section makes it clear that no sanction is required from anyone and the Assistant Registrar need not be approached for giving a seal of approval to the resolution of dissolving the society.*

*11. In addition to the voluntary resolution as provided under Section 13, two other modes of dissolution have also been provided in the State of Uttar Pradesh by incorporation of Section 13A and Section 13B in the Act.*

*12. Section 13A confers power on the Registrar to apply for the dissolution in the event of contingencies which are enumerated under Section 13A (1) of the Act.*

*13. Section 13B provides for yet another manner of dissolution by the Court on an application of the Registrar under Section 13A or Section 24 or on an application made by not less than one-tenth of the members of the society registered under this Act and the Court is empowered to pass orders for the dissolution of the society on the happening of any of the grounds as enumerated in Clause (a) to (e) of Section 13B (1) of the Act.*

*14. Curiously enough Section 13(B) (2) provides yet another mode of dissolution of the society by the Court on an application of the District Magistrate on the limited grounds enumerated therein.*

*15. Thus, under scheme of the Act, three modes of dissolution are prescribed, first one being voluntary dissolution under Section 13, second being dissolution at the instance of the Registrar and the third being dissolution under the orders of the Court.*

*16. In the present case, we are concerned with the voluntary dissolution under Section 13, which simply requires the passing of a resolution by the members of the society no being less than three-forth of the total members of the society. Once the said condition is met, no other condition is required to be fulfilled and the same does not require a seal of approval by any officer or authority. In the present case, it is alleged that by a resolution passed unanimously i.e. by more than three-fifth members of the society on 1.4.2011, the society has been dissolved, as such, no further approval is required and the dissolution would be deemed to be effective from the date of its passing i.e. 1.4.2011.*

*17. As I have recorded above that no seal of approval is required for dissolving the society as has been done in the present case, a writ, as prayed for cannot be granted, however, petitioners are directed to give an information in writing along with the copy of Resolution to the Assistant Registrar of Societies who shall record the same in his records."*

14. In the present case, more than 3/4th members of the general body of the Society in question have passed a resolution for dissolution of the Society and registration of a trust, therefore, the Society in question stood dissolved with effect from the date of resolution passed by the general body of the Society. Under the Societies Registration Act, 1860, the Joint Director, Secondary Education, does not have any jurisdiction to test the validity of the resolution of the Society whereby the Society has been dissolved. The Joint Director, Secondary Education also does not have any jurisdiction to test the validity of the registration of the trust, more so when the said conversion of the Society for formation of the trust has been permitted under the amended Regulation 6 of the Regulations framed under the U.P. Intermediate Education Act, 1921. The bare

perusal of the impugned order dated 01.03.2024 reveals that the Joint Director in the garb of decision over the approval of the amendments sought to be incorporated in the Scheme of Administration of the College has, in-fact tested the validity of the resolution by which the Society has been dissolved and decision to form the trust has been taken, whereas if any amendment is sought in the Scheme of Administration of a College, the Joint Director has to take decision for approval of the said amendment strictly as per the provisions made in Section 16(A) of the Act of 1921.

15. In view of the aforesaid reasons, this writ petition is ***allowed*** and impugned order dated 01.03.2024 is quashed. The matter is remitted to the Joint Director, Secondary Education, Agra Region, Agra to reconsider the amendments proposed by the petitioner in the Scheme of Administration of the College strictly in accordance with the provisions made in Section 16(A) of the Act of 1921 by passing speaking and reasoned order within a period of two months from the date of presentation of certified copy of this order.

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**(2024) 7 ILRA 269**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 11.07.2024**

**BEFORE**

**THE HON'BLE MANJIVE SHUKLA, J.**

Writ C No. 13592 of 2024

**C/M Maulana Abul Kalam Azad Educational Society, Tehsil Sadar, Mau & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Manoj Kumar Singh, Sri Rajendra Singh Chauhan, Sri Gajendra Pratap (Sr. Advocate)

**Counsel for the Respondents:**
C.S.C., Sri Gautam Baghel, Sri Om Prakash Singh, Sri Prabhakar Awasthi

**A. Civil/Society Law – Maintainability – Alternative Remedy - Societies Registration Act, 1860 - Sectiuons 4(1) & 25(2) - The important consideration of public policy is that the decisions pronounced by Courts of competent jurisdiction should be final unless they are modified or reversed by the appellate forum and no one should be made to face the same kind of litigation twice.** (Para 31)

**Where, what is complained of, is an impudent disregard of an order of a Court, the fact certainly cries out that a prerogative writ shall issue.** (Para 32)

Once an issue had been adjudicated by the Court, then same parties cannot be allowed to face litigation regarding the same issue again and further if any authority while passing the order has taken a different view to that of the view settled by the Court, then against the said order writ petition u/Article 226 of the Constitution of India shall be maintainable and the writ petition cannot be dismissed on the ground of availability of alternative remedy against the said order. (Para 33)

In the present case, once this Court is of the view that dispute raised by petitioner has not been decided by this Court in earlier rounds of litigation and petitioners themselves agreed that dispute raised may be decided by the Prescribed Authority, now it is not open for them to urge before this Court that they may be allowed to bypass the remedy of statutory appeal available u/s 25(1)(d) of the Act of 1860 against the impugned order dated 30.3.2024 on the ground that the impugned order dated 30.3.2024 passed by the Prescribed Authority is contrary to decisions rendered by this Court in earlier rounds of litigation. (Para 44)

**Writ petition is dismissed on the ground of statutory remedy of appeal available to the petitioners u/s 25(1)(d) of the Societies Registration Act, 1860.** (E-4)

**Precedent followed:**

1. Hope Plantations Ltd. Vs Taluk Land Board, Peermade & anr., (1999) 5 SCC 590 (Para 21)

2. Capt. Dushyant Somal Vs Smt. Sushma Somal & anr., 1981 (2) SCC 977 (Para 22)

**Present petition assails the order dated 30.03.2024, passed by the Prescribed Authority/Sub-Divisional Magistrate, Tehsil Mau Nath Bhanjan, District Mau whereby direction has been given to the Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh for holding fresh elections of the Committee of Management of the Society.**

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Sri Gajendra Pratap, learned Senior Advocate assisted by Sri Rajendra Singh Chauhan, learned counsel appearing for the petitioners, learned Standing Counsel appearing for Respondents No. 1 to 3 and Sri Prabhakar Awasthi as well as Sri Gautam Baghel, learned counsels appearing for Respondent No. 4.

2. Petitioners through this writ petition have assailed the order dated 30.03.2024 passed by the Prescribed Authority/Sub-Divisional Magistrate, Tehsil Mau Nath Bhanjan, District Mau whereby direction has been given to the Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh for holding fresh elections of the Committee of Management of the Society under Section 25(2) of the Societies Registration Act, 1860.

3. Learned Standing Counsel appearing for Respondents No. 1 to 3 and Sri Prabhakar Awasthi, learned counsel appearing for Respondent No. 4, at the very outset, have raised preliminary objection regarding maintainability of this writ petition on the ground that the impugned order dated 30.03.2024 has been passed by the Prescribed Authority/Sub-Divisional Magistrate, Tehsil Mau Nath Bhanjan, District Mau under Section 25 (1) of the Societies Registration Act, 1860 and against the said order, petitioners have efficacious statutory remedy of appeal under Section 25(1)(d) of the Act of 1860.

4. Facts of the case, as culled out from the writ petition, are that Maulana Abdul Kalam Azad Educational Society, Village, Aadedhi, Post Umarpur, Tehsil Sadar, District Mau is a Society registered under the provisions of the Societies Registration Act, 1860.

5. The last undisputed elections of the Committee of Management of the Society took place on 17.09.2016 and under the bye-laws of the Society, the term of the Committee of Management of the Society is five years i.e. the elections held on 17.09.2016 were valid up till 16.09.2021. In the elections held on 17.09.2016, Mr. Amit Kumar Singh was elected as President and Mohd. Javed was elected as Secretary of the Committee of Management of the Society. It has been claimed that Mr. Ajit Kumar Singh was inducted as a member of the general body of the Society vide resolution dated 02.10.2020. Mr. Amit Kumar Singh who was elected President in the elections of the Committee of Management of the Society held on 17.09.2016, died on 16.04.2021 and thereafter it has been claimed that Mr. Ajit Kumar Singh was elected/co-opted as President of the Committee of Management of the Society vide its resolution dated

29.04.2021. It has further been claimed that Mohd. Javed in the capacity of Secretary of the Committee of Management of the Society submitted an application on 28.05.2021 along with the minutes of the meeting of the Committee of Management held on 29.4.2021 before the Assistant Registrar and prayed to register the list of the office bearers and members of the Committee of Management of the Society.

6. The Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh vide its order dated 07.06.2021 registered the list of the office bearers and members of the Committee of Management of the Society as contemplated under Section 4(1) of the Societies Registration Act, 1860 and in the said list in place of Mr. Amit Kumar Singh, Mr. Ajit Kumar Singh has been shown as President of the Committee of Management of the Society.

7. In the writ petition, it has been claimed that the Committee of Management of the Society vide its resolution dated 04.07.2021 inducted nine more members in the general body of the Society including the Petitioner No. 2, Mr. Gulam Navi and thereafter Mohd. Javed in the capacity of Secretary/Manager submitted an application before the Assistant Registrar on 28.07.2021 for registration of the list of members of the general body of the Society.

8. Since the term of the Committee of Management of the Society was to expire, it has been claimed that fresh elections of the Committee of Management of the Society took place on 12.09.2021 in which Mr. Ajit Kumar Singh was elected as President and Mohd. Javed was elected as Secretary/Manager. Mohd. Javed in the capacity of Secretary/Manager of the Committee of Management of the Society submitted the list of the office bearers and members of the Committee of Management of the Society as well as the list of members of the general body of the Society for registration before the Assistant Registrar and the Assistant Registrar vide its order dated 22.09.2021 registered the aforesaid list.

9. It has also been claimed in the writ petition that Mohd. Javed submitted his resignation from the post of Secretary/Manager of the Committee of Management of the Society and the Committee of Management of the Society in its meeting held on 02.10.2021 elected/co-opted Mr. Gulam Navi as Secretary/Manager for remaining term of the Committee of Management of the Society. Mr. Gulam Navi submitted an application on 01.11.2021 before the Assistant Registrar and prayed for registration of the changed list of the office-bearers and members of the Committee of Management of the Society.

10. One Ms. Mridula Mishra filed complaint before the Assistant Registrar on 12.11.2021 along with proceedings of the Committee of Management of the Society dated 07.02.2021 and 07.03.2021 and claimed herself to be the President of the Committee of Management of the Society and further claimed that induction and election/co-option of Mr. Ajit Kumar Singh was based on forged documents. The Assistant Registrar vide its order dated 02.06.2022 rejected the claim of Ms. Mridula Mishra and directed for registration of the list of the office bearers and members of the Committee of Management of the Society on the basis of

the resolution of the Committee of Management of the Society dated 02.10.2021.

11. The order dated 02.06.2022 passed by the Assistant Registrar was put to challenge by Ms. Mridula Mishra in Writ-C No. 20596 of 2022 and a co-ordinate Bench of this Court dismissed the said writ petition vide order dated 24.08.2022. Thereafter Ms. Mridula Mishra filed Special Appeal No. 614 of 2022 which too was dismissed by the Division Bench of this Court vide order dated 30.11.2022.

12. Mohd. Javed filed a complaint before the Assistant Registrar claiming therein that he has never tendered resignation from the post of Secretary/Manager of the Committee of Management of the Society and further claimed that the applications dated 28.05.2021, 28.07.2021 and 20.09.2021 have been filed before the Assistant Registrar under his forged signatures. He also claimed that Mr. Ajit Kumar Singh has never been inducted as a member of the general body of the Society. On the complaint of Mohd. Javed, the Assistant Registrar issued notice to Mr. Gulam Navi on 03.04.2023 and after hearing all the concerned parties, the Assistant Registrar vide its order dated 28.06.2023 recalled his earlier order dated 02.06.2022 whereby list of the office bearers and members of the Committee of Management of the Society was registered pursuant to resolution dated 02.10.2021 by which alleged resignation of Mohd. Javed was accepted. The Assistant Registrar vide aforesaid order dated 28.06.2023 also declared all the proceedings of the Committee of Management of the Society held on or after 29.04.2021 including the alleged proceeding dated 02.10.2020, whereby Mr. Ajit Kumar Singh has been shown to be inducted as member of the general body of the Society, as forged. The Assistant Registrar passed another order on 14.09.2023 whereby he appointed Tehsildar Ghosi, District Mau as Election Officer to conduct the elections of the Committee of Management of the Society under Section 25(2) of the Societies Registration Act, 1860.

13. The petitioners challenged the orders dated 28.6.2023 and 14.9.2023 by filing Writ-C No.21962 of 2023 and a co-ordinate Bench of this Court vide judgment and order dated 6.10.2023 allowed the writ petition and further set aside the orders dated 28.6.2023 and 14.9.2023. The co-ordinate Bench of this Court vide judgment and order dated 6.10.2023 also issued a direction to the Assistant Registrar, Firms, Societies and Chits, Azamgarh to refer the dispute to the Prescribed Authority under Section 25(1) of the Act of 1860. Pursuant to the judgment and order dated 6.10.2023 passed in Writ-C No.21962 of 2023, the Assistant Registrar passed an order on 27.10.2023 and referred the dispute raised by Mohd. Javed to the Prescribed Authority for adjudication under Section 25(1) of the Act of 1860.

14. Though the petitioners in Writ-C No.21962 of 2023 did not raise any serious objection in reference of the dispute raised by Mohd. Javed to the Prescribed Authority for adjudication under Section 25(1) of the Societies Registration Act, 1860 but when the Assistant Registrar referred the matter vide order dated 27.10.2023, petitioners filed Writ-C No.42723 of 2023 and challenged the order dated 27.10.2023 on the ground that the dispute referred by the Assistant Registrar had already been adjudicated by the orders passed by this

Court in Writ-C No.20596 of 2022, Special Appeal No.614 of 2022 and Writ-C No.21962 of 2023 but this Court vide order dated 31.1.2024, while recording finding that petitioners had agreed that dispute may be decided by the Prescribed Authority, disposed of the writ petition with direction to the Prescribed Authority to decide the dispute of the Committee of Management of the Society within a period of six weeks.

15. In the aforesaid background, the Prescribed Authority has decided the reference dated 27.10.2023 made by the Assistant Registrar under Section 25(1) of the Act of 1860 vide order dated 30.3.2024 wherein it has been held that Mohd. Javed has not tendered resignation from the post of Secretary/Manager of the Society and therefore, the proceedings of the Committee of Management of the Society by which his resignation has been accepted and further proceedings are invalid in the eyes of law. The Prescribed Authority has also held that applications dated 28.05.2021, 28.07.2021 and 20.09.2021 by which various proceedings of the Committee of Management of the Society and the general body of the Society were forwarded to the Assistant Registrar, bear forged signatures of Mohd. Javed. The Prescribed Authority vide order dated 30.3.2024 has also directed the Assistant Registrar to hold fresh elections of the Committee of Management of the Society under Section 25(2) of the Societies Registration Act, 1860.

16. It is to be noted that during pendency of this writ petition, elections of the Committee of Management of the Society pursuant to the order dated 30.3.2024 have already been conducted.

17. Sri Gajendra Pratap, learned Senior Advocate appearing for the petitioners has submitted that as Mr. Amit Kumar Singh who was elected Secretary/Manager of the Committee of Management of the Society in the elections held on 17.9.2016, died on 16.4.2021, Mr. Ajit Kumar Singh was elected/co-opted as President vide resolution passed by the Committee of Management of the Society on 29.4.2021 and once the Assistant Registrar vide order dated 7.6.2021 registered the list of the office bearers and the members of the Committee of Management of the Society, there cannot be any occasion for the Assistant Registrar to refer the dispute with respect to the proceedings of the Committee of Management of the Society held on 29.4.2021 to the Prescribed Authority. It has further been submitted that after the term of the Committee of Management of the Society elected on 17.9.2016 ended, fresh elections of the Committee of Management of the Society took place on 12.9.2021 and once Mohd. Javed himself moved an application before the Assistant Registrar and on his application the list of the office bearers and the members of the Committee of Management of the Society has been registered by the Assistant Registrar, the question does not arise before the Assistant Registrar to refer the dispute to the Prescribed Authority vide order dated 27.10.2023.

18. Sri Gajendra Pratap, learned Senior Advocate appearing for the petitioners has argued that once Mohd. Javed tendered his resignation which was accepted by the Committee of Management of the Society on 2.10.2021 and further Mr. Gulam Navi was elected/co-opted as Secretary/Manager for remaining term of the Committee of Management of the Society, the Assistant Registrar while referring the dispute to the Prescribed

Authority has conducted himself in an absolutely arbitrary manner.

19. Learned Senior Advocate appearing for the petitioners has vehemently argued that Ms. Mridula Mishra filed a complaint before the Assistant Registrar on 12.11.2021 claiming therein that she is the President of the Committee of Management of the Society and election/co-option of Mr. Ajit Kumar Singh as Present and further proceedings are forged. Since the complaint filed by Ms. Mridula Mishra was rejected by the Assistant Registrar vide order dated 2.6.2022 and further she was not granted any relief by this Corut in Writ-C No.20596 of 2022 and Special Appeal No.614 of 2022 therefore, there cannot be any occasion for the Assistant Registrar to re-open the entire issue on the complaint of Mohd. Javed and to refer the matter to the Prescribed Authority therefore, the order dated 30.3.2024 passed by the Prescribed Authority on its face is erroneous.

20. Sri Gajendra Pratap, learned Senior Advocate appearing for the petitioners has argued that once a co-ordinate Bench of this Court vide its judgment and order dated 24.8.2022 passed in Writ-C No.20596 of 2022 has negated the claim of Ms. Mridula Mishra and thereby has affirmed the proceedings of the Committee of Management of the Society held on 29.04.2021, elections held on 12.9.2021 and proceedings of the Committee of Management of the Society held on 2.10.2021 and further the said judgment dated 24.8.2022 has been affirmed by the Division Bench of this Court vide its judgment rendered on 30.11.2022 passed in Special Appeal No.614 of 2022, it was not open for the Assistant Registrar to take a different view in the matter and to refer the matter to the Prescribed Authority and further it was also not open for the Prescribed Authority to take a different view contrary to the view taken in the aforesaid judgments as such, the order dated 30.3.2024 passed by the Prescribed Authority cannot sustain in the eyes of law. It has also been argued from the side of the petitioners that this Court while passing the order dated 6.10.2023 has recorded a finding that the claim raised by Mohd. Javed is not sustainable and therefore, the consequential reference made vide order dated 27.10.2023 and the order passed by the Prescribed Authority dated 30.3.2024 allowing the claim of Mohd. Javed cannot sustain in the eyes of law.

21. Sri Gajendra Pratap, learned Senior Advocate appearing for the petitioners in support of his submissions has relied on a judgment rendered by the Hon'ble Supreme Court in the case of **Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and another, (1999) 5 SCC 590** and has submitted that in the said judgment the Hon'ble Supreme Court has held that when the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. He further submits that the decisions pronounced by courts of competent jurisdiction should be final unless they are modified or reversed by the appellate forum.

22. Learned Senior Advocate appearing for the petitioners has further placed reliance on the judgment rendered by the Hon'ble Supreme Court in the case of **Capt. Dushyant Somal vs. Smt. Sushma Somal and another, 1981 (2) SCC 977** wherein it has been held that where what is complained of is an impudent disregard of an order of a Court,

the fact certainly cries out that a prerogative writ shall issue and thus, has submitted that in the present case once it is apparent from the record of the case that the order dated 30.3.2024 passed by the Prescribed Authority is contrary to the orders passed in Writ-C No.20596 of 2022, Special Appeal No.614 of 2022 and Writ-C No.21962 of 2023, the statutory remedy of appeal available against the order dated 30.3.2024 shall not be an impediment for this Court in exercising its extraordinary jurisdiction under Article 226 of the Constitution of India.

23. On the other hand, Sri Prabhakar Awasthi, learned counsel appearing for Respondent No.4 submits that in earlier rounds of litigation i.e. in Writ-C No.20596 of 2022, Special Appeal No.614 of 2022 and Writ-C No.21962 of 2023, the claim raised by Mohd. Javed was not before this Court and therefore, in the judgments and orders passed in Writ-C No. 20596 of 2022, Special Appeal No.614 of 2022 and Writ-C No.21962 of 2023, there is no adjudication made by this Court in respect of the claim of Mohd. Javed that he never tendered resignation and forged proceedings of the Committee of Management of the Society were filed before the Assistant Registrar by making his forged signatures on the applications therefore, the said judgments cannot come in the way of adjudication over the claim of Mohd. Javed as such, the Assistant Registrar while referring the dispute vide order dated 27.10.2023 and the Prescribed Authority while deciding the dispute vide order dated 30.3.2024 has not committed any error. It has further been submitted by the learned counsel appearing for Respondent No.4 that in earlier rounds of litigation i.e. in Writ-C No.20596 of 2022, Special Appeal No.614 of 2022 and Writ-C No.21962 of 2023, the claim of Ms. Mridula Mishra has been decided and it has been found that her claim is not sustainable in the eyes of law but so far as the claim raised by Mohd. Javed that he never tendered resignation and his signatures on the applications filed before the Assistant Registrar are forged, is concerned, that has never been decided by this Court.

24. Mr. Prabhakar Awasthi, learned counsel appearing for Respondent No.4 has further argued that so far as the judgment and order dated 6.10.2023 passed by this Court in Writ-C No.21962 of 2023 is concerned, the Court while passing the order dated 6.10.2023 has made a prima facie observation that Mohd. Javed was the Secretary/Manager of the Committee of Management of the Society since 2016 therefore, it cannot give rise to a presumption that he had no knowledge of the proceedings of Writ-C No.20596 of 2022 and Special Appeal No.614 of 2022 but at the same time, accepted that there exists a dispute raised by Mohd. Javed which needs to be adjudicated by the Prescribed Authority and therefore, the Court directed the Assistant Registrar to refer the dispute raised by Mohd. Javed to the Prescribed Authority under Section 25(1) of the Act of 1860. The present petitioners also did not raise any objection regarding reference of the dispute before the Prescribed Authority therefore, it is patently manifest that the dispute raised by Mohd. Javed has not been decided by this Court at any point of time.

25. It has further been argued by Sri Prabhakar Awasthi, learned counsel appearing for Respondent No.4 that when the dispute raised by Mohd. Javed was referred by the Assistant Registrar vide order dated 27.10.2023 to the Prescribed Authority, the petitioners challenged the

order dated 27.10.2023 by filing Writ-C No.42723 of 2023 wherein they took categorical ground that once the issue has been decided by this Court in earlier rounds of litigation, there was no occasion for the Assistant Registrar to refer the dispute to the Prescribed Authority but the grounds raised by the petitioners did not find favour of the Court therefore, petitioners ultimately agreed that a direction may be issued to the Prescribed Authority for deciding the dispute expeditiously and once petitioners themselves agreed for reference of the dispute to the Prescribed Authority, now they cannot be allowed to say that the dispute could not have been decided by the Prescribed Authority.

26. Sri Prabhakar Awasthi, learned counsel appearing for Respondent No.4 has strenuously argued that once there is no adjudication by this Court over the dispute raised by Mohd. Javed and petitioners themselves agreed that the dispute raised by Mohd. Javed may be decided by the Prescribed Authority, the petitioners cannot be permitted to bypass the statutory remedy of appeal available under Section 25(1)(d) of the Act of 1860 against the impugned order dated 30.3.2024 therefore, this writ petition filed under Article 226 of the Constitution of India is not maintainable.

27. I have considered the rival arguments advanced by the learned counsels appearing for the parties.

28. Since this Court is proceeding to decide the issue of maintainability of this writ petition therefore, the facts of the case are not being repeated here.

29. The impugned order dated 30.3.2024 has been passed by the Prescribed Authority/ Sub Divisional Magistrate, Tehsil Mau Nath Bhanjan, District Mau under Section 25(1) of the Societies Registration Act, 1860. Section 25(1)(d) of the Act of 1860 provides that any person aggrieved by an order passed by the Prescribed Authority under Section 25(1) of the Act of 1860 can file an appeal before the Commissioner of concerned region. For ready reference, Section 25(1) of the Act of 1860 is extracted as under:-

***"25. Dispute regarding election of office-bearers.****—(1) The prescribed authority may, on a reference made to it by the Registrar or by at least one-fourth of the members of a society registered in Haryana, meet and decide in a summary manner any doubt or dispute in respect of the election or continuance in office of an office-bearer of such society, and may pass such orders in respect thereof as it deems fit:*

*[Provided that the election of an office-bearer shall be set aside where the prescribed authority is satisfied—*

*(a) that any corrupt has been committed by such office-bearer; or*

*(b) that the nomination of any candidate has been improperly rejected; or*

*(c) that the result of the election insofar as it concerns to such office -bearer has been materially affected by the improper acceptance of any nomination or by the improper reception, refusal or rejection of any vote or the reception of any vote which is void or by any non-compliance with the provisions of any rules of the Society.*

*(d) An appeal against an order made under this sub-section may be preferred to the Commissioner of the Division in whose jurisdiction the headquarter of the Society lies, within one month from the date of communication of such order:*

*Provided that the appellate authority may admit an appeal after the expiry of such period if the appellant satisfies the appellate authority that he had sufficient cause for not preferring the appeal within such period."*

30. The petitioners, to come out from the rigors of availability of statutory remedy of appeal against the impugned order and to maintain this writ petition under Article 226 of the Constitution of India, have taken ground that while deciding the claim raised by Ms. Mridula Mishra in Writ-C No.20596 of 2022 and Special Appeal No.614 of 2022 this Court had already upheld the validity of the resolutions in question passed by the Committee of Management of the Society but the dispute raised by Mohd. Javed has now been decided by the Prescribed Authority in his favour by the impugned order dated 30.3.2024 which is in the teeth of the judgments and orders passed in Writ-C No.20596 of 2022, Special Appeal No.614 of 2022 and Writ-C No.21962 of 2023 therefore, the petitioners cannot be relegated to the statutory remedy of appeal and this writ petition under Article 226 of the Constitution of India is maintainable.

31. The Hon'ble Supreme Court vide its judgment rendered in the case of **Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and another, (1999) 5 SCC 590** has held that the important consideration of public policy is that the decisions pronounced by Courts of competent jurisdiction should be final unless they are modified or reversed by the appellate forum and no one should be made to face the same kind of litigation twice. The relevant paragraphs of the judgment rendered by the Hon'ble Supreme Court in the case of **Hope Plantations Ltd.** (supra) are extracted as under:-

*"17. In Devilal Modi, the question before this Court was whether the principle of constructive res judicata could be invoked against writ petition filed by the appellant under Article 226 of the Constitution. The appellant had been assessed to sales-tax for the year 1957-58 under Madhya Bharat Sales Tax Act, 1950. He challenged the validity of the order of assessment by a writ petition which was dismissed by the High Court of Madhya Pradesh. The Appellant's appeal by special leave to this Court was also dismissed. At the hearing of the appeal before this Court, appellant sought to raise two additional points, but he was not permitted to do so on the ground that they had not been specified in the writ petition filed before the High Court and had not been raised at an early stage. On those points which were not allowed to be raised, the appellant filed another writ petition in the High Court challenging the validity of the same very assessment for the year 1957-58. The High Court considered the merits of the additional grounds urged by the appellant but rejected them. The Appellant again came to this Court. This Court dismissed the appeal on the ground that principle of constructive res judicata was applicable in the circumstances and referred to its earlier decision in Daryao & Ors. vs. State of U.P. holding that the general principle underlying the doctrine of res judicata i.e. ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same*

*kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice.*

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*26. It is settled law that principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are 'cause of action estoppel' and 'issue estoppel'. These two terms are of common law origin. Again once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. their only remedy is to approach the higher forum if available. the determination of the issue between the parties gives rise to as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."*

32. The Hon'ble Supreme Court vide its judgment rendered in the case of **Capt. Dushyant Somal vs. Smt. Sushma Somal and another, 1981 (2) SCC 977** has held that where, what is complained of, is an impudent disregard of an order of a Court, the fact certainly cries out that a prerogative writ shall issue. The relevant paragraph of the judgment rendered by the Hon'ble Supreme Court in the case of **Capt. Dushyant Somal** (supra) is extracted as under:-

*"7. It was argued that the wife had alternate remedies under the Guardian and Wards Act and the CrPC and so a Writ should not have been issued. True, alternate remedy ordinarily inhibits a prerogative writ. But it is not an impassable hurdle. Where what is complained of is an impudent disregard of an order of a Court, the fact certainly cries out that a prerogative writ shall issue. In regard to the sentence, instead of the sentence imposed by the High Court, we substitute a sentence of three months, simple imprisonment and a fine of Rupees Five hundred. The sentence of imprisonment or such part of it as may not have been served will stand remitted on the appellant-petitioner producing the child in the High Court. With this modification in the matter of sentence, the appeal and the Special Leave Petition are dismissed. Criminal Miscellaneous Petition No. 677/81 is dismissed as we are not satisfied that it is a fit case for laying a complaint.*

33. In the aforesaid judgments rendered by the Hon'ble Supreme Court it had been categorically held that once an issue had been adjudicated by the Court, then same parties cannot be allowed to face litigation regarding the same issue again and further if any authority while passing

the order has taken a different view to that of the view settled by the Court, then against the said order writ petition under Article 226 of the Constitution of India shall be maintainable and the writ petition cannot be dismissed on the ground of availability of alternative remedy against the said order.

34. In view of the aforesaid law laid down by the Hon'ble Supreme Court, now this Court proceeds to analyse as to whether dispute raised by Mohd. Javed vide his complaint dated 28.3.2023, before the Assistant Registrar, has been adjudicated by this Court while deciding Writ-C No.20596 of 2022, Special Appeal No.614 of 2022 and Writ-C No.21962 of 2023.

35. It is to be noted in categorical terms that the dispute raised by Mohd. Javed before the Assistant Registrar was that he neither tendered resignation from the post of Secretary/Manager of the Society nor he ever filed any application before the Assistant Registrar and has submitted proceedings of the Committee of Management of the Society and proceedings of general body of the Society on or after 24.9.2021. Mohd. Javed in his complaint has categorically submitted that resignation under his forged signatures and certain applications under his forged signatures have been presented before the Assistant Registrar and on that basis, an attempt has been made by certain persons to take over the control of the Society.

36. This Court finds that Ms. Mridula Mishra filed an application on 12.11.2021 before the Assistant Registrar annexing therewith the minutes of the meeting of the Committee of Management of the Society held on 7.2.2021 and 7.3.2021 and thereby she claimed that election/co-option of Mr. Ajit Kumar Sigh as President of the Society is based on forged documents and actually she is the President of the Society. Since the Assistant Registrar did not recognize the claim raised by Ms. Mridula Mishra and did not refer the election dispute to the Prescribed Authority under Section 25(1) of the Act of 1860, she filed Writ-C No.20596 of 2022 and a co-ordinate Bench of this Court vide order dated 24.8.2022 had held that since the claim raised by Ms. Mridula Mishra on its face is not a valid claim therefore, the Assistant Registrar was not under obligation to refer the election dispute under Section 25(1) of the Societies Registration Act, 1860 to the Prescribed Authority for adjudication. The relevant paragraphs of the judgment and order dated 24.8.2022 passed by this Court are extracted as under:-

*"11. Now coming to the arguments advanced by learned counsel for the petitioner No. 2, on the merits, the Court finds that the Assistant Registrar in the impugned order has clearly recorded the factum that arguments of the parties were heard on 12.5.2022 and the judgment was reserved. It was agreed between the parties that they would submit written submissions and original documents by 20.5.2022. In pursuance to the order dated 12.5.2022, Shri Gulam Nabhi submitted the original documents pertaining to the proceedings while Smt. Mridula Mishra failed to produce any original documents and only submitted her written arguments. The Court is not impressed with the argument advanced by the learned counsel for the petitioners that the respondent No. 1 even after reserving the judgment, after hearing the parties on 12.5.2022 relied upon documents submitted by Gulam Nabhi on 20.5.2022 inasmuch as it had been*

*agreed between the parties to do so. The respondent No. 1 had permitted the original records to be filed. Shri Gulam Nabhi filed the original records, but Smt. Mridula Mishra, petitioner No. 2 failed to filed any original documents and pleaded that the documents had been stolen as an after thought. The case law relied upon by the learned counsel reported **in Ramadhar Shashtri's case (supra)** is clearly distinguishable on facts as in that case the Deputy Director permitted both parties to file documents after hearing the case on his own, but in the case at hand, the parties had themselves agreed to submit the original records by a particular date. The impugned order cannot be said to have been passed in violation of principal of natural justice as ample equal opportunity had been given to the petitioner No. 2 to establish her case.*

*12. It has also been argued that the impugned order dated 2.6.2022 passed by the Assistant Registrar/respondent No. 1 is without jurisdiction inasmuch as instead of referring the rival claims set up before him under Section 25 (I) of the Societies Registration Act, 1860, the Assistant Registrar proceeded to adjudicate the doubt or dispute with regard to the office bearers of the Society. Learned counsel for the petitioners has placed reliance upon the decision of Division Bench of this Court reported in **Gram Shiksha Sudhar Samiti's case** (supra). There can be no quarrel about the law laid down by Their Lordships in the decision reported in **Gram Shiksha Sudhar Samiti's case** (supra). However, the Court is of the opinion that only genuine rival claim / disputes or doubts about the office bearers of the Society are required to be referred for adjudication by Prescribed Authority under Section 25 (i) of the Societies Registration Act, 1860 and the Assistant Registrar, Firms, Societies and Chits while referring the dispute is not to function as a post office/rubber stamp. Sufficient, prima facie, material must be produced before the Registrar before he can validly exercise his jurisdiction of referring the dispute.*

*13. In the case at hand, the Assistant Registrar while, prima facie, considering the existence of a bona fide dispute regarding the office bearers of the Society has recorded in his order that in the typed copy of the proceedings submitted along with her application / objection dated 12.11.2021, the petitioner No. 2 Smt. Mridula Mishra, the details of the number of members of present are not mentioned. It has also not been mentioned as to who convened the meeting of the General Body and who informed the members. The said aspect has neither been clarified nor any evidence has been filed in support thereof. In the absence of proof of convening the meeting as per the registered bye laws of the Society, the proceedings submitted by Smt. Mridula Mishra appears to be doubtful. Besides the above, the Assistant Registrar has in its order recorded the factum that in respect of the meeting of the General Body on 3.10.2021 in which the vacant post of the President Shri Amit Kumar Singh has been filled up by Smt. Mridula Mishra. Much prior to the said date on 15.4.2021, the President Shri Amit Kumar Singh is stated to have expired and in terms of Rule 10, the then Manager Mohd. Javed was authorized to convene the meeting of the General Body on 3.10.2021 and send information to the members. No statement has been made by Smt. Mridula Mishra that the meeting had been convened by Mohd. Javed nor any document to that effect has been presented. In contrast to the above, much before the submission of the proceedings on 12.11.2021 i.e. 28.5.2021, the proceedings of filling the casual*

*vacancy of the post of President has been submitted by Mr. Mohd. Javed on 29.4.2021. The Assistant Registrar has on this basis returned a finding that the meeting of the General Body convened on 3.10.2021 was convened unauthorizedly and is void since the beginning. In contract to the above, the proceedings presented by Shri Gulam Nabhi and available in the office file have been found to confirm to the original records and as per the approved bye laws, the Assistant Registrar thus concluded that the application/objection dated 12.11.2021 submitted by the petitioner No. 2 Smt. Mridula Mishra as President and the proceedings attached with the objections are not found in accordance with the registered bye laws of the Society. In substance the Assistant Registrar has found that the rival claim set up by the petitioner No. 2 Smt. Mridula Mishra is not bona fide and accordingly has declined to refer the dispute to the prescribed authority under Section 25 (I) of the Societies Registration Act, 1860 and has ordered for proceeding under Section 4 (1) of the Act in respect of the proceedings submitted by Gulam Nabhi.*

*14. The Court finds no error in the view taken by the Assistant Registrar, Firms, Societies and Chits in refusing to refer the rival disputes for adjudication to the Prescribed Authority under Section 25 (I) of the Societies Registration Act, 1860 so as to warrant any interference in exercise of writ jurisdiction under Article 226 of the Constitution of India. The view of the Assistant Registrar is in consonance with the ratio of the decision of a Division Bench of this Court reported in* ***Committee of Management, Rashtriya Junior High School (Society), Babhaniyaon, District Jaunpur versus The Assistant Registrar, Firms, Societies and Chits, Varanasi Region, Varanasi and others, 2005 (61) ALR 74*** *decided on 11.8.2005. The relevant paragraph 4 of the aforesaid decision is being reproduced hereunder:-*

*"4. It is the standard law that if any bona fide dispute as to two rival Committees of Managements is shown to be in existence to the Registrar or Assistant Registrar, a reference by him of the dispute to the Prescribed Authority follows as a matter of course. But a bona fide dispute does come into existence merely because one member, even if he is a founder member, chooses simply to he has say or assert that he has a rival Committee and therefore, a bona fide dispute as to Management exists. Sufficient prima facie material must be produced before the Registrar before he can validly exercise his jurisdiction of referring the dispute. He must, simply put, be satisfied that there is something to refer and he is not merely sending litigations before the Prescribed Authority, without there being even a shadow of real cause for litigation."*

*15. In view of the above, the writ petition lacks merit. It is accordingly* ***dismissed.*** *No order as to costs.*

37. This Court finds that learned Single Judge while deciding Writ-C No.20596 of 2022 has not made any adjudication regarding the dispute raised by Mohd. Javed as in the entire order dated 24.8.2022 there is no finding as to whether Mohd. Javed ever tendered resignation from the post of Secretary/Manager of the Committee of Management of the Society and there is also no finding as to whether signatures on the alleged resignation and on the alleged applications are of Mohd. Javed. Learned Single Judge had decided the issues involved in Writ- C No.20596 of 2022 viz-a-viz the claim of Ms. Mridula Mishra and therefore, in no way it can be

said that the said judgment had decided the dispute raised by Mohd. Javed.

38. Ms. Mridula Mishra challenged the order dated 24.8.2022 passed by this Court in Writ- C No.20596 of 2022 by filing Special Appeal No.614 of 2022 and the Division Bench of this Court again decided the entire issue viz-a-viz the claim raised by Ms. Mridula Mishra and dismissed the special appeal vide judgment and order dated 30.11.2022. The relevant paragraphs of the judgment and order dated 30.11.2022 are extracted as under:-

*"We have given our thoughtful consideration to the rival submissions and have perused the record.*

*The facts which we have noticed above reflect that the last election as regards which there exist no dispute was held on 17.9.2016, returning Amit Singh as President and Mohd. Javed as Secretary. On 16.4.2021 Amit Singh died. The respondents set up a meeting dated 29.04.2021 showing election of Ajit Kumar as President for the remainder period, which was to expire within 5 years starting from 17.09.2016 or from the date of its recognition. The minutes of the meeting dated 29.04.2021 along with the list of office bearers was submitted for registration and that list was accepted on 07.06.2021 by the Assistant Registrar while exercising his power under Section 4(1) of the 1860 Act. The writ petitioner set up her claim questioning the entire proceeding in the month of November 2021 and to support her claim she set up a resolution, dated 03.10.2021, electing her as President in lieu of death of Amit Singh. In that claim, there was no specific prayer to recall the order, dated 07.06.2021, accepting the list of office bearers. In such circumstances, when the replacement of deceased Amit Singh by the writ petitioner Mridula Mishra was itself in the teeth of the bye-laws of the Society inasmuch as replacement could be only for the remainder term, which had already expired, and there being no prayer questioning the registration of the office-bearers on 07.06.2021, the Assistant Registrar was justified in finding the claim of the petitioner as not bonafide. For the reasons above, we do not find a good reason to interfere with the order of the learned Single Judge.*

*The appeal is, therefore,* ***dismissed.*** *Dismissal of the appeal as well as of the writ petition shall be without prejudice to the right of the writ petitioners to take recourse to other alternative remedies."*

39. This Court finds that even the Division Bench of this Court while dismissing Special Appeal No.614 of 2022 vide judgment and order dated 30.11.2022 has not adjudicated over the dispute raised by Mohd. Javed as the said dispute is based on the genuineness of the signatures of Mohd. Javed on the alleged resignation and also genuineness of his signatures on the alleged applications therefore, there is no hesitation for this Court to record the finding in categorical terms that judgments and orders passed in Writ-C No.20596 of 2022 and Special Appeal No.614 of 2022 only decide the issues raised therein viz-a-viz the claim of Ms. Mridula Mishra and do not decide the issues viz-a-viz the dispute raised by Mohd. Javed.

40. The claim raised by Mohd. Javed was accepted by the Assistant Registrar by passing orders dated 28.6.2023 and 14.9.2023 whereby fresh elections were directed to be held under Section 25(2) of the Act of 1860. The petitioners challenged

the said orders dated 28.6.2023 and 14.9.2023 by filing Writ-C No.21962 of 2023 which has been allowed vide judgment and order dated 6.10.2023 passed by a co-ordinate Bench of this Court. Vide judgment and order dated 6.10.2023, this Court had set aside the orders dated 28.6.2023 and 14.9.2023 with a direction to the Assistant Registrar to refer the dispute raised by Mohd. Javed to the Prescribed Authority for adjudication under Section 25(1) of the Act of 1860. The Court in its order dated 6.10.2023 had also recorded a finding that petitioners have no serious objection if the dispute raised by Mohd. Javed is referred by the Assistant Registrar to the Prescribed Authority for decision on merits. The learned Single Judge while issuing direction to the Assistant Registrar to refer the dispute raised by Mohd. Javed to the Prescribed Authority had also made few observations regarding claim of Mohd. Javed and has deliberately used word 'prima facie'. The relevant paragraphs of the judgment and order dated 6.10.2023 are extracted as under:-

*"10. There being some factual dispute in relation to resignation tendered by Mohd. Javed, however, after perusing the order impugned, I find that though as per the decision of Co-ordinate Bench as well as Division Bench dismissing the claim set up by Mridula Mishra in relation to the enrollment of new member Ajit Kumar Singh and further proceedings culminated into the decision dated 02.06.2022, ultimately, merged into the decisions of this Court, re-opening of the closed issue at the instance of Mohd. Javed in the facts and circumstances of the case, particularly when, he claimed himself to be continuing as Secretary/ Manager since 2016 onwards, prima facie, cannot give rise to a presumption that he had no knowledge of the proceedings of Writ Petition and Special Appeal pressed at the behest of allegedly elected President Mridula Mishra. The Assistant Registrar, though has referred to the decisions of this Court, in the discussion/finding part he has not recorded any finding as to the effect of the orders passed by this Court.*

*11. In the opinion of the Court, the decision making process adopted by the Assistant Registrar suffers from serious infirmities and, therefore, matter requires consideration.*

*12. When the Court proceeded to pass an interim order in the present case, learned counsel for the respondent no.3 submits that there being serious election dispute as well as continuance of office bearership covered by Section 25(1) of the Act, 1860 and the Competent Authority has to examine the entire things, the matter may be referred to the Prescribed Authority. He has also referred to the identical observations made by the Co-ordinate Bench and Division Bench of this Court in the earlier round of litigation.*

*13. Learned counsel for the petitioners has no serious objection to this submission, however, he submits that since election programme has been notified under the consequential order impugned, both the orders may be set aside.*

*14. Having heard learned counsel for the parties, I am of the view that the orders impugned cannot sustain in view of upholding of the ultimate decision dated 02.06.2022 upto Division Bench of this Court.*

*15. The writ petition succeeds and is* ***allowed****.*

*16. The order dated 28.06.2023 (impugned with the writ petition) and the order dated 14.09.2023 (impugned through the amendment application) passed by the Assistant Registrar, Firms, Societies and*

*Chits, Azamgarh Region, Azamgarh as well as election schedule notified pursuant thereto are hereby* ***set aside.***

*17. The Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh (respondent no.2) is directed to refer the dispute to the Prescribed Authority under Section 25(1) of the Act, 1860."*

41. This Court finds that learned Single Judge vide its order dated 6.10.2023 passed in Writ-C No.21962 of 2023 has not made any final adjudication regarding the dispute raised by Mohd. Javed and has made only prima facie observations in paragraph 10 and when the said observations are seen in the light of direction issued by the learned Single Judge to the Assistant Registrar for referring the matter to the Prescribed Authority, it can be easily inferred that the learned Single Judge was of the view that the dispute raised by Mohd. Javed has to be decided by the Prescribed Authority.

42. Pursuant to the order dated 6.10.2023 passed by this Court in Writ-C No.21962 of 2023, the dispute raised by Mohd. Javed was referred by the Assistant Registrar to the Prescribed Authority vide order dated 27.10.2023 for adjudication under Section 25(1) of the Act of 1860. Petitioners again challenged the order dated 27.10.2023 by filing Writ-C No.42723 of 2023 and there they took categorical ground that reference made vide order dated 27.10.2023 is in the teeth of judgments and orders passed in Writ-C No.20596 of 2022, Special Appeal No.614 of 2022 and Writ-C No.21962 of 2023 but the learned Single Judge of this Court did not find any apparent infirmity in the order dated 27.10.2023 and ultimately petitioners also agreed that a direction may be issued to the Prescribed Authority to decide the reference in a time bound manner and therefore, the learned Single Judge vide order dated 31.1.2024 issued direction for expeditious disposal over the reference by the Prescribed Authority.

43. Without making any comment on the merits of the claim of Mohd. Javed and the order dated 30.3.2024 passed by the Prescribed Authority, this Court finds that there is no final adjudication viz-a-viz the dispute raised by Mohd. Javed in the judgments and orders passed in Writ-C No.20596 of 2022, Special Appeal No.614 of 2022 and Writ-C No.21962 of 2023. Even further petitioners themselves, twice i.e. at the time of passing of the judgment and order dated 6.10.2023 in Writ-C No.21962 of 2023 and judgment and order dated 31.1.2024 in Writ-C No.42723 of 2023 had agreed that dispute raised by Mohd. Javed may be decided by the Prescribed Authority.

44. Once this Court is of the view that dispute raised by Mohd. Javed has not been decided by this Court in earlier rounds of litigation and petitioners themselves agreed that dispute raised by Mohd. Javed may be decided by the Prescribed Authority, now it is not open for them to urge before this Court that they may be allowed to bypass the remedy of statutory appeal available under Section 25(1)(d) of the Act of 1860 against the impugned order dated 30.3.2024 on the ground that the impugned order dated 30.3.2024 passed by the Prescribed Authority is contrary to decisions rendered by this Court in earlier rounds of litigation.

45. In view of the aforesaid reasons, this writ petition is dismissed on the ground of statutory remedy of appeal available to

the petitioners under Section 25(1)(d) of the Societies Registration Act, 1860.

46. Since the petitioners against the impugned order dated 30.3.2024 had approached this Court by filing this writ petition on 13.4.2024 and this writ petition remained pending for a quite some time therefore, it is provided that if petitioners file the statutory appeal under Section 25(1)(d) of the Act of 1860 within three weeks from today, the appellate authority shall hear and decide the appeal on merits and shall make endeavour to decide the appeal within three months from the date of its filing.

47. Since during pendency of this writ petition, pursuant to the impugned order dated 30.3.2024 elections of the Committee of Management of the Society have already taken place therefore, the elections held pursuant to the order dated 30.3.2024 shall abide by the decision in the appeal.

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**(2024) 7 ILRA 285**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 08.07.2024**

**BEFORE**

**THE HON'BLE DINESH PATHAK, J.**

Writ C No. 14461 of 2024

**Smt. Asha Devi ...Petitioner**
**Versus**
**Prescribed Authority/ Sub Divisional Magistrate & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Bhagwan Dutt Pandey, Sri Girja Shanker Sen

**Counsel for the Respondents:**
Sri Bheshraj Puri, C.S.C., Sri Sarvesh Pandey

**(A) Election Law – U.P. Panchayat Raj Act,1947 – Section 12 C – Application for questioning the elections – Section 12 (6) – Revision - Prescribed Authority on finally deciding an election petition becomes functus officio and cannot pass any order subsequent thereto even if the election petition has been decided finally calling for the re-counting of votes - Election Tribunal become functus offico after pronouncement of its decision on the election petition - The Act, 1947 does not allow the Prescribed Authority to re-entertain an already decided election petition, modify an order, or pass a fresh order. (Para - 11,15,16)**

**(B) Words and Phrases - "Functus Officio" - any judge or quasi-judicial authority would be considered as functus officio in the eventuality that he/she has performed his/her duty finally in its official capacity and nothing remains to be decided/considered/revisit on the said subject matter unless there is a legal provision to do so.(Para - 7)**

**(C) Words and Phrases - Principle of finality - Principle of finality is attached to the doctrine of functus officio, but there are exceptions to the principle of finality - Fraud as is a genuine, albeit limited, exceptions to the important principle of finality of litigation.(Para - 9)**

Prescribed authority allowed election petition partly - without fixing any date for the further proceedings in the election petition -issued direction for recounting of ballot papers – inherent lack of jurisdiction to pass subsequent order - considered final outcome of recounting - again allowed same election petition finally - declared respondent as a returned candidate. (Para - 6,16)

**HELD: -** Prescribed Authority's decision to partially allow the election petition without a final decision has made it functus officio and has no jurisdiction to entertain the petition again.

Prescribed Authority's order dated 21.3.2024, which was seized by the revisional court, was erroneous and perverse to the provisions of the Act, 1947. Order was illegal, unwarranted, and cryptic, warranting the court's exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. Impugned order quashed. Petitioner's revision pending consideration in the revisional court, which is expected to make a lawful decision as soon as possible. (Para – 16,17)

**Petition allowed.** (E-7)

**List of Cases cited:**

1. Parshuram Vs St. of U.P. & ors., 2022 O Supreme (All) 1629

2. Manoj Devi Vs St. of U.P. & ors., Writ C No. 33777 of 2022

3. Ram Kali Vs District Judge Hardoi & ors. , Writ C No. 6852 of 2023

4. Smt. Maneeta Devi Vs St. of U.P. & 8 ors. , Writ C No. 10442 of 2022)

5. Mohd Mustafa Vs U.P. Ziladhikari & ors., 2007 103 RD 282

6. Kusum Misra Vs St. of U.P., 2023 (5) AWC 4247

7. Jahida Begam Vs St. of U.P. & 8 ors., 2023 AIR (All) 120

8. Orissa Administrative Tribunal Bar Association Vs U.O.I. & ors., 2003 SCC OnLine SC 309

9. Lalit Narayan Mishra Vs St. of H.P. & ors., 2016 SCC OnLine HP 2866

10. VG Naidu Vs Pahalraj Gangaram, 2016 SCC OnLine Mad 9710

11. Abrar Vs St. of U.P. & ors., 2004(5) AWC 4088

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

1. Heard learned counsel for the petitioner, learned counsel for the private respondent No. 3 as well as learned Standing Counsel for the State-respondents and perused the record on board.

2. Petitioner has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India assailing the order dated 21.3.2024 passed by Sub-Divisional Officer, Aonwla, Bareilly whereby election petition under Section 12-C of UP Panchayat Raj Act, 1947 (in brevity, 'Act, 1947') moved on behalf of Rajkumari, respondent No. 3, has been allowed and she has been declared returned candidate on the post of Pradhan of the village Guleli, Vikas Khand Ramnagar, Tehsil- Aonwla, District Bareilly, after recounting of ballot papers in pursuance of the order dated 2.3.2024.

3. Facts culled out from the record are that in UP Panchayat Election 2020-2021 held on 15.4.2021, present petitioner has been declared successful to the post of Pradhan. Counting of votes was conducted on 2.5.2021 and, thereafter, result was declared on the same day. In the final result, returned candidate (petitioner) has secured 650 votes and the first runner respondent No. 3 has secured 644 votes. Having been aggrieved with the result of the panchayat election, Smt. Raj Kumari (respondent No. 3) has filed an election petition dated 25.5.2021 with the prayer to cancel the election result on the post of Pradhan of village/Gram Panchayat, Guleli and declare the election-petitioner as a returned candidate after recounting of votes. After exchange of respective pleadings between the parties, learned Prescribed Authority (Election Tribunal) has framed as many as 11 issues and, after due discussion, has allowed the election petition in part, vide its order dated 2.3.2024, with a direction for recounting of

ballot papers fixing 9.3.2024 as a date. Having been aggrieved with the order of recounting dated 2.3.2024, the returned candidate (present petitioner) has preferred a revision dated 12.3.2024 which has been ordered to be registered and admitted, vide order dated 22.3.2024 (Annexure No. 10). During pendency of the revision, recounting process was completed. Consequently, the Prescribed Authority has passed fresh order dated 21.3.2024 allowing the election petition and declared the respondent No. 3 as a returned candidate, which is under challenge before this Court.

4. In this backdrop of the facts, learned counsel for the petitioner, while assailing the order impugned dated 21.3.2024, has questioned the jurisdiction of the Prescribed Authority in passing the order dated 21.3.2024 on the ground that while passing the previous order dated 2.3.2024, whereby election petition has been allowed in part, the Prescribed Authority became functus officio, thus, he has inherent lack of jurisdiction to pass subsequent order impugned dated 21.3.2024 whereby the same election petition has been allowed second time and, consequently, respondent No. 3 has been declared as a returned candidate. He has laid emphasis on the final observation made by the Prescribed Authority in its previous order dated 21.3.2024 whereby election petition has been partially allowed. It is next submitted that once the election petition has been partially allowed without fixing any date for further proceeding or action, it amounts to final decision on the election petition and nothing remains to be decided in the said petition. Thus, subsequent order dated 21.3.2024 passed by the Prescribed Authority, who became functus officio, is nullity in the eye of law. In support of his submissions, learned counsel for the petitioner has placed reliance on the follwoing cases:

(i) **Parshuram vs. State of UP and others (Matter under Article 227 No. 31424 of 2021), decided on 23.12.2022 by coordinate Bench at Lucknow of this Court, 2022 O Supreme (All) 1629,**

**(ii) Manoj Devi vs. State of UP and 20 others (Writ C No. 33777 of 2022), decided on 29.3.2023 by the coordinate Bench of this Court, Neutral Citation No. 2013:AHC:67092**

**(iii) Ram Kali vs. District Judge Hardoi and 10 others (Writ C No. 6852 of 2023), decided on 9.8.2023 by the coordinate Bench at Lucknow of this Court (Neutral Citation No. 2023: AHC-LKO 53074), and**

**(vi) Smt. Maneeta Devi vs. State of UP and 8 others (Writ C No. 10442 of 2022), decided on 13.4.2022 by the coordinate Bench of this Court (Neutral Citation No. 2022:AHC:54664)**

5. Per Contra, learned counsel for the contesting respondent No. 3 has vehemently opposed the submissions as advanced by the learned counsel for the petitioner and contended that issuing a direction for recounting of the ballot papers is simply an aid to final decision on the election petition, therefore, order of recounting cannot be treated as a final order rather same is an interlocutory order, therefore, after recounting of ballot papers, final decision has rightly been taken on the election petition, vide order impugned dated 21.3.2024. It is next submitted that direction for recounting of the ballot papers amounts to pendency of the election

petition subject to final outcome of the recounting. Thus, learned Tribunal has rightly allowed the election petition finally, having regard to the result of the recounting. In support of his contention, learned counsel for the respondents has placed reliance on the follwoing judgments:-

**(i) Mohd Mustafa vs. U.P. Ziladhikari and others, 2007 103 RD 282,**

**(ii) Kusum Misra vs State of U.P., 2023 (5) AWC 4247, and**

**(iii) Jahida Begam vs State of U.P. and 8 others, 2023 AIR (All) 120.**

6. Having considered the rival submissions advanced by learned counsel for the parties and perusal of record, it is manifested that point for consideration in the instant writ petition lies in a narrow compass as to whether the Prescribed Authority has become functus officio while partly allowing the election petition and issuing a direction for recounting of ballot papers, vide order dated 2.3.2024, thus, he has inherent lack of jurisdiction to pass subsequent order dated 21.03.2024, having considered the final outcome of recounting, again allowing the same election petition finally and declaring the respondent No. 3 as a returned candidate?

7. In view of the point involved in the instant matter, as mentioned above, it would be befitting to define the phrase "Functus Officio". Needless to say that any judge or quasi-judicial authority would be considered as functus officio in the eventuality that he/she has performed his/her duty finally in its official capacity and nothing remains to be decided/considered/revisit on the said subject matter unless there is a legal provision to do so. In the recent judgment of **Orissa Administrative Tribunal Bar Association vs. Union of India and others, 2003 SCC OnLine SC 309**, Hon. Supreme Court has discussed the phrase "functus officio". The relevant paragraphs of the aforesaid judgment are quoted herein below:-

***107. P. Ramanath Aiyer's The Law Lexicon (1997 edition) defines the term functus officio as:-***

***"A term applied to something which once has had a life and power, but which has become of no virtue whatsoever One who has fulfilled his office or is out of office an authority who has performed the act authorised so that the authority is exhausted"***

***108. Black's Law Dictionary (5th edition) defines the term as follows***

***"Having fulfilled the function, discharged the office or accomplished***

***agency, etc. which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect***

***109. The doctrine of functus officio gives effect to the principle of finality. Once a judge or quasi-judicial authority has rendered a decision, it is not open to her to revisit the decision and amend. correct clarify, or reverse it (except in the exercise of the power of review, conferred by law) Once a Judicial or quasi-judicial decision attains finality, it is subject to change only in proceedings before the appellate court***

***110. For instance, Section 362 of the Code of Criminal Procedure 1975***

***provides that a court of law is not to alter its judgment once it is signed***

***"362 Court not to alter judgment. Save as otherwise provided by this Code or by any other law for the time being in force, 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."***

***111. In Hari Singh Mann v. Harbhajan Singh Bajwa35, this Court recognized that Section 362 was based on the doctrine of functus officio***

***70. The section is based on an acknowledged principle of law that once a matter is finally disposed of by a court, the said court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or an arithmetical error."***

***112. The doctrine of functus officio exists to provide a clear point where the adjudicative process ends and to bring quietus to the dispute. Without it, decision-making bodies such as courts could endlessly revisit their decisions. With a definitive endpoint to a case before a court or quasi-judicial authority, parties are free to seek judicial review or to prefer an appeal. Alternatively, their rights are determined with finality. Similar considerations do not apply to decisions by the state which are based entirely on policy or expediency.***

***115. Turning to the present case, the appellants' argument that the Union Government was rendered functus officio after establishing the OAT does not stand scrutiny. The decision to establish the OAT was administrative and based on policy considerations. If the doctrine of functus officio were to be applied to the sphere of administrative decision-making by the state, its executive power would be crippled. The state would find itself unable to change or reverse any policy or policy-based decision and its functioning would grind to a halt. All policies would attain finality and any change would be close to impossible to effectuate.***

***114. This would impact not only major policy decisions but also minor ones. For example, a minor policy decision such as a bus route would not be amenable to any modification once it was notified. Once determined, the bus route would stay the same regardless of the demand for say, an additional stop at a popular destination. Major policy decisions such as those concerning subsidies, corporate governance, housing, education and social welfare would be frozen if the doctrine of functus officio were to be applied to administrative decisions. This is not conceivable because it would defeat the purpose of having a government and the foundation of governance. By their very nature, policies are subject to change depending on the circumstances prevailing in society at any given time. The doctrine of functus officio cannot ordinarily be applied in cases where the government is formulating and implementing a policy.***

***115. In the present case, the State and Union Governments' authority has not been exhausted after the establishment of an SAT. Similarly, the State and Union Governments cannot be said to have fulfilled the purpose of their creation and to be of no further virtue or effect once they have established an SAT. The state may revisit its policy decisions in accordance with law. For these reasons, the Union Government was not rendered functus officio after establishing the OAT."***

8. In the matter of Lalit Narayan Mishra vs. State of Himachal Pradesh and others, 2016 SCC OnLine HP 2866, Division Bench of Hon'ble Himachal Pradesh High Court has held that "Functus officio" is a Latin term meaning having performed his or her office. With regard to an officer or official body, it means without further authority or legal competence because the duties and functions of the original commission have been fully accomplished. "Functus" means having performed and "officio" means office. Thus, the phrase functus officio means having performed his or her office, which in turn means that the public officer is without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

Trayner's Latin Maxims, 4th Edn. gives the expression functus officio the following meaning "Having discharged his official duty. This is said of any one holding a certain appointment, when the duties of his office have been discharged. Thus a Judge, who has decided a question brought before him, is functus officio and cannot review his own decision."

In Wharton's Law Lexicon, 14th Edn., the expression functus officio is given the meaning: "a person who has discharged his duties, or whose office or authority is at an end."

P. Ramanatha Aiyar's Law Lexicon gives the expression the meaning: "A term applied to something which once has had a life and power, but which has become of no virtue whatsoever. Thus when an agent has completed the business which he was entrusted his agency is functus officio."

In Black's Law Dictionary Tenth Edition, meaning of functus officio is: "having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." In other words, the authority, which had a life and power, has lost everything on account of completion of purpose/activities/act.

**(Emphasis added)**

9. Dealing with the execution proceedings, Hon'ble Single Bench of Madras High Court in the matter **of VG Naidu vs. Pahalraj Gangaram, 2016 SCC OnLine Mad 9710** has observed that till the time of limitation subsists, there can be any number of execution applications and if statute, provides power to correct certain account of certain kinds of errors, then the doctrine of functus officio would be subject to such qualification and its applicability would dependent upon the nature and extent of power conferred on the authority functioning. It is further observed that "principle of finality is attached to the doctrine of functus officio, but, there are exceptions to the principle of finality. However, the court's inherent power to set

aside the judgment only be invoked in exceptional circumstances to avoid miscarriage of justice. Fraud as is a genuine, albeit limited, exceptions to the important principle of finality of litigation.

**(Emphasis added)**

10. To apply the proposition of law qua functus officio, as discussed above, in the given circumstances of the present matter, it would be befitting to refer and discuss the final observation made by the Prescribed Authority in his order dated 2.3.2024, which is quoted herein below:

**अतः उक्त विवेचना के आधार पर चुनाव याचिका राजकुमारी की आंशिक रूप से स्वीकार की जाती है। मतपत्रों की पुर्नगणना हेतु दिनांक 09-03-2024 नियत की जाती है। पुर्नगणना की कार्यवाही विकास खण्ड रामनगर तहसील आंवला जिला बरेली में करायी जायेगी।**

"**Thus, in view of the discussion as above, election petition of Raj kumari is partly allowed. Date 9.3.2024 is being fixed for recounting of ballot papers. Proceeding of recounting will be conducted in Vikas Khand, Ram Nagar, Tehsil Aonwla, District Bareilly.**"

**(Tranlation by Court)**

11. It is evident from the first order dated 2.3.2024 passed by Prescried Authority that the election petition has been allowed partially fixing the date for recounting, without fixing any date for further hearing in the election petition, which resulted into final termination of the proceeding in election petition filed on behalf of respondent No. 3 under section 12-C of the Act, 1947. There is nothing on record to demonstrate that further date has been fixed for hearing in the election petition intending to decide it finally after final outcome of the recounting. Thus, a genuine question has arisen as to what remains to be decided in the election petition while it has been allowed, even partially, without fixing any further date for the purposes of further hearing in the election petition? Recounting of ballot papers was the consequential effect of the order dated 2.3.2024. However, declaring the respondent No. 3 as a returned candidate in consequence to the final outcome of the recounting may be a ministerial/procedural issue, but, same cannot be made an integral part of the such judicial proceedings under Section 12-C of the Act, 1947, which has already been terminated by previous order dated 2.3.2024. Partly allowing the election petition and fixing the date for recounting, vide order dated 2.3.2024 passed by Prescribed Authority, is a paramount consideration for the purposes to decide as to whether, after said order being passed, the Prescribed Authority became functus officio or not. Dealing with this question, the coordinate Bench at Lucknow of this Court in the case of Parshuram (supra) has held that once the final order has been passed in an election petition, the Prescribed Authority became functus officio and cannot pass any order subsequent thereto even if election petition has been decided finally for recounting of votes. The relevant paragraphs No. 6, 36 and 37 of the aforesaid judgment are quoted in hereinbelow:-

***"6. The legal question which has arisen in the instant petition is whether the Prescribed Authority has erred in law in directing for re-counting of votes while finally deciding the election petition***

***inasmuch as to whether the Prescribed Authority could pass any further order on receipt of the result of the re-counting of votes once the election petition had been finally decided and consequently the Prescribed Authority became 'functus officio'?***

***36. As already indicated above, the Apex Court in the case of Hari Vishnu Kamath (supra) has held that after the Election Tribunal finally pronounces its decision, it becomes 'functus officio' meaning thereby that it would not have any power to pass any order in the election petition after it pronounces its order. In the instant case what the Election Tribunal headed by the Prescribed Authority has done is that it has finally allowed the election petition and has directed for a recounting. Even if the result of recounting of the votes is to be either way, the Election Tribunal having become 'functus officio' after pronouncement of its decision/allowing the petition, it would not be able to pass any further orders. As such keeping in view the settled proposition of law, Article 243-O of the Constitution of India categorically providing that only by means of an election petition the election to the Panchayat can be called in question and the election petition having been finally decided, the Prescribed Authority/Election Tribunal, thus became functus officio and cannot pass any further orders in the matter. As such, the impugned order has to be treated as a final order in all respects and accordingly it is apparent that the Prescribed Authority has passed a patently perverse order and has failed to exercise jurisdiction vested in him i.e. of finally deciding an election petition either way.***

***37. Keeping in view the aforesaid discussion, the legal question which has arisen in the instant petition is answered below:-***

***The Prescribed Authority on finally deciding an election petition becomes functus officio and can not pass any order subsequent thereto even if the election petition has been decided finally calling for the re-counting of votes."***

12. In the case of **Mohd. Mustafa (supra),** the Division Bench of this Court has discussed scope of maintainability of the revision under Section 12-C (6) of the Act, 1947 in the event where order of recounting has been passed by the Prescribed Authority. The questions, which were referred to Hon'ble Division Bench, as mentioned in paragraph No.2 of the aforesaid judgement, are quoted herein below:-

***"[2] The learned Single Judge hearing the writ petition pointed out the conflict in the view taken by the learned Single Judge in Abrar's case (supra) with that of the decisions relied on by the learned Counsel for the petitioner and framed the following questions to be answered by a larger Bench:***

***(I) Whether the revision under Section 12-C (6) shall lie only against a final order passed by Prescribed Authority deciding the election petition under Section 12-C(1)_or a writ petition can be filed against an order of recount, which has been passed after deciding certain issues raised in the election petition?***

***(II)Whether the judgment or learned Single Judge in Abrar v. State of U.P., 2004 5 AWC 4088 and Ors. lays down correct law?"***

13. While answering the quetion referred in the matter of Mohd. Mustafa (supra), Hon'ble Division Bench has shown its inability to circumscribe to the view taken by the learned Single Judge in the matter of Abrar v. State of U.P. and others, 2004(5) AWC 4088 that the disposal of an application for recount would amount to be a final order as it disposes of the application for recounting finally. It is observed that the finality comes only after the disposed of the election application as the relief of setting aside an election or dismissing an election application comes at the final stage and not by mere disposal of an application of recount or ordering recount on deciding the issue framed for this purpose. Discussing the facts and circumstance of the **Mohd. Mustafa** (supra) case, it has been observed that only the order of recount has been passed by the Prescribed Authority and other issues were remained to be decided after recounting of ballot papers, as to whether the election had been held in accordance with law and as to whether the votes casted in favour of contesting respondents have been mixed up with the votes of the returned candidate and on the basis of which the petitioner has been declared elected. It was further to be decided as to whether election petition is to be allowed or dismissed. In this backdrop of the facts, Hon'ble Division Bench of this Court has observed that by no stretch of imagination it can be held that the order of recounting of votes has finally disposed of the election petition. In such specific facts and circumstances of the case, wherein simply order for recounting has been passed and original election petition was kept pending to be decided, Hon'ble Division Bench of this Court answered to the questions referred that revision under Section 12-C(2) of Act 1947 is always preferred against the final order passed by the Prescribed Authority, and the order for recounting is an interlocutory order, therefore, revision is not maintainable. Relevant paragraphs No. 24, 25, 26 and 27 of the aforesaid case are quoted herein below:

***"[24] The order impugned in the writ petition cannot be held to have disposed of the election application for the reason that the Election Tribunal framed following three issues:***

***(1) Whether the counting in the election on the post of Praonan of village Handia was conducted in accordance with law?***

***(2) Whether the agents of the applicant in election application, were forcibly removed from the place of counting and the votes cast in favour of the election applicant had been mixed up with the votes of the returned candidate (present petitioner) and on the basis of which opposite party No. 1 (present petitioner) was declared elected? And***

***(3) Whether on the facts and circumstances of the case, the recounting of votes is permissible and the election had been held in accordance with law?***

***[25] It is evident from the order impugned that only the order of recount has been passed. However, the other issues are yet to be decided after recount of ballot papers as to whether the -election had been held in accordance with law and as to whether the votes cast in lavour of the contesting respondent has been mixed up with the votes of the returned candidate and on the basis of which the petitioner has been declared elected. It is further to be decided as to whether the election***

***application is to be allowed or dismissed, Therefore, by no stretch of imagination, it can be held that the order of recount of votes has finally disposed of the election application.***

***[26] We are, therefore, with the utmost respect, not able to circumscribe to the view taken by the learned Single Judge in the Abrar's case (supra) for the reasons aforesaid and, therefore, we nave no hesitation in holding that the said decision does not lay down the law correctly on the question of the maintainability of revision under Section 12-C(6) of the Act in respect of an application disposed of by the Prescribed Authority for recount. We further approve the law lald down in the cases relied upon by the learned Counsel for the petitioner,***

***[27] We answer the questions referred to by the learned Single Judge as follows:***

***(I) A revision under Section 12-C(6) of the Act shall lie only against a final order passed by the Prescribed Authority deciding the election application preferred under Section 12-C(1) and not against any interlocutory order or order of recount of votes by the Prescribed Authority.***

***(II) The judgment of the learned Single Judge in the case of Abrar v. State of U.P. and Ors., 2004 5 AWC 4088 does not lay down the law correctly and is, therefore, overruled to the extent of the question of maintainability of a revision petition, as indicated hereinabove.***

***(III) As a natural corollary to the above, we also hold that a writ petition would be maintainable against an order of recount passed by the Prescribed Authority while proceeding in an election application under Section 12-C of the U.P. Panchayat Raj Act, 1947."***

14. Facts and circumstances of the cited case viz**. Mohd. Mustafa** (supra) is distinguishable from the facts and circumstances of the present case wherein election petition has been allowed partly by order dated 2.3.2024. Prescribed Authority has decided all the eleven (11) issues as formulated in the election petition filed under Section 12-C of the Act, 1947 and nothing remains to be decided. It would not be befitting to discuss the issues at this juncture inasmuch as order dated 2.3.2024 is under challenge in revison under Section 12-C(6) of Act, 1947 which is still pending before revisional court. While dealing with an election petition, there would be two options available for the Prescribed Authority; either to decide the election petition finally leaving no issue to be decided in further proceeding or fix dates for further proceedings intending to decide the election petition finally. If the Prescribed Authority chose to keep the election petition pending and directs to recount of votes then it would be an interlocutory order, in view of the ratio decided by the Hon'ble Division Bench of this Court in the matter of **Mohd. Mustafa** (supra). However, on the flip side, if the Prescribed Authority passes an order allowing or dismissing the election petition, may be partly, without keeping the election petition pending, with direction for recounting of votes, then, in my considered opinion, it would tantamount a final order and to that extent, the Prescribed Authority would be treated as functus officio, who has finally terminated the proceeding of election petition without keeping it pending for further proceedings.

15. The case of **Mohd. Mustafa** (supra) was discussed by the coordinate Bench at Lucknow of this Court in case of **Parshuram** (supra) and concluded that Election Tribunal become functus offico after pronouncement of its decision on the election petition. Hon'ble Judge has considered the provisions under Article 243-O of the Constitution of India as well. In similar facts and circumstances, wherein election petition has been allowed and direction has been issued for recounting of ballot papers, co-ordinate Bench of this Court in the case of **Kusum Kumari** (supra) and **Ram Kali** (supra) has finally upheld that such orders are final order in the eye of law subject to remedy of revision under Section 12-C (6) of the Act, 1947. It is apposite to mention that while entertaining the revision under Section 12-C (6) of the Act, 1947 against the order dated 2.3.2024, the revisional court, vide order dated 22.3.2024, has considered the order under revision as a final order to be revisable under Section 12-C (6) of the Act, 1947 and, accordingly, passed order for admission of the revision and its registration. While confronted with the counsel for the parties querying the pendency of the revision petition, they have admitted that said revision is still seized with the revisional court against the order dated 2.3.2024.

16. In this conspectus, as above, I found substance in the submissions advanced by the learned counsel for the petitioner that in view of allowing the election petition partly, vide order dated 2.3.2024, that too, without fixing any date for the further proceedings in the election petition intending to decide any issue or to take final decision on said election petition, the Prescribed Authority became functus officio and he has an inherent lack of jurisdiction to entertain such election petition again and allowed the same second time declaring respondent No. 3 as a returned candidate. It appears, prima facie, that learned Prescribed Authority has passed order dated 21.3.2024 in zeal, while the revision dated 12.3.2024 was seized with the revisional court to examine the legality and validity of the order dated 2.3.2024. Even assuming that no interim order was passed by the revisional court, the Prescribed Authority has not justified in passing the order dated 21.3.2024 while he had already laid his hands off from the election petition by terminating its proceeding finally vide order dated 2.3.2024. There is no provision under the Act, 1947 authorizing the Prescribed Authority to re-entertain the election petition, which has already been decided, and modify the previous order dated 2.3.2024 passed by him or to pass subsequent fresh order in furtherance of the previous order. The order under challenge, passed by the Prescribed Authority, is patently erroneous and perverse to the provisions of the Act, 1947 and same is liable to be qushed being illegal, unwarranted under the law, cryptic and suffers from infirmity warranting the indulgence of this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. The existence of such order beget prejudice and miscarriage of justice to the present petitioner, who is an elected representative in the democratic setup.

17. Resultantly, instant writ petition succeeds and is allowed. Order impugned dated 21.3.2024 passed by the Prescribed Authority/Sub-Divisional Officer, Aonwla (Annexure No. 1) is hereby quashed. Parties are already under litigation before the Revisional Court in

revision filed on behalf of present petitioner assailing the order dated 2.3.2024. The final outcome of the recounting, subject to objection if any at the relevant time, shall be kept in the sealed cover and shall be subject to the final decision of the revisional court. The revisional court, before whom revison filed on behalf of the petitioner is pending consideration, is expected to decide the said revision strictly in accordance with law as early as possible.

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**(2024) 7 ILRA 296**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 23.07.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE MANJIVE SHUKLA, J.**

Writ C No. 20071 of 2024

**Sadhna Sahu** **...Petitioner**
**Versus**
**U.O.I. & Ors.** **...Respondents**

**Counsel for the Petitioner:**
Sri Nishant Mishra, Sri Vinay Kumar

**Counsel for the Respondents:**
A.S.G.I., Sri Bimalesh Ch. Tripathi, C.S.C., Sri Sudarshan Singh

**Pradhan Mantri Garib Kalyan Package: Insurance Scheme for Health Workers Fighting COVID-19 –** The scheme was extended via several notifications, including Notification No. F.No.Z.21020/16/2028-PH issued on 26.04.2021. By virtue of this notification, the scheme was extended upto 24.03.2021. The notification clarified that the period would continue for 180 days w.e.f. 24.04.2021. Petitioner's husband, a Ward Boy working in the O.P.D. located opposite the COVID section, succumbed to COVID-19. Benefit was rejected on the grounds that the death of the petitioner's husband occurred three months after 28.03.2020, and he was not directly working in the COVID ward but was in the O.P.D. department. *Held:* Beneficial schemes provided by the Government are not to be interpreted in a technical manner but must be viewed holistically. Health workers at risk of being impacted by COVID-19, including accidental loss of life due to contracting COVID-19, are to be covered under such schemes. Since the petitioner's husband passed away on 08.05.2021, he would be covered under the scheme. The authorities were directed to provide the petitioner with ex-gratia payment in accordance with the law. **(Paras 4, 5)**

**Writ Petition allowed**. (E-5)

**List of Cases cited:**

1.Sangeeta Wahi Vs U.O.I. & ors., 2023 SCC OnLine Del 6808

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

1. Heard Sri Nishant Mishra and Sri Vinay Kumar, learned counsel appearing for the petitioner, Sri Sudarshan Singh, learned counsel appearing for Respondent No.1 and learned Standing Counsel appearing for Respondents No. 2 to 6.

2. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is aggrieved by the impugned order passed by the respondent no.6 under **'Pradhan Mantri Garib Kalyan Package : Insurance Scheme for Health Workers Fighting COVID-19'.**

3. The grounds taken by the authorities are dual in nature. The first ground is that death of the petitioner's husband took place subsequent to three months of the date 28.3.2020 and therefore, the same would not be covered by the

Scheme. It is to be noted that the Scheme had been extended vide several notifications including the one bearing No. F.No.Z. 21020/16/2028-PH issued on April 26, 2021. By virtue of this notification it is clear that the Scheme was extended twice uptil 24.3.2021. Furthermore, the notification clarifies that the period shall continue for a period of 180 days w.e.f. 24.4.2021. Since the petitioner's husband expired on 8.5.2021, he would be covered under the Scheme. The second reason given in the rejection order that the petitioner was not directly working in Covid ward but was a Ward Boy in the O.P.D. Department.

4. The beneficial schemes provided by the Government are not to be read in a technical manner and are required to be looked in a holistic manner. The relevant portion of the order dated 28.03.2020 is provided below:-

*"i. It will be a comprehensive personal accident cover of Rs. 50 lakh for ninety (90) days to a total of around 22.12 lakh public healthcare providers, including community health workers, who may have to be in direct contact and care of COVID-19 patients and who may be at risk of being impacted by this. It will also include accidental loss of life on account of contracting COVID-19."*

5. Upon perusal of the said paragraph, it appears that Health Workers who may be at risk of being impacted by COVID-19 including accidental loss of life on account of contracting COVID-19 would also be included in the same order.

6. Reliance may be placed on the Delhi High Court judgment in **Sangeeta Wahi -v- Union of India and others,** reported in **2023 SCC OnLine Del 6808**. The ratio of the said judgment is provided below:-

*"8. Covid-19 Pandemic struck the country in March, 2020. Lakhs of persons lost their lives in the Pandemic. Police officials, healthcare workers, Doctors, Paramedics, etc. were braving the Pandemic and were in the line of duty to provide assistance to persons who fell victims to the life taking virus. Concerns had been raised regarding the country's healthcare system and its capacity to cope with the massive outbreak. Doctors, nurses, paramedical staff, including security staff in various hospitals, were working day and night to streamline the patients to ensure that the patients are screened at the earliest and are quarantined so that the virus does not spread. Persons who were affected by any fever were in a state of panic and not knowing what is to be done, they were rushing to hospitals not knowing where to go and whom to meet. People were crowding OPDs and the causality in the hospital to get themselves screened. At this juncture, it was these security guards, paramedical staff, who not only to ensured the safety of the hospitals but were also acting as guides by directing the patients to approach the correct centre. It, therefore, cannot be said that the security guards who were posted at various places were not in direct contact of Covid-19 patients. It is well known that Covid-19 virus spread through air and any patient who was coming to the hospital could have been infected by the virus, whether he/she was symptomatic or not. The patients got in touch with many service providers, be it security guards, nurses, paramedical staff, who might or might not have been posted in the Covid-19 ward. The Central Government, therefore, cannot take such a narrow approach that only such persons*

*who were posted in the Covid-19 ward or centre only will be covered by the "Pradhan Mantri Garib Kalyan Package: Insurance scheme for health workers fighting COVID-19". The Scheme was actually brought out as a measure to benefit the family members of persons who became martyrs in the line of duty while protecting thousands of persons affected by Covid-19 Pandemic. Taking such a narrow view actually goes against the spirit of the Scheme which was meant to provide immediate relief to persons who were tackling the situation and were protecting the lives of thousands of patients. This Court can take judicial notice of the fact that any person having mildest of the symptoms of Covid-19 was getting himself/herself tested. Poor people who could not afford private testing centres were rushing to the Government hospitals. A normal person would never know that there is a special Covid- 19 ward and his normal reaction would be to approach either the OPD desk or the casualty of the hospital to meet the Doctor. At that point of time, to streamline the queue, the services of the security guards were availed. The security guards were also directing the people to the Departments where the patients have to approach in order to get themselves treated. It, therefore, cannot be said that the late husband of the Petitioner herein, who died of Covid-19 which he may have contracted in the Hospital, was not in direct contact with the Covid-19 patients.*

*9. The Scheme has been brought out as a social welfare scheme and application of such schemes are not to be put in Procrustean beds or shrunk to Liliputian dimensions. Welfare Schemes must necessarily receive a broad interpretation. Where Scheme is designed to give relief, the Court should not be inclined to make etymological excursions [refer: Workmen v. American Express International Banking Corpn., (1985) 4 SCC 71].*

*10. The Apex Court in Regl. Provident Fund Commr. v. Hooghly Mills Co. Ltd., (2012) 2 SCC 489, has observed as under:*

*"24. If we look at the modern legislative trend we will discern that there is a large volume of legislation enacted with the purpose of introducing social reform by improving the conditions of certain class of persons who might not have been fairly treated in the past. These statutes are normally called remedial statutes or social welfare legislation, whereas penal statutes are sometime enacted providing for penalties for disobedience of laws making those who disobey, liable to imprisonment, fine, forfeiture or other penalty.*

*25. The normal canon of interpretation is that a remedial statute receives liberal construction whereas a penal statute calls for strict construction. In the cases of remedial statutes, if there is any doubt, the same is resolved in favour of the class of persons for whose benefit the statute is enacted, but in cases of penal statutes if there is any doubt the same is normally resolved in favour of the alleged offender.*

*26. It is no doubt true that the said Act effectuates the economic message of the Constitution as articulated in the directive principles of State policy. Under the directive principles the State has the obligation for securing just and humane conditions of work which includes a living wage and decent standard of life. The said*

*Act obviously seeks to promote those goals. Therefore, the interpretation of the said Act must not only be liberal but it must be informed by the values of the directive principles. Therefore, an awareness of the social perspective of the Act must guide the interpretative process of the legislative device."*

*11. In view of the above, the narrow and pedantic stand taken by the Central Government cannot be accepted and the Petitioner is entitled to the benefit of "Pradhan Mantri Garib Kalyan Package: Insurance scheme for health workers fighting COVID-19".*

7. Keeping in view the above judgment, we are of the view that the present case is very much covered by '**Pradhan Mantri Garib Kalyan Package : Insurance Scheme for Health Workers Fighting COVID-19'** as the petitioner's husband was a Ward Boy working in the O.P.D. that was just opposite the Covid Section. The pedantic view taken by the authorities is without application of mind that too with narrow interpretation of the said Scheme. Such an interpretation would be wholly contrary to the intention of the said Scheme.

8. Accordingly, the impugned order dated 29.2.2024 is quashed and set aside with a direction given on the authorities concerned to implement the Scheme expeditiously. The petitioner should be provided with the ex-gratia payment in accordance with law preferably within a period of three months from date.

9. With the above direction, the writ petition is allowed.

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**(2024) 7 ILRA 299**

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 25.07.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE MANJIVE SHUKLA, J.**

Writ C No. 20480 of 2024

**Mohammad Umar ...Petitioner**
**Versus**
**U.O.I. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Suhel Ahmed Azmi

**Counsel for the Respondents:**
C.S.C.

**A. Passport Act, 1967 – Sections 10(3)(e) & (5) – Impounding of passport – Criminal case relating to matrimonial dispute was pending which was stayed by the High Court – Mere pendency of a criminal was made the basis for impounding the passport – No reason regarding the misuse of passport was recorded – Effect – Held, prior to passing the order of impounding passport, the passport officer after considering the facts and circumstances of each case has to record reasons to arrive at a conclusion that due to pending criminal proceedings in a criminal court, the passport holder may misuse the passport for avoiding his appearance before the court and can delay the conclusion of the the proceedings. (Para 11 and 14)**

**B. Interpretation of Statute – Word 'may' – Effect – Effect of using the word 'may' in S. 10 (3) is that it is not necessary that in every case falling under Section 3, the passport officer is mandatorily required to impound the passport. (Para 11)**

**Writ petition allowed.** (E-1)

<u>**List of Cases cited**</u>**:**

Writ C No. 59959 of 2016; Mohd. Farid Vs U.O.I. & anr. decided on 20.12.2016

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Sri Suhel Ahmad Azmi, learned counsel appearing on behalf of the petitioner and learned counsel appearing on behalf of the respondents.

2. Petitioner through this writ petition has challenged the communication dated 30.05.2023 issued by the Regional Passport Officer, Vipin Khand, Gomti Nagar, Lucknow whereby he has been informed that decision has been taken to impound the passport No. M1266202 issued in his favour on 20.08.2014, under Section 10 (3) (e) of the Passports Act, 1967 on the ground of pending criminal case.

3. Facts of the case, in brief, are that pursuant to petitioner's application, Passport No. M1266202 was issued to him on 20.08.2014. The said passport is valid up to 19.08.2024. The petitioner on the basis of the aforesaid passport was residing in Kingdom of Saudi Arabia and was doing a private job. Petitioner's wife Fatima Jahara has lodged an F.I.R. against the petitioner which has been registered as Case Crime No. 25 of 2023 under Sections 498-A, 323, 406, 504, 506 I.P.C., Section 3/4 Dowry Prohibition Act and Section 3/4 of Muslim Women (Protection of Rights of Marriage) Act, 2019 at Police Station Mahila Thana, District Ambedkar Nagar. The investigating officer after completing his investigation in the aforesaid crime had submitted charge-sheet on 27.08.2023 before the competent court. The petitioner and other accused of the aforesaid crime have filed an application under Section 482 Cr.P.C. before this Court at Lucknow bearing Case No. 4935 of 2024 and the Court vide order dated 29.05.2024 has stayed the proceedings of the criminal case pending before the Court concerned.

4. Learned counsel appearing for the petitioner has submitted that Section 10 (3) (e) of the Passports Act, 1967 provides that the passport authority may impound or cause to be impounded or revoked a passport or travel document if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before criminal court in India. He further submits that under Section 10 (5) of the Passports Act, 1967 provides that where the passport authority makes an order impounding a passport or travel document under sub-section 3 of Section 10 of the Passports Act, 1967, it shall record in writing a brief statement of the reasons of the making such order and furnish it to the holder of the passport.

5. Learned counsel appearing for the petitioner has argued that the legislature while enacting Section 3 of the Passports Act, 1967 had conferred discretion to the passport authority that in the case of pending criminal proceedings against a passport holder, he may impound the passport. He further argues that the legislature in Section 10 (3) had deliberately used word 'may' therefore intention of the legislature is very clear that a passport officer may impound the passport if criminal proceedings are pending against a passport holder but that does not mean that the passport officer is required to impound the passport of a person in every case where the criminal proceedings are pending against the said person. The passport officer as per the mandate of the legislature under Section 10

(3) (e) is required to consider each and every case on its own facts and thereafter by recording reasons of a possible misuse of the passport for avoiding presence of the passport holder before the court trying the offence or possibility of delay in conclusion of the criminal proceedings, can impound the passport.

6. Learned counsel appearing for the petitioner has further argued that when Section 10 (3) (e) is read with Section 10 (5) of the Passports Act, 1967 it can easily be inferred that the legislature had mandated the passport officer to give reasons for recording his satisfaction that a case for impounding passport is made out under Section 10 (3) (e) of the Passports Act, 1967 but in the case of the petitioner no reasons for recording satisfaction of the passport officer has been given and in the impugned communication dated 30.05.2023 it has been stated that because of the pending criminal case before the court, petitioner's passport has been impounded under Section 10 (3) (e) of the Passports Act, 1967.

7. Learned counsel appearing for the petitioner has vehemently argued that since the decision of impounding petitioner's passport is unreasoned and without consideration of the necessary facts, the said decision cannot be sustained in the eyes of law.

8. Learned counsel appearing for the petitioner in support of his arguments has relied on the judgment dated 20.12.2016 rendered by a Divisional Bench of this Court in Writ-C No. 59959 of 2016 and has contended that in the said judgment it has categorically been held that the passport officer is required to record reasons for arriving at a conclusion that in view of pending criminal case before the court, impounding of passport is necessary and only thereafter the order for impounding of passport can be passed, whereas in the case of the petitioner no such consideration has been done and straightaway his passport has been impounded, therefore the decision of the passport officer cannot sustain in the eyes of law.

9. Per contra, learned counsel appearing for the respondents has argued that the passport officer is empowered to impound passport of a person under Section 10 (3) (e) of the Passports Act, 1967 on the ground of pending criminal proceedings against him and therefore the passport officer while taking decision for impounding petitioner's passport under Section 10 (3) (e) of the Passports Act, 1967 in view of the pending criminal case against the petitioner in the competent court has acted strictly in accordance with law. He further submits that in view of the criminal case pending against the petitioner in the competent court, interference may not be shown by this Court in the impugned communication dated 30.05.2023.

10. We have considered the arguments advanced by the learned counsels appearing for the parties. We find that Section 10 (3) (e) of the Passports Act, 1967 provides that the passport authority may impound or cause to be impounded a passport if the proceedings in respect of an offence alleged to have been committed by the holder of the passport are pending before the criminal court in India. For ready reference Section 10 of the Passports Act, 1967 is extracted as under :-

"**10. Variation, impounding and revocation of passports and travel documents.—**

(1)The passport authority may, having regard to the provisions of sub-section (1) of section 6 or any notification under section 19, vary or cancel the endorsements on a passport or travel document or may, with the previous approval of the Central Government, vary or cancel the conditions (other than the prescribed conditions) subject to which a passport or travel document has been issued and may, for that purpose, require the holder of a passport or a travel document, by notice in writing, to deliver up the passport or travel document to it within such time as may be specified in the notice and the holder shall comply with such notice.

(2) The passport authority may, on the application of the holder of a passport or a travel document, and with the previous approval of the Central Government also vary or cancel the conditions (other than the prescribed conditions) of the passport or travel document.

(3) The passport authority may impound or cause to be impounded or revoke a passport or travel document,—

(a) if the passport authority is satisfied that the holder of the passport or travel document is in wrongful possession thereof;

(b) If the passport or travel document was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the passport or travel document or any other person on his behalf:

Provided that if the holder of such passport obtains another passport, the passport authority shall also impound or cause to be impounded or revoke such other passport.

(c) if the passport authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public;

(d) if the holder of the passport or travel document has, at any time after the issue of the passport or travel document, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years;

(e) if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India;

(f) if any of the conditions of the passport or travel document has been contravened;

(g)if the holder of the passport or travel document has failed to comply with a notice under sub-section (1) requiring him to deliver up the same;

(h) if it is brought to the notice of the passport authority that a warrant or summons for the appearance, or a warrant for the arrest, of the holder of the passport or travel document has been issued by a court under any law for the time being in force or if an order prohibiting the departure from India of the holder of the passport or other travel document has been made by any such court and the passport authority is satisfied that a warrant or

summons has been so issued or an order has been so made.

(4) The passport authority may also revoke a passport or travel document on the application of the holder thereof.

(5) Where the passport authority makes an order varying or cancelling the endorsements on, or varying the conditions of, a passport or travel document under sub-section (1) or an order impounding or revoking a passport or travel document under sub-section (3), it shall record in writing a brief statement of the reasons for making such order and furnish to the holder of the passport or travel document on demand a copy of the same unless in any case the passport authority is of the opinion that it will not be in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country or in the interests of the general public to furnish such a copy.

(6) The authority to whom the passport authority is subordinate may, by order in writing, impound or cause to be impounded or revoke a passport or travel document on any ground on which it may be impounded or revoked by the passport authority and the foregoing provisions of this section shall, as far as may be, apply in relation to the impounding or revocation of a passport or travel document by such authority.

(7) A court convicting the holder of a passport or travel document of any offence under this Act or the rules made thereunder may also revoke the passport or travel document: Provided that if the conviction is set aside on appeal or otherwise the revocation shall become void.

(8) An order of revocation under sub-section (7) may also be made by an appellate court or by the High Court when exercising its powers of revision.

(9) On the revocation of a passport or travel document under this section the holder thereof shall, without delay, surrender the passport or travel document, if the same has not already been impounded, to the authority by whom it has been revoked or to such other authority as may be specified in this behalf in the order of revocation."

11. We find that the legislature under Section 10 (3) (e) of the Passports Act, 1967 had deliberately used word 'may' meaning thereby that in the eventualities enumerated under Section 3 of the Passports Act, 1967 of the passport officer by recording reasons can impound passport but it is not necessary that in every case falling under Section 3 the passport officer is mandatorily required to impound the passport. The legislature under Section 10 (3) (e) has given power/discretion to the passport authority that if he is satisfied then he can impound the passport of a person on the ground of pending proceedings in relation to an offence in the criminal court, therefore prior to passing the order of impounding passport, the passport officer after considering the facts and circumstances of each case has to record reasons to arrive at a conclusion that due to pending criminal proceedings in a criminal court, the passport holder may misuse the passport for avoiding his appearance before the court and can delay the conclusion of the the proceedings.

12. The Division Bench of this Court vide its judgment rendered on 20.12.2016 in ***Writ-C No. 59959 of 2016***

***(Mohd. Farid Vs. Union of India & Anr.)*** had considered the purport of Section 10 (3) (e) of the Passports Act, 1967 and has held that before impounding the passport of a person, the passport authority is required to record reasons for arriving at a conclusion that the passport holder may misuse the passport for avoiding his appearance before the court concerned and for delaying the conclusion of the criminal proceedings. Relevant paragraphs of the judgment rendered in the case of Mohd. Farid (supra) are extracted as under :-

"After respective arguments have been advanced, we have proceeded to examine the provisions of the Passport Act, 1967 wherein section 10 confers power on the Passport Authority to pass orders for impounding/revocation of passports and travel documents. The grounds of impounding/revocation has been provided under Clause (a) to (h) of sub-section 3 of Section 10 of the Passport Act, 1967. Sub-section (5) of Section 10 obligates the Passport Authority to give reasons for making such an order. The relevant provisions that have been invoked in the present case is as follows:-

"(3) The passport authority may impound or cause to be impounded or revoke a passport or travel document:-

(e) if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India

(5) Where the passport authority makes an order varying or cancelling the endorsement on, or varying the conditions of, a passport or travel document under sub-section (1) or an order impounding or revoking a passport or travel document under sub-section (3), it shall record in writing a brief statement of the reasons for making such order and furnish to the holder of the passport or travel document on demand a copy of the same unless in any case, the passport authority is of the opinion that it will not be in the interests of the sovereignty and integrity of India, friendly relations of India with any foreign country or in the interests of the general public to furnish such a copy."

A bare perusal of the provisions quoted above would go to show that the Passport Authority under the Passports Act, 1967 has been conferred with the Authority to impound or caused to be impounded/revoked a passport or travel document if proceedings in respect of an offence have been committed by the holder of the passport or travel document are pending before a criminal Court in India. Sub-section 5 of Section 10 obligates the Passport Authority to record in writing a brief statement of reasons for making such an order.

Apex Court in the case of ***Menaka Gandhi vs. Union of India 1978 (1) SCC 248*** has taken the view that sub-section 5 of Section 10 of the Passports Act, 1967 requires the Passport Authority impounding the passport to record reasons of making such order and the necessity of giving reasons has obviously been introduced in the sub-section so that it may act as a healthy check against abuse or misuse of power. If the reasons given are not relevant and there is no nexus between reasons and the ground on which the passport was impounded, it would be open to the holder of the passport to challenge the order of impounding in a Court of law

and if the Court is satisfied that the reasons are extraneous or irrelevant, the Court would struck down the order.

Apex Court in the case of ***Suresh Nanda vs. CBI 2008 (3) SCC 674*** has taken the view that impounding of passport entails civil consequences and in view of this, the Authorities are duty bound to give opportunity of hearing to the person concerned.

There is no doubt on this fact that discretion is vested with the Passport Authority in terms of section 10 of the Passports Act, 1967 but it is not at all mandatory on the passport authority to impound or caused to be impounded or revoke a passport or travel document if proceedings in respect of offence merely alleged to have been committed by the holder of the passport or travel document are pending before the Court in India.

Pendency of criminal case against the holder of passport would not automatically result in impounding of his passport and the mere fact that certain conditions specified in Section 10 (3) of the Act, on the basis of which a passport can be impounded, subsists in a given case cannot by itself result in impounding of passport automatically and once the Passport Authority, in his wisdom, chooses to exercise his discretion in the said direction as to whether on account of pendency of such criminal case, the passport in question should be impounded or not, then, at the said point of time, the Passport Officer should apply his mind looking into the nature of the criminal cases that have been lodged/initiated against the petitioner and further that if a passport is not impounded, then there are possibilities that the incumbent would not at all face the criminal cases. Even if criminal case is pending against a person that by itself does not require passport authority to impound/revoke the passport in every given case. It is only in appropriate cases for adequate and cogent reasons such an order could be passed. While passing order of impounding/revocation of passport, merely by quoting the requirement mentioned in the section is clearly indicative of circumstance that order has been passed without there being any objective consideration of the subject matter."

13. We find that a criminal case relating to a matrimonial discord is pending against the petitioner in the criminal court and proceedings of the said case have been stayed by the High Court and mediation proceedings in between the parties are in process.

14. The passport officer in the present matter has taken decision to impound petitioner's passport under Section 10 (3) (e) of the Passports Act, 1967 only on the ground that proceedings related to an offence are pending against the petitioner before criminal court but he has not considered the facts of the criminal case and has also not recorded reasons to arrive at a conclusion that petitioner may misuse his passport for avoiding his presence before the criminal court and also for delaying the conclusion of the criminal proceedings and therefore it is necessary to impound his passport under Section 10 (3) (e) of the Passports Act, 1967. More so we find that Section 10 (5) of the Passports Act, 1967 mandates the passport authority to give brief reasons for passing the order for impounding of the passport but in the present case impugned communication dated 30.05.2023 does not disclose that the passport authority has made any

consideration of the facts of the case and has recorded reasons. Ergo, the impugned decision for impounding petitioner's passport contained in the impugned order dated 30.05.2023 cannot be sustained in the eyes of law.

15. In view of the aforesaid reasons, this writ petition is allowed. The impugned decision of impounding petitioner's passport No. M1266202 contained in impugned order dated 30.05.2023 is quashed. The Respondent No. 2 is directed to reconsider the entire matter, grant an opportunity of hearing to the petitioner and thereafter pass a fresh order within a period of six weeks from the date of service of a copy of this order.

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**(2024) 7 ILRA 306**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 24.07.2024**

**BEFORE**

**THE HON'BLE CHANDRA KUMAR RAI, J.**

Writ C No. 31553 of 2002

**Bhukhal ....Petitioner**
**Versus**
**The Commissioner Gorakhpur & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri H.P. Mishra, Sri Hari Pratap Gupta, Sri R.K. Gupta, Sri Upendra Kumar Mishra

**Counsel for the Respondents:**
C.S.C.

**A. Civil Law - U.P. Imposition of Ceiling on Land Holdings Act, 1960 - Section 10(2) & 11(2) - Objection u/s 11(2) of the Ceiling Act filed by the petitioner on the basis of a registered sale deed executed in his favour before the relevant date, 24.01.1971, was allowed after hearing the objector as well as the State - Appeal filed by the State after five years was allowed by the Appellate Court, and the matter was remanded back before the Prescribed Authority for fresh consideration - Appeal filed in a similar situation of the remaining area of the same plot was allowed by the Commissioner. Held: Order of the Prescribed Authority cannot be set aside in appeal unless there is sufficient ground for setting aside the order of the Prescribed Authority. Remand order passed by the Commissioner in appeal is nothing but an abuse of the process of law, as the Prescribed Authority has already decided the objection of the petitioner on merit, taking into consideration the sale deed executed in the year 1960, which has not yet been cancelled. (*Para 12, 14*)**

**Allowed.** (E-5)

**<u>List of Cases cited</u>:**

Ramadhar Singh Vs Prescribed Authority & ors., 1994 (Supp 3) SCC 702

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Satyendra Pratap Singh, learned counsel for the petitioner and Sri Krishna Mohan Mishra, learned counsel for the State.

2. Brief facts of the case are that plot no. 156 area 0.50 Dismal situated in village Ahirauli Rai, Tappa Parwarpar, Pargana Sidhuwa Jobna, Tehsil Kasya, District-Deoria at present District Kushinagar was purchased by the petitioner by way of a registered sale deed executed in his favour on 10.03.1960. In proceeding under Section 10 (2) of U.P. Imposition of Ceiling on Land Holdings Act 1960 hereinafter to referred as Ceiling Act, the aforementioned plot no. 156 was declared

as surplus vide order dated 19.02.1990 without any notice to petitioner accordingly petitioner filed an objection under Section 11 (2) of the Ceiling Act stating that petitioner had purchased the plot in question by way of registered sale deed from the then recorded tenure holder Laxmi Pratap Narayan Singh, but without any notice and opportunity to petitioner, the plot in question has been declared as surplus. State has filed his reply in the aforementioned proceeding under Section 11 (2) of the Ceiling Act. The Prescribed Authority vide order dated 03.05.1994 allowed the objection of the petitioner under Section 11 (2) of the Ceiling Act and separated the plot no. 156 area 0.50 Dismil from the Ceiling proceedings. Against the said order dated 03.05.1994, State filed an appeal before Commissioner along with the prayer for condonation of delay of five years. The aforementioned appeal was registered as appeal no. 1/K of 1999. The Commissioner vide order dated 31.05.2022 allowed the appeal, set aside the order of the Prescribed Authority dated 03.05.1994 and remanded the matter before the Prescribed Authority for fresh decision of the dispute under Section 11 (2) of the Ceiling Act after affording opportunity of hearing to both the parties. Hence, the present petition on behalf of petitioner for the following reliefs:-

***i) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 31.05.2002.***

***ii) issue a writ, order or direction in the nature of mandamus commanding the respondents not to dispossess the petitioner from the land in dispute in pursuant to order dated 31.05.2002.***

***iii) issue any other and further suitable order or direction in the nature which this Hon'ble Court may deem fit and proper in the circumstances of the case.***

***iv) award cost of the writ petition to the petitioner***.

3. This Court entertained the matter on 05.08.2002 and stayed the operation of the order dated 03.05.2002.

4. In pursuance of the order dated 05.08.2002 the State has filed Counter affidavit and petitioner has filed his rejoinder affidavit.

5. Learned counsel for the petitioner submitted that the objection under Section 11 (2) of the Ceiling Act filed by the petitioner on the basis of registered sale deed executed on 10.03.1960 in his favour was allowed after giving proper opportunity to the State, as such the order passed by the Prescribed Authority under Section 11 (2) of the Ceiling Act can not be set aside in appeal filed by the State after five years from the date of judgment of the Prescribed Authority. He further submitted that the appellate Court after granting benefit of Section 5 of Limitation Act, allowed the appeal setting aside the order of Prescribed Authority and remanded the matter back to the Prescribed Authority for fresh decision of objection, which is abuse of process of law. He next submitted that the sale deed executed in favour of the petitioner has not been cancelled, as such the order passed under Section 11 (2) of the Ceiling Act can not be set aside in appeal filed by the State. He further submitted that in respect to the remaining area of the same plot, another sale deed was executed by the then

recorded owner Laxmi Pratap Narayan Singh in favour of one Jagar Nath and Others and under similar circumstances his appeal was allowed by the Commissioner, as such the claim of the petitioner can not be refused by the Ceiling Authorities. He submitted that under the impugned appellate order dated 31.05.2002 the matter has been again remanded before the Prescribed Authority for fresh decision, which is illegal, as such the same is liable to be set aside and the order passed by the Prescribed Authority deserves to be maintained.

6. On the other hand, Sri Krishna Mohan Mishra, learned Additional Chief Standing Counsel, submitted that the objection under Section 11 (2) of the Ceiling Act filed by the petitioner has been allowed in arbitrary manner, as such the said order has rightly been set aside in appeal filed by State. He next submitted that petitioner has not taken any steps to get his name recorded in the revenue record on the basis of the sale deed executed on 10.03.1960, as such the sale deed relied upon by the petitioner can not be taken into consideration. He next submitted that by the appellate order the matter has been remanded back to the Prescribed Authority for fresh decision of the dispute, as such no interference is required in the matter. He further submitted that there was a delay in filing the appeal before the Commissioner, which has been properly explained in the affidavit filed in support of the appeal, accordingly the delay was rightly condoned by the appellate Court. He next submitted that no interference is required in the matter and the petition is liable to be dismissed.

7. I have considered the arguments advanced by the Counsel for the parties and the perused the record.

8. There is no dispute about the fact that objection under Section 11 (2) of the Ceiling Act filed by the petitioner was allowed by the Prescribed Authority, vide order dated 03.05.1994, and plot no. 156 area 0.5 Dismil was separated from the Ceiling proceedings. There is also no dispute about the fact that on a time-barred appeal filed by the State against the order dated 03.05.1994, the matter was remanded back before the Prescribed Authority for fresh decision of the objection filed under Section 11 (2) of the Ceiling Act.

9. In order to redress the controversy involved in the matter a perusal of Section 5 (1) Explanation I & II and the Ceiling Act will be relevant, which are as under:-

***Section 5 :- Imposition of Ceiling. - (1) [On and from the commencement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972], no tenure-holder shall be entitled to hold in the aggregate through-out Uttar Pradesh, any land in excess of the ceiling area applicable to him.***

***[Explanation I. - In determining the ceiling area applicable to a tenure-holder, all land held by him in his own right, whether in his own name, or ostensibly in the name of any other person, shall be taken into account.***

***Explanation II. - [If on or before January 24,1971, any land was held by a person who continues to be in its actual cultivatory possession and the name of any other person is entered in the annual 5 register after the said date] either in addition to or to the exclusion of the former and whether on the basis of a deed***

***of transfer or licence 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.]***

***Section 11(2)- The Prescribed Authority shall, on application made within thirty days, from the date of the order under sub-section (1) by a tenure holder aggrieved by such order passed in his absence and on sufficient cause being shown for his absence, set aside the order and allow such tenure-holder to file objection against the statement prepared under Section 10 and proceed to decide the same in accordance with the provisions of Section 12.***

10. Perusal of the aforementioned provision clearly demonstrates that the sale deed executed before 24.01.1971 can not be ignored by the Ceiling Authorities.

11. Perusal of relevant portion of finding of fact recorded by prescribed Authority will be relevant which is as under:-

**"न्यायालय नियत प्राधिकारी/अपर जिलाधिकारी (वि०/रा०) देवरिया।**

**सरकार । मुकदमा अन्तर्गत धारा 11 (2)**

**बनाम । सीलिंग अधिनियम निवासी**

**लक्ष्मी प्रताप नरायन सिंह । सा० अहिरौली राय, तप्पा- परवरपार**

**मृतक वारिस प्रा०न० सिंह आदि । पर०- सि०जो०, तह०- हाटा,**

**(आपत्तिकर्ता भूखल) । जिला देवरिया**

**निर्णय**

**……………………………………………… ……………………………………………… ……………………………………………… ………………………**

**मैंने आपत्तिकर्ता के विद्वान अधिवक्ता तथा राज्य सरकार के तरफ से विद्वान जिला शासकीय अधिवक्ता (माल) के तर्क को सुना तथा पत्रावली का सम्यक अवलोकन किया।**

**आपत्तिकर्ता के विद्धान अधिवक्ता की तरफ से यह कहा गया कि विवादित भूमि का बैनामा संशोधित सीलिंग अधिनियम लागू होने की नियत दिनांक 24.1.71 के बहुत पूर्व का है इसलिए इसे खातेदार की भूमि मानकर अतिरिक्त घोषित नहीं किया जा सकता। इसके विरोध में जिला शासकीय अधिवक्ता (माल) ने यह तर्क प्रस्तुत किया कि आपत्तिकर्ता द्वारा लिया गया बैनामा पुरानी सीलिंग अधिनियम के लागू होने की नियत तिथि दिनांक 20.8.1959 के बाद का है, इसलिए सीलिंग प्रयोजन के लिए इसे उपेक्षणीय समझा जाये।**

**मैंने पत्रावली का अवलोकन किया। आपत्तिकर्ता के विद्वान अधिवक्ता के कथन में बल है, क्योंकि खातेदार के विरूद्ध संशोधित सीलिंग अधिनियम के अन्तर्गत सीलिंग नोटिस जारी की गयी और इन्हीं नम्बरान के निस्फ रकबे के बावत जगरनाथ आदि ने आयुक्त गोरखपुर मण्डल, गोरखपुर के न्यायालय में सीलिंग अपील दायर किया था जिसे अपर आयुक्त न्यायिक, गोरखपुर मण्डल, गोरखपुर ने अपने निर्णय दिनांक 27.5.91 द्वारा संशोधित सीलिंग अधिनियम की नियत तिथि दिनांक 24.1.71 के पूर्व का बैनामा मानते हुए सीलिंग नोटिस से पृथक करने का आदेश पारित कर**

**दिया है। उसी के निस्फ रकबे को सीलिंग नोटिस में बने रहने का कोई औचित्य नहीं रह जाता है।**

**<u>आदेश</u>**

**उपर्युक्त विवेचना के आधार पर आपत्तिकर्ता की आपत्ति धारा 11 (2) स्वीकार की जाती है तथा गाटा संख्या 156 मि०/0-50 डि० जानिब उत्तर आपत्तिकर्ता भूखल की भूमिधरी की आराजी मानते हुए खातेदार लक्ष्मी प्रताप नरायन सिंह की सीलिंग नोटिस से पृथक किया जाता है। आदेश की एक प्रति प्रभारी अधिकारी सीलिंग/तहसीलदार हाटा को आवश्यक कार्यवाही हेतु भेजी जावे। वाद अनुपालन पत्रावली दाखिल दफ्तर हो।**

**दिनांक - 3.5.94**

**ह० अप०**

**(राज कुमार सचान) नियत प्राधिकारी/अपर जिलाधिकारी (वि०/रा)**

**देवरिया।**

12. The objection under Section 11 (2) of the Ceiling Act filed by the petitioner on the basis of registered sale deed executed in his favour before the relevant date was allowed after hearing the objector as well as the State, as such the order of prescribed Authority dated 03.05.1994 can not be set aside in appeal unless there is sufficient evidence before Appellate Court. The appeal filed by the State after five years from the date of judgment passed by the Prescribed Authority under Section 11 (2) of the Ceiling Act has been allowed by Appellate Court and the matter has been remanded back before the prescribed Authority for fresh consideration, which is abuse of process of law, as the Prescribed Authority has already decided the objection of the petitioner on merit taking into consideration the sale deed executed in year 1960, which has yet not been cancelled. It is also material that appeal filed in similar situation on the basis of the sale deed executed by the Laxmi Pratap Narayan Singh in favour of another person in respect to the remaining area of the same plot has been allowed by the Commissioner.

13. **Hon'ble Apex Court** in the case reported **in 1994 (Supp3) SCC 702 Ramadhar Singh Versus prescribed Authority and Others** has held that sale-deed executed prior to 29.01.1971 can not be ignored paragraph no. 2 of the judgment rendered in Ramadhar Singh (Supra) will be relevant for perusal, which is as under:-

***2. "It has to be seen under what provision of the Act can the validity of the sale executed prior to January 24, 1971, the appointed day, be gone into? Sub-section (6) of Section 5 of the said Act says that in January, 1971, which but for the transfer would have been declared as surplus land under the Act shall be ignored and not taken into account. The proviso (b) thereto, inter alia, provides that a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and an irrevocable instrument, not being of benami transaction or for immediate or deferred benefit for the tenureholder or other members of the family, is outside the scope fo the aforesaid sub-section. Thereafter explanation II provides that the burden of proving that a case falls within clause (b) of the proviso shall rest with the party claiming its benefit. Apparently, it is under this provision of law that the validity of the sake deed dated April 22, 1969 was put to test. The***

***authorities under the Act took the view that the sale deed was not genuine because no consideration appears to have passed before the Sub-Registrar and that it was a transfer between father and son raising a dust of suspicion. Otherwise it was not disputed on fact that the sale had been effected by means of a registered deed in which the passing of consideration was mentioned as a recital. The existence of the sale deed being not disputed and it having taken place, as said before, on February 24, 1969, prior to the appointed day that is January 24, 1971, the inquiry regarding the validity of the sale deed under sub-section (6) of Section 5 was totally misplaced. Thereunder, as it appears to us, the appropriate authority had no jurisdiction to be put the validity of the sale deed to test since his jurisdiction arose only when the deed of transfer had been effected on or after the appointed day. Not only the first and the appellate authority under the Act persisted in that view, but the High Court tooo proceeded on that basis. The effort of the appellant to have it declared that the authorities had no jurisdiction to in validate the sale under sub-section (6) of Section 5 when read with Explanation II to sub-section (1) of Section 5 also was a futile attempt because the High Court followed the path, as did the authorities under the Act, and rejected the writ petition. We are of the view that this was a wholly erroneous approach. Sub-section (6) of Section 5 did not confer jurisdiction on the authorities to determine the validity of the sale and if that is so any finding of theirs as to the contents of the sale is of no assistance. In the result the appeal must succeed. Accordingly, allowing the same we set aside all the orders of the authorities below as also that of the High Court.***

14. Considering the findings recorded by the Prescribed Authority under Section 11 (2) Ceiling Act while allowing the objection filed by the petitioner, there was no occasion for the Commissioner to allow the appeal filed by the State and remand the matter back before Prescribed Authority for fresh consideration of the objection. The remand order passed by the Commissioner in appeal is nothing, but abuse of the process of law.

15. Considering the entire facts and circumstances of the case as well as ratio of law laid down by Hon'ble Apex Court in Ramadhar Singh (Supra) the impugned appellate order dated 31.05.2022 is hereby set aside and order of the Prescribed Authority dated 03.05.1994 is affirmed.

16. The writ petition stands **allowed**.

17. No order as to costs.

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**(2024) 7 ILRA 311**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 10.07.2024**

**BEFORE**

**THE HON'BLE MAHESH CHANDRA TRIPATHI, J.**
**THE HON'BLE ANISH KUMAR GUPTA, J.**

Writ C No. 38069 of 2022
And
Writ C No. 2674 of 2023

**M/s Shakuntla Educational & Welfare Society ...Petitioner**

**Versus**

**Yamuna Expressway Industrial Development Authority ...Respondent**

**Counsel for the Petitioner:**
Sri Ashish Kumar, Sri Sunil Gupta (Sr. Advocate), Sri Anurag Khanna (Sr. Advocate)

**Counsel for the Respondents:**
C.S.C., Sri Raj Kishore, Sri Aditya Bhushan Singhal, Sri Zain Mazbool, Sri Pranav Tandon, Sri Abhay Pratap Singh, Sri Manish Goyal (Sr. Advocate)

**A. Land Acquisition Law – Additional Compensation – Interest on compensation - Land Acquisition Act, 1894 - Sections 17 & 5A - Societies Registration Act, 1860 - Interest Act, 1978 - Section 2(c) - Recovery of Debts and Bankruptcy Act, 1993 - Section 2(g) - The Galgotias University Uttar Pradesh Act, 2011 - Civil Procedure Code, 1908 - Order II Rule 2 & Section 11 Explanation IV.**

On the recommendations submitted by the Committee constituted under the chairmanship of Hon'ble Jail Minister Sh. Rajendra Chaudhary, the Government Order No. 1015/77-3-14-6C/12 dated 29.08.2014 has been issued by the Government, vide which, directions to pay 64.7% extra compensation as no litigation incentive on the compensation paid towards the land acquisition or direct purchase of land within the area of Authority, have been received. (Para 11)

The G.O. in question provided that the farmers should be offered 64.7% additional amount on the condition that they withdraw their petitions challenging the acquisition proceedings and undertake not to institute any litigation and create any hindrance in the development work of YEIDA. It was also clarified in the G.O. in question that the Government would not bear the burden of the additional amount. The G.O. in question was placed before the Board of YEIDA in its 51st Board Meeting held on 15.09.2014 and the same was approved in the said meeting on the very same day vide Resolution dated 15.09.2014. (Para 10)

Present writ petition is preferred against the demand of Rs.33.04 crores alleged and described as "No Litigation Incentive/ 64.7% Additional Compensation" in the impugned letter dated 20.09.2022 (consequential demand notice). It appears that some other demands have also been mentioned by YEIDA in the same letter, namely, Differential Amount @ Rs.1041/- per sq. m. and External Development Charges (EDC). (Para 72)

**It is obligatory on the St. to ensure that people are adequately compensated for the transfer of resource to the private domain. When the change in the policy of the St. is in public interest, it will override all private agreements entered into by the St..** (Para 75)

**As an instrumentality of the St., YEIDA is legally bound to implement the directives of the Supreme Court, once the same serve a public duty by ensuring the equitable distribution of additional compensation among affected farmers. This legal framework mandates YEIDA's compliance to uphold social justice and public interest, reinforcing the status of G.O. in question as lawful enactment in the pursuit of its statutory obligations.** Petitioner's attempt to contest the additional compensation and the associated levy of interest through repeated litigation is to be seen in the light of these constitutional provisions. Moreover, once the Supreme Court had validated the GO in question as well as the Board Resolution in question, therefore, the duty is cast upon YEIDA to enforce the GO and Board Resolution in question in their entirety. Pick and choose policy cannot be adopted by YEIDA. (Para 80)

**B. It is well settled that Order 2 Rule 2 CPC requires the unity of all claims based on the same cause of action in one suit, it does not contemplate unity of distinct and separate cause of action.** The earlier proceeding, which were drawn by the petitioner while filing the earlier writ petition, wherein he has challenged the demand of 2014 and the GO as well as Resolution in question, the same was put at rest by the Supreme Court on 19.05.2022 in *Yamuna Expressway (infra).* Subsequently, present proceeding has been drawn in the year 2022. Considering the relief, no fresh cause of

action arose between first proceeding and second proceeding. (Para 93)

**If the petitioner is entitled to seek relief against YEIDA in respect of the same cause of action, the petitioner cannot split up the claim so as to omit one part to the claim and sue for the other cause i.e. interest in the subsequent petition.**

The penal interest was shown in the first demand as well as interest and penal interest were also indicated in the second demand of the year 2018 due to alleged default of the petitioner. The subsequent (third) notice has been challenged in the present proceeding. Surprisingly earlier petition was filed in the year 2018 and at the same time it was known to the petitioner *qua* interest and penal interest. After finalisation of the earlier proceeding and approval of demand of YEIDA based upon GO and the Resolution in question, present proceeding has been drawn questioning the validity of impugned demand letter dated 20.9.2022 sent by YEIDA to the extent that the said letter pertains to demand of 64.7% additional compensation (inasmuch as other demands mentioned in the letter already stand challenged by way of other legal remedies adopted by the petitioner as St.d in the present writ petition). Alternatively, it had also been prayed for a direction to YEIDA not to recover from the petitioner any amount other than the amount of 64.7% additional compensation. **The impugned demand notice dated 20.9.2022 is only reiteration of earlier first and second demand notices of the year 2014 and 2018 respectively.** (Para 94)

**<u>Order 2 Rule 2 CPC</u> provides that every proceeding (suit) shall include the whole of the claim, which the petitioner (plaintiff) is entitled to make in respect of same cause of action. The petitioner is not entitled to split the cause of action into parts by filing separate proceedings (suits).** The petitioner had not omitted present relief but infact challenged the demand letter in the light of G.O. in question and resolution in question in the previous litigation. Even in such situation, it cannot be presumed that the petitioner had omitted certain reliefs, which they want to press in the present proceeding. Present relief was available to the petitioner and infact it had also been challenged in the previous proceeding, therefore, it cannot be permitted to reagitate the same cause of action in the subsequent writ petition. The object of Order 2 Rule 2 CPC is to avoid multiplicity of proceedings and not to vex the parties again and again in a litigative process. The object is very noble and laudable and it has a larger public purpose to achieve by not burdening the court with repeated proceedings. (Para 95)

**C. The <u>Principle of restitution</u> is founded on the ideal of complete justice, entitling the successful party to compensation, including interest, for the period it was deprived of its lawful dues.**

**The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement.** At this stage, it is not amenable to the petitioner to press the relief that the interest cannot be charged except in accordance with law. The G.O. in question, Resolution in question and subsequent demand notice had been approved by the Supreme Court and the interest is also payable in equity in certain circumstances. (Para 87)

In the present case, the petitioner is liable to pay interest on additional compensation during the pendency of litigation initiated by it, as per the <u>doctrine of restitution</u> upheld by the Hon'ble Supreme Court. The interest acts as compensation for the period during which the petitioner was unjustly enriched by withholding the lawful dues owed to YEIDA. Interest on the additional compensation can be claimed by YEIDA as part of <u>equitable restitution</u>, given that the petitioner benefited from the interim relief granted during the litigation. (Para 101)

**D. The directives (GO and Resolution) derive their legal force from the Constitution and must be treated with the same deference as statutory law - G.O. in question as well as Board Resolution in question, having been held to serve a larger public interest, constitute "law"**

**within the meaning of Article 13(2) r/w Article 13(3)(a) of the Constitution.**

**In the present matter, the G.O. in question as well as Board Resolution in question are not only lawful but also essential *qua* equitable and efficient administration of public policy.** Once the additional compensation has decisively been settled by the Supreme Court in *Yamuna Expressway (infra)* and the Board Resolution in question does contain a provision for payment of interest, particularly in view of G.O., which entitles YEIDA to levy not only interest but the penal interest upon the allottees, the same were also reflected from all the three demand notices, the same has binding effect to be enforced by YEIDA in the pursuit of its statutory obligations. (Para 80)

The first demand notice was given to the petitioner on 15.12.2014 and once G.O. as well as Board Resolution were upheld by the Supreme Court in *Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & ors. (infra),* which mandates the payment of additional compensation as part of the land allotment cost, therefore, the directives in the said judgment are authoritative and legally binding and established the petitioner's obligation to pay both principal and interest on the delayed payment. The conduct of the petitioner was not *bonafide* as it never made any payment, following the first demand notice dated 15.12.2014. Only part payment of Rs.15 crores was made only in compliance of the interim order dated 05.01.2023 (vide interim order in question dated 05.01.2023, the Coordinate Bench had dismissed the challenge to the additional compensation on the ground of proportionality and quantum and only on the issue of interest, the response was asked from YEIDA). The record clearly reflects that at no point of time prior to interim order in question the petitioner was ever inclined to deposit even the additional compensation. (Para 84, 86)

Petitioner is also liable to pay penal interest from the date of accrual of demand till the date of actual payment, as mandated by the Supreme Court in *Yamuna Expressway (infra)* and non-compliance thereof attracts the imposition of penal interest as a lawful consequence. **YEIDA's issuance of demand notices and enforcement of the G.O. in question and Board Resolution in question constitute acts in aid of the Supreme Court's order. YEIDA's actions align with its constitutional obligation to uphold the rule of law and facilitate the implementation of judicial directives.** Conversely, the petitioner has consistently disregarded the legal obligations inspite of the mandate in *Yamuna Expressway (infra)*. (Para 102)

**E. While common law provisions like the Interest Act and Contract Act provide a supplementary framework, they do not supersede the constitutional directives governing the imposition of additional compensation in this case**. The G.O. in question and Board Resolution in question, upheld by the Supreme Court, override the lease deed and establish a higher legal authority integrating principles of justice, equity, and public interest. The petitioner's claim of unjust enrichment on YEIDA's part is unsubstantiated and lacks merit. The interest levied is a legitimate exercise of YEIDA's rights under the law and serves as compensation for the delay in fulfilling a lawful obligation, rather than being an unjust benefit. (Para 103)

**F. The Petitioner's claim of charitable status and financial hardship are contradicted by their operational practices, which suggest a profit-driven approach. Nonetheless, these claims cannot override their legal obligations or the constitutional mandate in the public interest.** In the interest of justice, equity, and the larger public good, it is imperative that the petitioner adheres to the lawful demands. (Para 105)

**The educational institution cannot be exempted from obligation to pay additional compensation as this could create an unfair disparity among farmers, whose land has been acquired. Moreover all the farmers are entitled to equal compensation irrespective of any use of land by the allottees.** (Para 89)

**Object of the 51st Board Resolution** was to pay additional compensation to the farmers and even in case of allottees, who did not agree to pay additional compensation, leave was accorded to them to surrender the plot and get refund of the deposited amount (other than penal interest) along with interest @ 6% p.a. However, no such endeavour or serious efforts reflected from the record that the petitioner was even willing to pay up the additional compensation. (Para 90)

**In view of the uncontroverted facts, the issue w.r.t. liability of petitioner for payment of additional compensation to be paid to the farmers has been set at rest.** Therefore, the computation made by YEIDA while raising the first demand in the year 2014 and later on through second demand of the year 2018 is no longer *res integra* in view of the judgment in *Yamuna Expressway (infra)* (in *Yamuna Expressway (infra),* the G.O. in question; resolution in question as well as the demand notice of the year 2014 was approved by the Supreme Court). (Para 92)

Petitioner's plea of being an educational institute and the absence of an undertaking to pay future liabilities cannot be considered valid, as this argument was already dismissed by Hon'ble Supreme Court in *Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & ors. (infra).* The said judgment did not recognize any exemption for educational institutions regarding the liability to pay additional compensation. Moreover, the Petitioner's claim of having meagre sources of income contradicts the information available on their official website, which clearly suggests that the petitioner is focused on profit making through undisclosed fees for premium amenities. There is nothing on record to convince us that the petitioner is not indulged in profit making. Moreover, all the farmers are entitled to equal compensation irrespective of any use of land. (Para 36, 56, 59, 70, 104)

**G. The principles of constructive *res judicata* further reinforce the finality of the matter, precluding the petitioner from re-litigating settled issues (issue of interest on additional compensation, as it was an integral part of the cause of action in the earlier litigation).** Continued defiance would not only undermine the authority of the judiciary but also impede the timely fulfillment of YEIDA's public duty to disburse the additional compensation to the farmers. We find that YEIDA's actions in levying interest and demanding additional compensation are legally justified and essential for upholding legal obligations in the public interest, and ensuring equitable treatment of all stakeholders involved. (Para 92, 103, 106)

**The principle of *res judicata* fully operates in the court proceeding. It is the courts, which are prohibited from trying the issue, which was directly and substantially in issue in the earlier proceedings between the same parties, provided the court trying the subsequent proceeding is satisfied that the earlier court was competent to dispose of the earlier proceedings and that the matter had been heard and finally decided by such court.** While deciding the matter by the Supreme Court, not only G.O. in question and resolution in question but the demand notices were also under challenge and the matter had been heard and finally decided by the Supreme Court. In the instant case, the parties were the same. Hon'ble Supreme Court was competent to decide the issue, which it did with a reasoned order on merits after the contested hearing. In the earlier proceeding, the ground of interest and penal interest were also the subject matter in view of the first and second demand notice, which the YEIDA claimed and the Supreme Court had approved the G.O. in question and the Resolution in question, therefore, the decision was final and at present it is not open to the petitioner to reagitate the issue. **Since the relief, as has been prayed for, is already negated by the Supreme Court, therefore, at this stage, the petitioner cannot be permitted to turn back and challenge the demand on the ground that the liability, rate, period etc. of interest had not been disclosed in G.O. in question, Resolution in question and YEIDA's demand notices. The principles of *res judicata* laid down u/s 11 CPC including**

**the principles of constructive *res judicata* are applicable in the present matter.** [*Details of earlier litigation in Para 83, 91, 96*] (Para 97, 98, 99)

**The principles of restitution, public interest, and the rule of law converge to uphold YEIDA's demand for additional compensation and the interest thereon.** Petitioner's contentions lack legal and factual merit, as they disregard the binding nature of the Supreme Court's judgments and the constitutional framework governing YEIDA's actions. The petitioner's repeated attempts to evade its lawful obligations jeopardize the distribution of additional compensation intended for the affected farmers. The government directives, validated by the Hon'ble Apex Court, serve as a bulwark against such actions, ensuring that the benefits reach their rightful beneficiaries. (Para 105)

**H. Words and Phrases – (1) *'Debt'*** – 'Debt' has been defined in **Section 2 (c) of Interest Act**, to be a '**liability** for an ascertained sum' and has been held by the courts to mean a fixed and determined sum agreed and known to both the parties i.e. known not only to the party claiming the sum but also known from before to the party said to be liable so that it constitutes an obligation of the latter party to pay the sum. Such pre-existing knowledge of both the parties can be either owing to an agreement or adjudication of a dispute. An ascertained or known 'debt' is a jurisdictional pre-condition for the grant of interest u/s 3 of Interest Act. If there is no such 'debt', no interest can be awarded. **A demand of any sum unsupported by any statute, contract, usage or implied agreement and made unilaterally by any person would not be covered by the word 'liability' in Section 2 (c) r/w Section 3 of interest Act for award of interest.** (Para 26)

**Recovery of Debts and Bankruptcy Act, 1993: Section 2 (g) - 'debt'** means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution…..". (Para 27)

**(2) 'law' - Article 13(3)(a) of the Constitution of India** elaborates that "law" includes any Ordinance, order, bye-law, rule regulation, notification, custom, or usage having the force of law in India. (Para 52)

**Both the writ petitions dismissed**. (E-4)

**Precedent followed:**

1. Gajraj Vs St. of U.P., 2011 SCC OnLine All 1711 (Para 7)

2. Savitri Devi Vs St. of U.P., (2015) 7 SCC 21 (Para 7)

3. Shakuntla Educational and Welfare Society Vs St. of U.P. & ors., 2020 SCC OnLine All 676 (Para 16)

4. Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & ors., 2022 SCC OnLine SC 655 (Para 17)

5. Eureka Forbes Ltd. Vs Allahabad Bank, (2010) 6 SCC 193 (Para 27)

6. Jyothi Ltd. Vs Boving Fouress, 2000 SCC OnLine Karn 832 (Para 27)

7. Viva Highways Vs MP RDC, AIR 2017 MP 103 (Para 27)

8. U.O.I.Vs A.L. Rallia Ram, 1963 SCC OnLIne SC 132 (Para 27)

9. Central Bank of India Vs Ravindra & ors., (2002) 1 SCC 367 (Para 27)

10. Secretary, Irrigation Department, Government of Orissa & ors. Vs G.C. Roy, (1992) 1 SCC 508 (Para 28)

11. LIC of India & anr. Vs S. Sindhu, (2006) 5 SCC 258 (Para 29)

12. Bengal Nagpur Railway Co. Vs Ruttanji Ramji, AIR 1938 PC 67 (Para 31)

13. Seth Thawardas Pherumal Vs U.O.I., AIR 1955 SC 468 (Para 31)

14. U.O.I.Vs A.L. Rallia Ram, AIR 1965 SC 1685 (Para 31)

15. U.O.I.Vs West Punjab Factories, AIR 1966 SC 395 (Para 31)

16. V.V.S. Sugars Vs St. of AP (CB), (1999) 4 SCC 192 (Para 34)

17. Shree Bhagwati Steel Rolling Mills Vs CCE, (2016) 3 SCC 643 (Para 34)

18. Celir LLP Vs Bafna Motors (Mumbai) Pvt. Ltd. & ors., (2024) 2 SCC 1 (Para 35)

19.NTPC Ltd. Vs M.P. St. Electricity Board & ors., (2011) 15 SCC 580 (Para 35)

20. T.M.A. Pai Foundation Vs St. of Karn., (2002) 8 SCC 481 (Para 35)

21. S.B.I. Vs Gracure Pharmaceuticals Ltd., (2014) 2 SCC 959 (Para 44)

22. Indore Development Authority Vs Manoharlal & ors., (2020) 8 SCC 129 (Para 48)

23. South Eastern Coalfields Ltd. Vs St. of M.P., (2003) 8 SCC 661 (Para 49)

24. Pradeep Kumar Biswas Vs Indian Institute of Chemical Biology, (2002) 5 SCC 111 (Para 52)

25. H.C. Narayanappa Vs St. of Mysore, AIR 1960 SC 1073 (Para 53)

26. Smyth Vs U.S., 302 U.S. 329 (Para 63)

27. Bangley Const. Development & Engineering Inc. Vs All Phase Elec. & Maintenance, Inc., 562 So. 2d 800 (Para 63)

28. Arnold Rodricks Vs St. of Mah., 1966 SCC OnLine SC 62 (Para 66)

29. St. of Bombay Vs BhanjiMunji, (1954) 2 SCC 386 (Para 66)

30. Forward Constructions Co. Vs Prabhat Mandal (Regd.), (1986) 1 SCC 100 (Para 67)

31. Direct Recruit Class II Engg. Officers'Assn. Vs St. of Mah., (1990) 2 SCC 715 (Constitution Bench) (Para 67)

32. Sarguja Transport Service Vs S.T.A.T., (1987) 1 SCC 5 (Para 67)

33. Kantaru Rajeevaru (Sabarimala Temple Review -5 J.) Vs Indian Young Lawyers Assn., (2020) 2 SCC 1 (Para 68)

34. Spencer & Co. Ltd. Vs Vishwadarshan Distributors (P) Ltd., (1995) 1 SCC 259 (Para 68)

35. St. of Tamil Nadu Vs St. of Karn. & ors., (2016) 10 SCC 617 (Para 68)

36. U.O.I.Vs Colonel L.S.N. Murthy & anr., (2012) 1 SCC 718 (Para 69)

37. Pharmacy Council of India Vs Rajeev College, (2023) 3 SCC 502 (Para 69)

38. Bijoe Emmanuel Vs St. of Kerala, (1986) 3 SCC 615 (Para 69)

39. U.O.I.Vs Naveen Jindal, (2004) 2 SCC 510 (Para 69)

40. Unni Krishnan, J.P. Vs St. of U.P., (1993) 1 SCC 645 (Para 70)

41. South Eastern Coal Fields Vs St. of M.P., (2003) 8 SCC 648 (Para 71)

42. Centre for Public Interest Litigation Vs U.O.I., (2012) 3 SCC 1 (Para 75)

43. Narmada Bachao Andolan Vs U.O.I., (2000) 10 SCC 664 (Para 75)

44. Dr. Sham Lal Narula Vs Commissioner of IncomeTax, Punjab, AIR 1964 SC 1878 (Para 86)

45. T.N. General & Distribution Corpn. Ltd. Vs PPN Power Generating Co. (P) Ltd., (2014) 11 SCC 53 (Para 88)

46. M.P. Palanisamy & ors. Vs A Krishnan & ors., 58 (2009) 6 SCC 428 (Para 97)

47. Pondicherry Khadi & Village Industries Board Vs P. Kulothangan & ors. (2004) 1 SCC 68 (Para 97)

48. K. Ethiajan (dead) by Lrs. Vs Lakshmi & ors., (2003) 10 SCC 578 (Para 99)

49. Gorte Gouri Naidu (minor) and Anr. Vs Thandrothu Bodemma & ors., (1997) 2 SCC 552 (Para 99)

**Present petition assails demand letter dated 20.09.2022 sent by YEIDA to the extent that the said letter pertains to the demand of 64.7% Additional Compensation (inasmuch as other demands mentioned in the letter already stand challenged by way of other legal remedies adopted by the petitioner).**

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri Sunil Gupta & Sri Anurag Khanna, learned Senior Advocates assisted by Shri Ashish Kumar for the petitioner in Writ-C No.38069 of 2022 and Shri H.N. Singh, learned Senior Advocate assisted by Shri Ashish Kumar for the petitioner in connected Writ-C No.2674 of 2023; Shri Manish Goyal, learned Senior Counsel assisted by S/Sri Aditya Bhushan Singhal, Zain Mazbool, Pranav Tandon and Abhay Pratap Singh, learned counsel for Yamuna Expressway Industrial Development Authority1 and Shri Ambrish Shukla, learned Addl. Chief Standing Counsel along with Shri Fuzail Ahmad Ansari, learned counsel for the State respondents in both the writ petitions.

2. The Writ-C No.38069 of 2022 has been preferred by the petitioner under Art.226 of the Constitution of India, seeking the following reliefs:-

*"(i) Issue a writ of certiorari calling for the records of the petitioner and quashing demand letter dated 20.09.2022 sent by YEIDA (Annexure 1) to the extent that the said letter pertains to the demand of 64.7% Additional Compensation (inasmuch as other demands mentioned in the letter already stand challenged by way of other legal remedies adopted by the petitioner as stated in para 5 of the present writ petition).*

*(ii) Issue a writ of declaration that YEIDA is not entitled to recover any amount as 64.7% additional compensation unless it has first fixed the factors and, applying those factors, decided the sum, if any, for collecting such compensation from the petitioner on the basis of the principle of proportionality as enunciated in the Full Bench judgment of High Court dated 25.8.2011 in the Gajraj case and mandated in GO dated 29.8.2014 read with judgment of Supreme Court dated 19.05.2022 in the case of YEIDA v. Shakuntala Educational Welfare Society*

*AND*

*In the alternative, issue a writ of mandamus directing YEIDA not to recover from the petitioner any amount other than an amount of 64.7% additional compensation @ Rs.517.60 per sq. mtr. for its plot of 2023500 sq. m."*

3. The Writ-C No.2674 of 2023 has been preferred by the petitioner under Art.226 of the Constitution of India, praying for following reliefs:-

*"(I) To issue a writ, order or direction in the nature of certiorari calling for the records of the case and quashing the impugned demand notice dated 20.09.2022 (Annexure 1) sent by the Respondent no.2 to the extent that the said notice pertains to the demand of 64.7% Additional Compensation.*

*(II) To issue a writ, order or direction in the nature of a writ of mandamus directing the respondent no.2 to not to recover from the petitioner any*

*amount by way of interest on the alleged amount of Additional Compensation."*

4. Since the controversy involved in both the writ petitions are similar, with the consent of parties, they are being decided by this common judgment and the facts of Writ-C No.38069 of 2022 are being taken as a leading case for deciding the controversy.

**BRIEF HISTORY OF THE LITIGATION**

5. This much is averred that a vast area of land was acquired by the State of Uttar Pradesh in District Gautam Budh Nagar for public purposes. The said area of land was acquired for the benefit of YEIDA. After the land was acquired, YEIDA invited applications for the allotment of plots in the area developed by it. In response to the notice inviting applications for such allotment, various allottees including the petitioner applied.

6. The petitioner is a society registered under the Societies Registration Act, 1860 having the aim and object of imparting education. The YEIDA allotted a plot of land viz. Plot No.02, Sector 17A to the petitioner having an area of 50 acres, which is equivalent to 2,02,350 sq. mtr. (@ Rs.1055/- per sq. mtr.) situated on Yamuna Expressway, Gautam Budh Nagar by means of Allotment Letter dated 10.12.2009. Finally in terms of the allotment letter, lease deed was executed in favour of the petitioner-institution on 22.01.2010 for a period of 90 years for institutional purpose namely establishing a private University. The lease deed further provided that in addition to the amount payable by the petitioner, as mentioned in the allotment letter, a further amount i.e. 2.5% of the total premium of the plot was payable as annual lease rent. Consequently, over the said plot, Galgotias University was constructed as per the purpose for which the plot was allotted.

7. The State of U.P. had also made large scale acquisition of lands for the benefit of New Okhla Industrial Development Authority2 and Greater Noida. Against the said acquisition, a large number of writ petitions were filed before this Court by the farmers on various grounds. The ground of attack in the said proceeding was invocation of urgency clause under Section 17 of the Land Acquisition Act, 18943 and the dispensation of enquiry under Section 5A of the L.A. Act. All the said writ petitions were decided by the Full Bench of this Court vide its judgment and order dated 21.10.2011 with leading case viz. **Gajraj v. State of U.P.4.** The Full Bench had held that the urgency clause ought not to have been invoked and the farmers were unlawfully denied the benefit of Section 5A of the L.A. Act as there was no plausible reason for invocation of Section 17 of the L.A. Act. However, taking into consideration the subsequent developments that the lands had already been developed and third party rights had accrued, the Full Bench in Gajraj (Supra) considered it appropriate not to disturb the acquisition. In order to balance the equities, the Full Bench directed payment of additional compensation of 64.7% plus some other benefits to the farmers. The aforesaid judgment of Full Bench in Gajraj (Supra) was approved by Hon'ble Supreme Court in **Savitri Devi v. State of Uttar Pradesh5**.

8. As the farmers, whose lands were acquired for the benefit of Noida and

Greater Noida, were paid additional compensation of 64.7%, there was unrest amongst the farmers, whose lands were acquired for YEIDA. They also started agitating and demanding similar treatment. In this connection, more than 600 writ petitions were filed in the High Court and various interim orders were also passed. As a result of which, vast stretches of lands could not be developed. The said factual situation was communicated to the State Government by the then Chief Executive Officer on 10.04.2013 apprising the ground realities and the agitations launched by the affected farmers.

9. On 03.09.2013, the State Government had constituted a High-Level Committee under the Chairmanship of Shri Rajendra Chaudhary, Minister of Prison, State of U.P.6. The Chaudhary Committee submitted its recommendations to the State Government recommending for the payment of 64.7% additional amount as "no litigation incentive" to the farmers and for its reimbursement from the allottees in the appropriate proportion. The State Government had accepted the recommendations of the Chaudhary Committee and issued a Government Order dated 29.08.20147.

10. The G.O. in question provided that the farmers should be offered 64.7% additional amount on the condition that they withdraw their petitions challenging the acquisition proceedings and undertake not to institute any litigation and create any hindrance in the development work of YEIDA. It was also clarified in the G.O. in question that the Government would not bear the burden of the additional amount. The G.O. in question was placed before the Board of YEIDA in its 51st Board Meeting held on 15.09.2014 and the same was approved in the said meeting on the very same day vide Resolution dated 15.09.20148. For ready reference, the G.O. in question is reproduced as under:-

*"Important*
*No. 1015/77-3-14-6C/12*

*From,*
*Anil Kumar*
*Under Secretary*
*Government of U.P.*
*To,*
*The Chief Executive Officer*
*Yamuna Industrial Development Authority*
*Sector- Omega-1, Greater Noida City*
*Gautambudhnagar.*

*Industrial Development Section-1*
*Lucknow,*
*Dt. 29th August, 2014*

*Subject: Regarding grant of 64.7% additional compensation to the farmers affected by land acquisition in Notified Area of Yamuna Expressway Industrial Development Authority.*

*Sir,*

*After due consideration, regarding the implementation of recommendations of Committee constituted under the chairmanship of Sh. Rajendra Chaudhary, Hon'ble Minister, Jail vide Office Memorandum No 4/4/2/2013-C.X.(1) dated 03.09.2013 of Confidential Section-1 for giving recommendations regarding resolving the problems of the villagers of notified areas of the Noida, Greater Noida, Yamuna Expressway Industrial Development Authority i.e. District-Gautambudhnagar, Bulandshahar, Hathras, Aligarh, Mathura and Agra, demands raised by the farmers'*

*representatives/organizations and the problems of farmers related to acquisition of land of any particular industry or any other Industrial Area, the following decision has been taken by the Government:-*

*(1) In the common order passed in the different Writ Petitions filed by Noida and Greater Noida Authorities, the Hon'ble High Court by not finding the proceedings conducted under Section 17 of Land Acquisition Act, 1894 to be proper, had directed that the Authority shall pay 64.7% additional compensation to the farmers and return them 10% developed land. Also in the Yamuna Expressway Authority, around 700 Writ Petitions have been filed by the farmers by challenging the different notifications, wherein, stay orders have been passed in the most of the Petitions, the circumstances which were existing in the acquisition made by Noida and Greater Noida Authority, same circumstances are also existed in the most of the cases of acquisition of Yamuna Expressway. The lands acquired by the Authority, have been allotted to the different allottees for different projects, due to which, the third party rights have been created in this acquired land and if order is passed against the Authority in the Petitioners filed against the Acquisition Proceedings, then, many difficulties would arise Therefore, keeping in view the legal expected legal complications, it is required to do the out of court settlement with the affected farmers. At the time of discussion, it was assured by the farmers' representatives that if the Government/ Authority agrees to give 64.7% additional compensation, then, the farmers will withdraw the Petitions filed in the Court,*

*(2) If, all the farmers/ Petitioners of a village related to the land acquired/ purchased by the Yamuna Expressway Authority, withdraw their Petitions filed in the Hon'ble High Court or in any other Court and if they give written assurance for future that they will not file any claim against the Authority or it's allotee in any Court and will not cause any obstruction in the Development Works, then, like the Greater Noida Authority, the Authority may consider to give amount equivalent to 64.7% additional compensation in the form of No Litigation Incentive/Additional Compensation, which may be concerned allottees and same may also be imposed proportionally in the costing of allotment of land available with the Authority.*

*(3) These benefits will be allowed also to those farmers, whose' lands have been purchased by the Authority vide Sale Deed on mutual consent basis.*

*(4) The process of payment of additional compensation, be completed Villagewise in accordance with the Schemes/Priorities of Authority after obtaining physical possession of on the spot and after withdrawal of all the Writ petitions/ Cases of concerned village after doing settlement with the farmers. In view of the financial condition of Authority, if the payment of additional compensation is not possible in lumpsum, then, the consideration could also be made regarding payment in installments or in the form of developed land)*

*(5) The aforementioned additional benefits be granted to the landowners only in that case when they will handover the physical possession of land to the Authority and withdraw Writ Petition/Case pending in Hon'ble High Court or any other Court and agreement for not causing any obstruction in future in the development works of allottees and for not filing any claim in any Court against the acquisition of land in future. The expenses to be accrued on the additional*

*compensation will be borne by the Authority itself from it's own sources and no financial aid will be granted by the State Government.*

*(6) If, the Government receives other recommendations of the Committee constituted under the chairmanship of Sh. Rajendra Chaudhary, Hon'ble Minister, Jail vide Office Memorandum No 4/4/2/2013-C.X.(1) dated 03.09.2013 of Confidential Section-1 for giving recommendations regarding resolving the problems of the villagers of notified areas of the Noida, Greater Noida, Yamuna Expressway Industrial Development Authority i.e. District- Gautambudhnagar, Bulandshahar, Hathras, Aligarh, Mathura and Agra, demands raised by the farmers' representatives/organizations and the problems of farmers related to acquisition of land of any particular industry or any other Industrial Area, then, Hon'ble Chief Minister will be authorized for taking decision on the same.*

*2. In this regard, I have been directed to say that kindly ensure to conduct the aforementioned proceedings regarding grant of 64.70% additional compensation to the affected farmers of notified area of Yamuna Expressway Industrial Development Authority.*

*Regards,*
*Sd/-*
*(Anil Kumar)*
*Under Secretary*
*TRUE TRANSLATION COPY"*

11. For ready reference, the Resolution in question is also reproduced as under:-

*"ITEM/NO. 51/04: Recommendations of High Level Committee constituted under the chairmanship of Hon'ble Minister Sh. Rajendra Chaudhary for analysis of demands of farmers of Yamuna Expressway Authority Area and for disposal of their problems and regarding conducting further proceedings in compliance of the Government Order No. 1015/77-3-14-6C/12 dated 29.08.2014 issued by the Government of U.P. in that continuation.*

*On the recommendations submitted by the Committee constituted under the chairmanship of Hon'ble Jail Minister Sh. Rajendra Chaudhary, the Government Order No. 1015/77-3-14-6C/12 dated 29.08.2014 has been issued by the Government, vide which, directions to pay 64.7% extra compensation as no litigation incentive on the compensation paid towards the land acquisition or direct purchase of land within the area of Authority, have been received. In pursuance of the recommendations of committee constituted under the chairmanship of Hon'ble minister, vide office Order dated 13.08.2014, a Committee headed by Deputy Chief Executive Officer was constituted for determining the procedure regarding grant of aforementioned extra compensation and other benefits. The aforesaid Committee after taking into consideration the financial status, cash outflow, available land etc. of the Authority, has submitted it's recommendations. Government Order dated 29.08.2014 Encl.01), Recommendations of High Level Committee constituted under the chairmanship of Hon'ble Minister (Encl-2) and Recommendations of Committee constituted under the chairmanship of Deputy Chief Executive Officer (Encl.-03) are enclosed herewith. On the basis of above, it is proposed to take following decision:-*

*1. By calculating 64.7% extra compensation on the compensation determined in District- Gautambudh Nagar*

*for the year 2007-08 i.e. on Rs.800/- Per Sq. Mtrs., it is proposed to determine the compensation as Rs. 517,60 Per Sq. Mirs. The extra compensation will be payable on the aforesaid rates on all the lands acquired or directly purchased on or after 2007-08. Similarly in other districts of Yamuna Expressway Authority viz. Bulandshahar, Aligarh, Hathras, Mathura and Agras, these rates will be Rs. 517.60, 267.90, 251, 251, 274.30 per sq. mtrs.*

*2. On calculating in the aforesaid manner, the following amount of extra compensation shall be paid district wise :-*

| *District* | *Extra Compensation (In Crores)* |
|---|---|
| *Gautambudh Nagar and Bulandshahar* | *4630.48* |
| *Aligarh* | *197.35* |
| *Hathras* | *10.88* |
| *Mathura* | *213.60* |
| *Agra* | *192.74* |
| *Total:* | *5245.05* |

*It is proposed to pay the extra compensation on priority basis in view of the status of liquidity, as may be determined by the Chief Executive Officer, within a period of 2 years.*

*3. The aforementioned additional benefits will be given to the land only in that condition, when, they will handover the physical possession of land to the Authority, withdraw any Writ Petition/Suit pending in the Hon'ble High Court or any other Court, and produce the agreement of not causing any hindrance in the development works of allottess of Authority and in future, they will not file any case in any Court against the land acquisition.*

*4. It is proposed to disburse the extra compensation from the level of Authority because if this compensation is disbursed through the Land Acquisition Office, then, 10% more liable on this amount of extra compensation, would accrue towards the additional acquisition expenses, which has to he deposited in the account of State Government. Keeping in view the financial condition of Authority, it is proposed to take this decision that the disbursement of compensation be carried out directly through the Authority level.*

*5. (a) According to the Authority's Policy, 10% of the total paid compensation, is get deposited through the Land Owners in the head of allotment of 7% abadi land to be given to the ancestral farmers and the development fees of the area of 7% plot is deposited on the half rates of compensation, which amounts to 3.5% of the total amount. Therefore, on adding the extra amount to be distributed at present to the land owners in the amount of compensation paid earlier, total 13.5% of the total amount, has to be deposited through the Land Owners towards the allotment of 07% abadi land Therefore, it is recommended that after deducting the 13.5% amount as calculated above from the amount of extra compensation to be paid to the ancestral farmers, the balance amount be paid to them.*

*(b) Under the provisions of Land Management Regulations, it has been decided by the Authority Board to lease back the acquired abadi land of certain farmers. Also in the cases of Lease Bank, the amount of compensation received towards the being leased back to the farmers, has to be refunded in the Account of Authority. Therefore, it is recommended that it would be appropriate to adjust the aforesaid amount with the amount being paid as the extra compensation.*

*6. It is also proposed that if any farmer wants to take plot in place of extra compensation from the Authority, then, on his written consent, plot could be allotted to him in place of extra compensation in*

*case. Since, the most of acquired/ reserved land, Industrial-use, are available with the Authority, therefore, it is proposed that on the written consent of farmers, the industrial plot of equivalent area be allotted to them in place of additional compensation and the rate of plot proposed to be allotted will be determined by giving concession of 10% from the existing rates. It is pertinent to mention here that if the amount of extra compensation is paid in cash, then, aforesaid amounts shall have to be paid after taking loan from the Financial Institutions, on which, at present 10.20% interest is payable. Therefore, if any farmer takes plot in place of cash compensation from the Authority, then, due to granting him concession of 10%, the Authority would not suffer any financial burden and the status of financial liquidity of authority will also not get disturbed.*

*Regarding giving developed land in lieu of cash amount, the Committee is of the opinion that the Land Owners could give option of developed land against their entire amount of extra compensation or it's part. In view of the Planning, it would be appropriate that the plots to be given as developed land in lieu of cash amount, be planned in some regular shapes. In view of the above, the Committee is of the opinion that the slabs of the developed plots to be provide i.e. 450, 600, 900, 1200, 1800 sq. mtrs, shall also be published for the information of public at large. The area of plot which would be approximate to actual area to be given to the Land Owner, the plot of such area would be given to the Land Owner and the cash amount will be paid against the balance area. For example, if total 617 sq. mtrs. area has to be given to any land owner, then, the plot of 600 Sq. Mtrs. will be allotted to him and the cash amount will be paid to him towards 17 Sq. Mtrs.*

*The industrial plot which is being allotted to the farmers in lieu of the compensation, on that plot, the farmer shall have to operate the industry within a period of 03 years. If, the farmer fails to establish industry on the aforesaid plot, then, with his consent, the farmer will be free to transfer the said land to any Industrialist without establishing /operating industry, within a period of 3 years. In such cases, transfer fees shall be payable by the buyer to the Authority as per Rules. The period prescribed for operating industry on the land transferred to the Buyer, will be calculated from the date of sale deed. The person, to whom the plot will be allotted by the farmer, on him, all the Rules and conditions related to Industrial Allotment of Authority will be applicable.*

*It would not be appropriate to pay the amount to be paid as extra compensation, in installments because from this, the difficulties would arise in taking the physical possession and the land owners will cause hindrance in the development works on the ground of payment of balance installments.*

*7. The Authority shall collect the amount to be given as extra compensation, from it's allotees or by enhancing the rates of allotment of acquired land, which is yet to be allotted.*

*A. From Allottees: It will be recovered in 04 six monthly installments from the Allottes, wherein, the first installment will start after 03 months of issuance of order. For this purpose, it is proposed as under:-*

| *S No.* | *Particulars* | *Amount to be imposed (Rupees per sq. mtrs.)* |
|---|---|---|
| *1.* | *M/s. J.P. SI (SDZ, Gautambudh Nagar)* | *517.60* |
| *2.* | *Other lands transferred to M/s J.P. Infratech Ltd* | *545.79* |

| | | |
|---|---|---|
| | *(Gautambudh Nagar) LFD Facilities etc.* | |
| *3.* | *Land Transferred to M/s. J.P. Infratech Ltd (Other District)* | *253.50* |
| *4.* | *Residential Township Plot/ Group Housing* | *1770* |
| *5.* | *Institutional Scheme of Plots from 25 to 250 Acres* | *600* |
| *6.* | *Residential Plot Scheme 2009* | *1330* |
| *7.* | *Institutional Plot (Offices) 2010-11* | *600* |
| *8.* | *Mixed Land Use* | *600* |
| *9.* | *Industrial* | *550* |
| | | |

*B. From Unsold Land :-*

| *S.No.* | *Particulars* | *Rate of Allotment Per Sqm. (before extra compensation)* | *Rate of Allotment Per Sqm. (After Extra Compensation)* | *Increase in rate of Allotment (Rs. Per sqm.)* |
|---|---|---|---|---|
| *1.* | *Residential Plot* | *11500* | *14200* | *2700* |
| *2.* | *Group Housing* | *1400* | *14750* | *750* |
| *3.* | *Industrial* | *5500* | *6100 (Maximum)* | *600* |
| *4.* | *Institutional* | *6500* | *7200 (Max.)* | *700* |
| *5.* | *Commercial* | *23000* | *28400* | *5400* |
| *6.* | *Recreational Green* | *4500* | *5100 (max.)* | *600* |
| *7.* | *Transport* | *4000* | *4000* | |

*C. For compensating this amount, the Authority shall have to take loan from the Financial Institutions till 2022-23 in the following manner :-*

| *Year* | *Necessary Loan (In Crores)* | *Repayment of Loan (In Crores)* |
|---|---|---|
| *01.07.2014 to 31.03.2015* | *1425* | *1465.41* |
| *2015-16* | *1450* | *1875.11* |
| *2016-17* | *-* | *1684.78* |
| *2017-18* | *650* | *1583.28* |
| *2018-19* | *1850* | *1082.27* |
| *2019-20* | *300* | *989.61* |
| *2020-21* | *1700* | *1133.52* |
| *2021-22* | *2100* | *1394.30* |
| *2022-23* | *-* | *4651.66* |

*8. Due to the pendency of Writ petitions and due to passing stay orders therein, the development work being carried out by the Allottees is stopped. Moreover, the development works of Authority are also stopped. In view of this, the Allottees have raised demand time to time to make the disputed period as zero period.*

*In this regard, it is proposed that :-*

*(1) For completion of pending Projects, additional period of 2 years will be granted to each allottee without any penalty apart from the period prescribed under relevant rules and Bylaws. In the matters of personal residential plot additional period of 2 years from the date of Lease Deed and in other cases, additional period of 2 years will be granted for completing the project.*

*(2) The Penal Interest to be imposed on the defaulted amount of allottees (2% in housing scheme and 03% in others) will not be imposed.*

*(3) If the allotee is agreed to pay 50% of defaulted amount in lump sum within a period of 60 days, then, the defaulted amount, will be reassessed with the balance installments.*

*(4) The late fees to be imposed on delay in the execution of Lease Deed, will not be imposed. *

*(5) This option will also be available to the allottees of this scheme that such allottees who are not agreed to pay the burden imposed on the allottee as a result of extra compensation to be given to the farmers, then, they by surrendering the allotted plot in favour of the Authority till 30.04.2010, may get the refund of their deposited amount (other than Penal*

*Interest) alongwith interest @ 6% per annum. If, the allottee has deposited lump sum lease rent, then, apart from the Lease Rent from the date of Lease Deed till the date of Surrender, they may get the refund of balance amount of lease rent.*

*Accordingly, the aforesaid proposal is being produced before the Board of Directors for consideration.*

*Sd/- illegible*
*Sd/- illegible*
*Sd/- illegible*
*15.9.2014*

*TRUE TRANSLATION COPY"*

*12. Pursuant to the G.O. in question as well as Resolution in question, YEIDA issued various notices to the allottees including the petitioner for payment of additional compensation. Consequently, demand notice dated 15.12.20149 was sent to the petitioners for payment of additional compensation expressly stipulating with three terms:-*

*"a) Rate of additional compensation @ 600/sqm;*

*b) Four installments for payment of the entire additional compensation;*

*c) Levy of interest in case of failure to deposit additional compensation by the specified dates."*

*13. In terms of the G.O. in question as well as the resolution in question, the YEIDA raised first demand notice on 15.12.2014, which for ready reference, is reproduced as under:-*

*"YAMUNA EXPRESSWAY INDUSTRIAL DEVELOPMENT AUTHORITY*
*First Floor, Commercial Complex, P-02, Sector-Omega-1*
*Greater Noida City, Gautambudh Nagar - 201308(U.P.)*

*Letter No. Sansthagat/2014/175*

*Dated: 15.12.2014*
*Estate Department*
*Allotment No. : MSEZ-0006*
*Plot No./Sector : 02/17A*
*Area : 202350.00 Sqm*
*To,*
*M/s Shakuntala Educational & Welfare Society*
*4405/6, Prakash Apartment, Part-II*
*5, Ansari Road*
*Darya Ganj, New Delhi-110002.*

*Sir/Madam,*

*Vide Letter No. 1015/77-3-14-6C dated 29.08.2014 of the Government, it has been directed that an amount equal to 64.7% additional compensation be given to the farmers affected by land-acquisition in the form of No Litigation Incentive/ Additional Compensation, which shall be compensated from the concerned allottees in proportionate manner.*

*In pursuance of the directions received from the Government, proposal was passed in the 51st Board Meeting of Authority, wherein, it has been decided to realize Rs.600/- sq. mtrs. as additional dues other than the rate of allotment for compensating the burden of extra compensation on the plots allotted under the Mini SEZ (25 to 250 acres) Scheme.*

*On the basis of decision taken in the 51st Board Meeting of Authority, the following additional compensation will be payable as under:--*

*Total Area Allotted : 2023500.00 Sqm*
*Rate : Rs.600/- Per Sqm*

*Total Amount : Rs.12,14,10,000/-*
*Date of issue Letter : 15.12.2014*
*Depositor Bank Name : Bank of Baroda, First Floor,*
*Commercial Complex, Block-P-02,*
*Sector- Omega-1, Greater Noida, District- G.B. Nagar.*

| Particular | Installment | Due Date |
|---|---|---|
| Extra Compensation Installment- 01 | 3,03,52,500 | 16.03.2015 |
| Extra Compensation Installment- 02 | 3,03,52,500 | 14.09.2015 |
| Extra Compensation Installment- 03 | 3,03,52,500 | 15.03.2016 |
| Extra Compensation Installment- 04 | 3,03,52,500 | 13.09.2016 |

***Therefore, you are requested that kindly ensure to deposit the due payment of aforementioned extra compensation on the prescribed date in the prescribed Bank, otherwise, in case of default the penal interest will be imposed.***

*Regards,*
*Sd/-*
*(Rajesh Kumar Shukla)*
*OSD*

*Copy to:-*
*Finance Controller for perusal.*
*TRUE TRANSLATION COPY"*

*(Emphasis supplied)*

14. The Government Order in question, Board Resolution in question as well as first demand of notice were challenged by various allottees including the petitioner on similar and identical facts in various writ petitions on following grounds:-

*"(a) The decision of the High Court in the Gajraj (Supra) is not applicable in respect of land acquired for YEIDA.*

*(b) the burden of the additional compensation cannot be shifted upon the allottees.*

*(c) YEIDA cannot realize any amount over and above that which has been mentioned in the allotment letter or the lease deed, which is a binding contract."*

15. On similar grounds the petitioner filed Writ Petition No.28698 of 2018 (Shakuntla Educational and Welfare Society v. State of U.P. & Ors.) before this Court mainly with following prayer:-

*"1. To issue a writ, order or direction in the nature of certiorari calling for records of the case and quashing the impugned demand notice dated 15.12.2014 issued by the respondent no.3 for payment of Rs.12,14,10,000/- and 64.7% additional compensation in respect of Plot No.2 Section 17A Yamuna Expressway, allotted under Mini S.E.Z. Scheme (25-250 acres) having allotment no.MSEZ-0006."*

16. In the said writ petition, initially an interim order was accorded on 29.08.2018. Eventually, the Division Bench of this Court clubbed all such matters and allowed the same vide its judgment and order dated 28.05.2020 in **Shakuntla Educational and Welfare Society v. State of U.P. & Ors.10.** The operative portion of the said judgment is reproduced as under:-

*"…………..114. This apart as the issues raised in this petition are all of legal nature and are not dependent upon any disputed facts, we see no good reason to relegate the petitioner to alternate remedy instead of answering the questions on the*

*judicial side. In the end, we conclude as under:-*

*(i) The decision in the case of Gajraj as approved by Savitri Devi is not a judgement in rem which could have been applied to proceedings for acquiring the land under different notifications or for Y.E.I.D.A.;*

*(ii) the issuance of the Government Order dated 29.08.2014 and its acceptance by Y.E.I.D.A. is patently illegal. It is violative of the provisions of the L.A. Act and is otherwise without jurisdiction as no such Government Order is liable to be issued in equity by the Government and that the policy behind it is unfair, unreasonable and arbitrary which is in violation of the provisions of the T.P. Act; and*

*(iii) the aforesaid Government Order dated 29.08.2014 as such is held to be invalid and liable to be ignored. Consequentially, all actions and demands of the Y.E.I.D.A. based upon it are held to be illegal.*

*115. In view of above facts and circumstances, the impugned Government Order dated 29.08.2014 is declared to be illegal and without jurisdiction and consequently all demands raised on its basis are quashed.*

*116. The Writ Petitions are allowed with no orders as to costs."*

17. The aforesaid judgment and order passed by the Division Bench of this Court along with similar other judgments were challenged by YEIDA before Hon'ble Supreme Court by way of preferring Civil Appeals. All such appeals were allowed by Hon'ble Supreme Court on 19.05.2022 in Civil Appeal Nos.4178-4197 of 2022 **(Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors.)** and other connected appeals11. The relevant portion of the said judgment is quoted as under:-

*"…………..60. It is trite law that an interference with the policy decision would not be warranted unless it is found that the policy decision is palpably arbitrary, mala fide, irrational or violative of the statutory provisions. We are therefore of the considered view that the High Court was also not right in interfering with the policy decision of the State Government, which is in the larger public interest.*

*61. It will also be apposite to refer to the following observations of this Court in the case of APM Terminals B.V. vs. Union of India and another (2011) 6 SCC 756:*

*"67. It has been the consistent view of this Court that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest and provided such change in policy was guided by reason. Several decisions have been cited by the parties in this regard in the context of preventing private monopolisation of port activities to an extent where such private player would assume a dominant position which would enable them to control not only the berthing of ships but the tariff for use of the port facilities."*

*62. It could thus be seen that it is more than settled that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest. The additional requirement is that such change in policy is required to be guided by reason.*

*63. Insofar as the reliance placed by the respondents on the judgment of this Court in the case of ITC Limited (supra) is concerned, in our considered view, the said judgment would not be of any assistance to the case of the respondents. This Court in the said case in paragraph 107.1 has clearly observed that in the case of conflict between public interest and personal interest, public interest should prevail.*

*64. A number of judgments of this Court have been cited at the Bar by the respondents in support of the proposition that in view of concluded contracts, it was not permissible for the appellants to unilaterally increase the premium by framing a policy.*

*65. We have hereinabove elaborately discussed that when a policy is changed by the State, which is in the general public interest, such policy would prevail over the individual rights/interests. In that view of the matter, we do not find it necessary to refer to the said judgments. The policy of the State Government as reflected in the said G.O. was not only in the larger public interest but also in the interest of the respondents.*

*66. We further find that the respondents have indulged into the conduct of approbate and reprobate. They have changed their stance as per their convenience. When their projects were stalled on account of the farmers' agitation, it is they who approached the State Authorities for finding out a solution. When the State Government responded to their representations and came up with a policy which was equitable and in the interest of both, the farmers and the allottees and when the said policy paved the way for development, when called upon to pay the additional compensation, the respondentsallottees somersaulted and challenged the very same policy before the High Court, which benefitted them. We have already hereinabove made reference to the various communications made by the allottees of the land for intervention of the State Government.*

*67. Insofar as the individual plot owners are concerned, it will be worthwhile to mention that the residential plot owners in Sectors 18 and 20 of Yamuna Expressway city have formed an association, viz., Yamuna Expressway ResidentialPlotOwners Welfare Association (hereinafter referred to as "the YERWA"). The communication addressed by the president of the YERWA to the CEO of YEIDA would reveal that 98.5% of the allottees/owners have voted in favour of paying the additional premium demanded by the Authority. The only request made by the YERWA is with regard to making a provision for paying additional premium in installments.*

*68. It can thus be seen that even insofar as the individual residential plot owners are concerned, more than 98% of the plot owners do not have any objection to the payment of the additional compensation.*

*69. With respect to the contention of the respondent No.19 Supertech with regard to initiation of CIRP, we are not concerned with the said issue in the present proceedings. The law will take its own course.*

*70. In conclusion, we are of the considered view that the policy decision of the State Government as reflected in the said G.O. dated 29th August, 2014 and the Resolution of the Board of YEIDA dated 15th September, 2014 were in the larger public interest, taking care of the concerns of the allottees as well as the farmers. As already discussed hereinabove, had the said decision not been taken, there was a hanging sword of the acquisition being*

*declared unlawful. The development of the entire project was stalled on account of farmers' agitation. Before taking the policy decision, the State Government, through the Chaudhary Committee, had done a wide range of deliberations with all the stakeholders including the allottees, farmers and YEIDA. The policy decision was taken after taking into consideration all relevant factors and was guided by reasons. In any case, it is a settled position of law that in case of a conflict between public interest and personal interest, public interest will outweigh the personal interest. The High Court was therefore not justified in holding that the policy decision of the State was unfair, unreasonable and arbitrary. We are of the considered view that the High Court has erred in allowing the writ petitions. The present appeals, therefore, deserve to be allowed.*

*71. In the result, we pass the following order:*

*(i) The appeals are allowed;*

*(ii) The impugned judgment and order dated 28 th May, 2020, passed by the Allahabad High Court in Writ Petition No. 28968 of 2018 and companion matters is quashed and set aside;*

*(iii) The writ petitions filed by the respondents covered by the impugned judgment and order dated 28th May, 2020 passed by the Allahabad High Court are dismissed;*

*72. Applications for Intervention are allowed. Pending applications, including the applications for directions, shall stand disposed of in the above terms. There shall be no order as to costs."*

18. Once Hon'ble Supreme Court had upheld the Government Order in question as well as Board Resolution in question, afresh a demand notice was issued by YEIDA to the petitioner on 20.09.202212 (impugned in this writ petition) for payment of additional compensation and accrued interest due to their default as admittedly no payment was made in response to the first demand notice or subsequent demand notices. The consequential demand notice is subject matter of challenge in the present writ petition. For ready reference, the consequential demand notice is reproduced as under:-

"नोटिस

सेवा में

M/S Shakuntla Educational Welfare Society

1405/6, Prakash Apertinem, Part-11,

5, Ansari Road Daryaganj

New Delhi-110002

विषय - भूखण्ड संख्या-02, सैक्टर-17ए के सापेक्ष देय धनराशि के सम्बन्ध में ।

महोदय/ महोदया,

कृपया अवगत कराना है कि इस कार्यालय से पूर्व में प्रेषित पत्र दिनांक 01.08.2022 के माध्यम से भू-उपयोग के आधार पर अंतर धनराशि (रू०.1041 प्रति वर्ग मीटर) के सापेक्ष देय धनराशि का भुगतान किये जाने हेतु सूचित किया गया जिसके क्रम में वर्तमान तक उपलब्ध अभिलेखानुसार कोई धनराशि प्राप्त नहीं है।

अवगत कराना है कि No Litigation Incentive (64.7% अतरिक्त प्रतिकर) वितरण के संबंध में शासन द्वारा जारी शासनादेश संख्या 1015/77-3-14-6सी /12 दिनांक 29.08.2014 के संबंध में योजित रिट याचिक संख्या 28968/2018) शकुन्तला एजुकेशन एण्ड वेलफेयर सोसायटी के साथ अन्य 19 रिट

याचिकाओं में उक्त शासनादेश को दिनांक 28.05.2020 को निरस्त कर दिया गया था।

मा० उच्चतम न्यायालय के समक्ष प्राधिकरण द्वारा योजित विशेष अनुज्ञा याचिका (एस.एल. पी.) सं०. 10015-10034/2020 पर मा० उच्चतम न्यायालय द्वारा दिनांक 19.05.2022 को आदेश पारित करते हुए मा. उच्च न्यायालय के उक्त आदेश दिनांक 28.06.2020 को निरस्त कर दिया गया है। अतः मा० उच्चतम न्यायालय द्वारा दिये गये आदेश के अनुसार 64.7 प्रतिशत अतिरिक्त प्रतिकर की धनराशि आवंटी द्वारा दी जानी है।

आप के पक्ष में आवंटित भूखण्ड के सापेक्ष भू-उपयोग के आधार पर अंतर धनराशि (रू०. 1041 प्रति वर्ग मीटर) के अतिरिक्त अन्य मदों में अतिदेय धनराशि ब्याज सहित दिनांक 15.10.2022 तक निम्नानुसार है:-

धनराशि करोड़ में

| प्रीमियम तथा ई.डी.सी | 32.05 |
|---|---|
| कृषको को दिये जाने वाली 64.7 प्रतिशत अतिरिक्त प्रतिकर की धनराशि | 33.04 |

उपरोक्त के दृष्टिगत आपसे अनुरोध है कि अतिदेय धनराशि दिनांक 15.10.2022 तक जमा कर जमा चालान की प्रति प्राधिकरण कार्यालय में प्रस्तुत करना सुनिश्चित करें। यह नोटिस प्राधिकरण के अन्य मदों में अतिदेय धनराशि की मॉग और वसूली के अधिकार और बिना किसी पूर्वाग्रह के है।

उक्त नोटिस का अनुपालन न होने की स्थिति में नियमानुसार वसूली अथवा पट्टा प्रलेख निरस्त किये जाने की आवश्यक कार्यवाही की जायेगी।

भवदीय
(सिद्धार्थ गौतम)
सहायक महाप्रबन्धक (संस्थागत)"

19. On the matter being taken up on 5.01.2023, following interim order13 was passed by this Court, the relevant portion of which, for ready reference is reproduced as under:-

*"1. Heard Sri Sunil Gupta and Sri Anurag Khanna learned Senior Counsels assisted by Sri Ashish Kumar learned counsel for the petitioner and Sri Manish Goyal learned Senior Counsel assisted by Sri Aditya Bhushan Singhal learned counsel for the Yamuna Expressway Industrial Development Authority (in short YEIDA).*

*2. This writ petition is directed against the letter of demand dated 20.09.2022 issued by YEIDA, to the extent that it pertains to the demand of 64.7% additional compensation to be given to the farmers which is to the tune of Rs.33.4 crores.*

*Summary of grounds of challenge:-*

*3. The challenge is pressed on four grounds:-*

*(i) The first attack is on the question of proportionality as per the recommendation of the Chaudhary Committee, Government order dated 29.08.2014 (as affirmed by the Supreme Court in its judgement and order dated dated 19.05.2022) and on the principle of parity with the judgement of the Full Bench of this Court in Gajraj and others Vs. State of U.P. and others1.*

*(ii) The quantum of additional compensation of 64.7% being excess to the amount of Rs.517.60 per square meters actually paid by the acquiring authority to the farmers.*

*(iii) On the levy of interest that it is being charged without backing of any law, statute or contract on the amount of*

*additional compensation worked out by YEIDA.*

*(iv) Last ground is that the petitioner has not indulged in unjust enrichment and since it has not collected any amount towards the additional compensation from its end users, it cannot be saddled with the liability of interest on the additional compensation amount on any ground or otherwise for the period of pendency of litigation in Court.*

*Brief facts:-*

*4. The petitioner is a society registered under the Societies Registration Act' 1860, having the object of imparting education. On a piece of land which was allotted by YEIDA to the petitioner, they had established a University known as "Galgotia University". The allotment process was completed in the year 2009-10 and the University was started w.e.f. 01.07.2011 with the completion of admission and commencement of classes. The impugned demanded vide letter dated 20.09.2022 to the extent of 64.7% additional compensation, is a renewed demand by YEIDA which was firstly made vide notice dated 15.12.2014. The demand letter appended as Annexure No.'1' to the writ petition records that with respect to the demand notice dated 15.12.2014, pursuant to the Government order dated 29.08.2014 of 64.7% additional compensation as 'No Litigation Incentive', the petitioner herein namely Shakuntala Educational and Welfare Society filed a writ petition No.28968 of 2018 which was allowed vide judgement and order dated 28.05.2020 passed by this Court quashing the aforesaid government order. In the Special Leave Petition (Civil) No.10015-10034 of 2020 (Civil Appeal No.4178-4197 of 2022), the Apex Court vide judgement and order dated 19.05.2022 set aside the judgment of the Writ Court and all the writ petitions including the writ petition filed by the petitioner herein had been dismissed. The notice of demand under challenge, thus, states that the petitioner herein is liable to pay 64.7% additional compensation pursuant to the order of the Apex Court.*

*5. This is, thus, the second round of litigation by the petitioner to challenge the demand of 64.7% additional compensation.*

*Preliminary Objection:-*

*6. Sri Manish Goyal learned Senior Counsel appearing for YEIDA raised a preliminary objection with regard to the maintainability of the writ petition on the first two grounds noted above, i.e. on the question of proportionality and quantum of additional compensation. While placing the relief clause of the previous writ petition filed by the petitioner therein, it was urged by the learned Senior Counsel appearing for YEIDA that the relief in the previous writ petition was not only confined to the challenge to the government order dated 29.08.2014, but also to the decision of the Board of YEIDA at item No.51/4 of 51st meeting of the Board dated 15.09.2014 whereby computation of additional compensation was made for different categories of allottees as also the consequent demand notice dated 15.12.2014 issued by YEIDA demanding Rs.12 crores and odd towards 64.7% additional compensation. It was urged that with the dismissal of the previous writ petition by the judgement and order dated 19.05.2022 passed by the Apex Court, the issue in relation to the computation of additional compensation or quantum fixed by the Board cannot be re-agitated on any ground whatsoever, including the grounds of proportionality and the factors to be worked out to compute the amount of 64.7% additional compensation.*

*7. As regards the demand of interest, it was submitted that as the petitioner has failed to meet the demand raised on 15.12.2014 within the time given in the said demand notice, with the dismissal of the writ petition filed by the petitioner, the demand would go back to the date when it was first raised and as per the original demand notice dated 15.12.2014, the petitioner herein is liable to pay interest as intimated therein.*

………………….

………………….

*39. The 'proportionality' observation, i.e. "collection of additional compensation proportionally from the concerned allottees" as propounded in the Government Order dated 29.08.2014 is to be understood in terms of the resolution of the 51th Board meeting of YEIDA. A perusal of the relevant clauses of the Board's resolution, extracted above, makes it evident that 64.7% additional compensation for District Gautam Buddh Nagar for the year 2007-08 on the compensation determined by YEIDA to the tune of Rs.800/- per square meter, was worked out to be Rs. 517.60 square meter. The district-wise liability of additional compensation for District Gautam Buddh Nagar and Bulandshahr was worked to Rs. 4630.48 crores and the distribution of said amount amongst the allottees was made in terms of the table given in 'para 7' of the resolution at item No.51/04 of the 51st Board meeting of YEIDA, which clearly provides for apportionment of extra/additional compensation by applying different rates per square meters to be imposed upon different categories of allottees.*

*40. It may be seen that for residential township/group housing the rate is Rs.1770/- per square meter; for residential plot scheme 2009 the rate is Rs1330/- per square meter; for institutional scheme of plot from 25 to 200 acres (the category to which the petitioner belongs) the rate is Rs.600/- per square meters whereas for industrial plot (offices) 2010-11 and Mixed land use the rate is Rs600/- per square meters; for industrial purposes the amount to be imposed upon the allottees is Rs.550/- square meter.*

*41. In our considered opinion, the 'proportionality principle' propounded in the recommendation of the Chaudhary Committee and approved by the State Government in the order dated 29.08.2014, i.e. to consider the amount of 64.7% additional compensation to be paid to the farmers in the form of 'No Litigation Incentive', "which may be collected proportionally from the applied allottee and which may be imposed proportionally in the costing of allotment of land available with the authority (i.e. for existing allottees and future allottees)" has been duly applied by YEIDA (development authority) while distributing its total liability of additional compensation amongst different categories of allottees proportionally.* ***The decision of Board of YEIDA in its 51st meeting taken in compliance of the Government Order dated 29.08.2014 has been upheld by the Apex Court while dismissing the previous writ petition filed by the petitioner herein vide judgement and order dated 19.05.2022 in Yamuna Expressway Industrial Development Authority Etc Vs. Shakuntala Educational and Welfare Society & others19.***

*42.* ***The issue as to the liability of additional compensation fastened upon different categories of allottees of the lands*** *by YEIDA has been upheld by the Apex Court in the above noted decision which is binding between the parties herein. The quantum of additional compensation determined by YEIDA in its*

*Board meeting dated 15.09.2014 @ of Rs.600/- per square meter having been upheld by the Apex Court in the above noted decision is not open for consideration before us in this second round of litigation.* ***Challenge to the demand notice dated 20.09.2022 is nothing but reiteration of the demand raised by the first notice dated 15.12.2014 upheld by the Apex Court.*** *Any observations of the learned Single Judge of this Court in Gaursons (supra) on the issue of 'proportionality' as observed in Gajraj (supra) in no way is attracted in the present case nor the word "proportionally" used in the recommendation of the Chaudhary Committee and the Government Order dated 29.08.2014 can be interpreted in the manner as has been submitted by the learned Senior Counsel for the petitioner herein.*

*43. The emphasis laid on the decision of the learned Single Judge in Gaursons (supra) to draw analogy for interpretation of word "proportionally" occurring in the Government Order dated 29.08.2014 is wholly misconceived. We are convinced to uphold the preliminary objection raised by the learned Senior Counsel for YEIDA that the challenge to the reiterated demand notice dated 20.09.2022 after dismissal of the previous Writ Petition No.28968 of 2018 by the Apex Court on the issue of determination of the liability of the allottee towards additional compensation, i.e. quantum as determined in the 51st Board meeting of YEIDA dated 15.09.2014 is no longer res integra and is hit by the principles of res judicata under Section 11 of the Code of Civil Procedure. As the proportionality principle raised by the learned Senior Counsel for the petitioner based on the decision of the learned Single Judge in Gaursons (supra), has no applicability in the facts and circumstances of the case, we are not required to deal with the detail arguments raised on the principle of res judicata, i.e. the interpretation, scope and applicability of Section 11 and Order 2 Rule 2 CPC. The plea that the matter of proportionality is an independent ground and the question of* ***quantum of liability remains open for consideration in this second round of litigation between the parties, is liable to be turned down.***

*44. The first two grounds of challenge, as noted above (in the beginning of this judgement), to the demand notice dated 20.09.2022 requiring the petitioner to deposit Rs.33.04 crores towards the additional compensation to be paid to the farmers are, thus, turn down.*

*45. However, the question remains of the liability of interest on the initial demand of Rs.12,14,10,000/- raised by the first demand notice dated 15.12.2014. In this regard, it was argued by the learned Senior Counsel for the petitioner that there is no legal backing to the demand of penal interest as indicated in the first demand notice dated 15.12.2014. Moreover, the petitioner was not obliged to deposit the demanded money in view of the fact that the challenge raised by it was upheld by this Court. The amount of Rs.33.04 crores which include interest as is evident from the language of the notice dated 20.09.2022 is exorbitant and has no rationale basis or backing of legal or statutory provisions. It was argued that there is no break up of the interest liability in the demand notice and hence rationale for the same cannot be examined by this Court without calling for a reply from YEIDA.*

*46. It was also argued that the petitioner being an institutional allottee has not been benefited, in any manner, on account of non-deposit of the additional*

*compensation as its end users are students to whom the liability could not be passed on. The contention is that the case of the petitioner is to be distinguished from that of the colonizer/builders who have collected the additional compensation paid by them from their allottees/home buyers. The demand of any sum of interest or otherwise for the period of pendency of litigation in Court is inequitable, unfair, unreasonable and violative of Article 14 of the Constitution of India.*

*47. On the above issue, i.e. to the extent of the dispute pertaining to the demand of interest over the additional amount of compensation computed at the rate of Rs.600/- per square meter for the total land area of 202350.00 square meter, we are of the opinion that the matter is required to be considered after exchange of pleadings between the parties.*

*48. We, therefore, call upon the respondent-YEIDA to file a counter affidavit within a period of three weeks from today confined to the challenge to the levy of interest raised herein. Two weeks , thereafter is granted to the petitioner to file rejoinder.*

*49. Put up on 14.02.2023 in the additional cause list.*

*50. In view of the above discussion, the demand of Rs.33.04 crores towards 64.7% additional compensation as raised in the demand notice dated 20.09.2022 is partially stayed, i.e. subject to the condition that an amount of Rs.15 crores shall be deposited by the petitioner with the development authority namely YEIDA within a period of four weeks from today.*

*51. Any default on the part of the petitioner in complying with the above condition would give rise to a cause of action to YEIDA to press the entire demand raised in the notice dated 20.09.2022 with respect to 64.7% additional compensation to be paid to the farmers."*

*(Emphasis supplied)*

20. As per the record, this much is reflected that the aforesaid condition stipulated in the interim order in question qua deposit of Rs.15 crores by the petitioner with the YEIDA has been fulfilled by the petitioner. The interim order in question has also attained finality as there was no challenge to the same as yet.

**ARGUMENTS ON BEHALF OF THE PETITIONER**

21. Shri Sunil Gupta, learned Senior Counsel appearing for the petitioner submitted that the Division Bench while passing the interim order in question has turned down the grounds of challenge to the demand notice dated 20.09.2022 i.e. the consequential demand notice, requiring the petitioner to deposit Rs.33.04 crores towards the additional compensation to be paid to the farmers and in compliance of the same the requisite amount has already been deposited by the petitioner. The interim order in question has also not been challenged before the Supreme Court and as such he is not pressing the said ground. At present he has confined his prayer only to challenge the levy of interest.

22. Shri Gupta, learned Senior Counsel submitted that it is well settled that interest on delayed payment of a debt is a matter of substantive law and can be claimed or awarded only if it is provided for in any of the following ways:-

(i) a statutory provision in an enactment

(ii) express terms of a contract
(iii) mercantile or trade usage or

(iv) implied agreement between the parties.

23. He vehemently submitted that in the present case, so far as the petitioner is concerned, interest on the item of ‘additional compensation, was never provided for in any of the above four ways. There was clearly no enactment or trade usage for the same. The G.O. in question, which was issued for additional compensation is purely an administrative decision and at no point of time the petitioner was part of deliberations before the Chaudhary Committee. The terms in the contract of the petitioner with YEIDA in 2009-10 viz. the Allotment Letter and Lease Deed comprised of only three items of consideration viz. Land Premium, External Development Charges (EDC) and Lease Rent. The item of additional compensation did not even exist at that time.

24. He next submitted that the ‘liability’ to pay the said sum also never got imposed on the petitioner by way of implied agreement as might have been the case with some other allottees viz. the allottees, who had given undertakings to YEIDA to pay additional compensation in lieu of YEIDA removing for them the obstructions caused by the farmers. Moreover, the petitioner had already completed its project and established the University in the year 2011 and it did not face any farmers obstruction, gave no such undertaking and entered no such implied agreement. He submitted that some written undertaking agreeing to pay additional compensation was given by various companies, if the hindrances caused by the farmers are removed by the authorities and that such allottees were bound by their undertakings and cannot ‘somersault’ or ‘approbate and reprobate’. While referring to the judgment of Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra), he submitted that in the said judgment, the Supreme Court has named some of the companies/ incumbents, who had given such an undertaking but the name of the petitioner was not there in the said judgment. Therefore, there was no agreement or implied agreement whatsoever given by the petitioner so as to pay additional compensation and/or interest.

25. Learned Senior Counsel appearing for the petitioner has heavily relied upon the Interest Act, 197814, which is a general and comprehensive substantive law on the subject of interest and applies only where, at least, an implied agreement to pay interest exists. In the petitioner’s case, there being no agreement for additional compensation, there was obviously no implied agreement even for interest and as such the demand of interest in demand notices dated 15.12.2014 and 20.09.2022 is ex facie without jurisdiction, illegal and impermissible in law. In support of his submissions, he has placed reliance on Section 3 read with Section 2 (c) of the Interest Act. He has submitted that in the present case, there is no ‘debt’ or ‘liability for an ascertained sum’, which is a precondition for any interest to be allowed under Section 3 read with Section 2 (c) of the Interest Act, hence the demand notices for interest are wholly unsustainable.

26. To elaborate, learned Senior Counsel submitted that interest under Section 3 of the Interest Act can be claimed only in respect of a ‘debt’. ‘Debt’ has been defined in Section 2 (c) to be a ‘liability for an ascertained sum’ and has been held by

the courts to mean a fixed and determined sum agreed and known to both the parties i.e. known not only to the party claiming the sum but also known from before to the party said to be liable so that it constitutes an obligation of the latter party to pay the sum. Such pre-existing knowledge of both the parties can be either owing to an agreement or adjudication of a dispute. An ascertained or known 'debt' is a jurisdictional pre-condition for the grant of interest under Section 3 of Interest Act. If there is no such 'debt', no interest can be awarded. A demand of any sum unsupported by any statute, contract, usage or implied agreement and made unilaterally by any person would not be covered by the word 'liability' in Section 2 (c) read with Section 3 of interest Act for award of interest. It is claimed that in the instant case the unilateral levy and demand of additional compensation contained in Government Order in question, Board Resolution in question and the demand notices was never a liability upon the petitioner.

27. Reliance has also been placed on Section 2 (g) of the Recovery of Debts and Bankruptcy Act, 1993, which provides, 'debt' means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution…..". In the interest Act, the word 'debt' has been defined under Section 2 (c) of that Act by using specific terms of restricted character. It means 'any liability for an ascertained sum of money and includes a debt payable in any kind but does not include a 'judgment debt'. In this definition, the 'ascertained sum' obviously means a sum which has been determined under any methods of the adjudicative process. Ref. **Eureka Forbes Ltd. v. Allahabad Bank15.** Reliance has also been placed on the judgments in **Jyothi Ltd. v. Boving Fouress16, Viva Highways v. MP RDC17 and Union of India v. A.L. Rallia Ram18**. Heavy reliance has also been placed on the judgment **in Central Bank of India v. Ravindra & Ors.19.** For ready reference, paras 30, 38 and 39 are reproduced as under:-

*"……..30. Their Lordships cited with approval the following passage from Halsbury's Laws of England (4th Edition) (Vol. 3, at page 118, para 160) :-*

*"160. Interest. By the universal custom of bankers, a banker has the right to charge simple interest at a reasonable rate on all overdrafts. An unusual rate of interest, interest with periodical rests, or compound interest can only be justified, in the absence of express agreement, where the customer is shown or must be taken to have acquiesced in the account being kept on that basis. Whether such acquiescence can be assumed from his failure to protest at an interest entry in his statement of account is doubtful.*

*Acquiescence in such charges only justifies them so long as the relation of banker and customer exists with respect to the advance. If the relation is altered into that of mortgagee and mortgagor by the taking of a mortgage, interest must be calculated according to the terms of the mortgage, or according to the new relation.*

*The taking of a mortgage to secure a fluctuating balance of an overdrawn account, is not, however, inconsistent with the relation of a banker and customer, so as to displace a previously accrued right to charge compound interest.*

*It is the practice of bankers to debit the accrued interest to the borrower's current account at regular periods (usually half-yearly); where the current account is*

*overdrawn or becomes overdrawn as the result of the debit the effect is to add the interest to the principal, in which case it loses its quality of interest and becomes capital."*

*………..*

*38. However 'penal interest' has to be distinguished from 'interest'. Penal interest is an extraordinary liability incurred by a debtor on account of his being a wrong-doer by having committed the wrong of not making the payment when it should have been made, in favour of the person wronged and it is neither related with nor limited to the damages suffered. Thus, while liability to pay interest is founded on the doctrine of compensation, penal interest is a penalty founded on the doctrine of penal action. Penal interest can be charged only once for one period of default and, therefore, cannot be permitted to be capitalised.*

*39. Mulla on the Code of Civil Procedure (1995 Edition) sets out three divisions of interest as dealt in Section 34 of CPC. The division is according to the period for which interest is allowed by the Court, namely- (1) interest accrued due prior to the institution of the suit on the principal sum adjudged; (2) additional interest on the principal sum adjudged, from the date of the suit to the date of the decree, at such rate as the Court deems reasonable; (3) further interest on the principal sum adjudged, from the date of the decree to the date of the payment or to such earlier date as the Court thinks fit, at a rate not exceeding 6 per cent per annum. Popularly the three interests are called pre-suit interest, interest pendente lite and interest post-decree or future interest. Interest for the period anterior to institution of suit is not a matter of procedure; interest pendente lite is not a matter of substantive law (See, Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C. Roy, [1992] 1 SCC 508, Pr. 44-iv). Pre-suit interest is referable to substantive law and can be sub-divided into two sub-heads; (i) where there is a stipulation for the payment of interest at a fixed rate; and (ii) where there is no such stipulation. If there is a stipulation for the rate of interst, the Court must allow that rate upto the date of the suit subject to three exceptions; (i) any provision of law applicable to money lending transactions, or usury laws or any other debt law governing the parties and having an overriding effect on any stipulation for payment of interest voluntarily entered into between the parties; (ii) if the rate is penal, the Court must award at such rate as it deems reasonable; (iii) even if the rate is not penal the Court may reduce it if the interest is excessive and the transaction was substantially unfair. If there is no express stipulation for payment of interest the plaintiff is not entitled to interest except on proof of mercantile usage, statutory right to interest, or an implied agreement. Interest from the date of suit to date of decree is in the discretion of the Court. Interest from the date of the decree to the date of payment or any other earlier date appointed by the Court is again in the discretion of the Court - to award or not to award as also the rate at which to award. These principles are well established and are not disputed by learned counsel for the parties. We have stated the same only by way of introduction to the main controversy before us which has a colour little different and somewhat complex. The learned counsel appearing before us are agreed that pre-suit interest is a matter of substantive law and a voluntary stipulation entered into between the parties for payment of interest would being the parties*

*as also the Court excepting in any case out of the three exceptions set out hereinbefore. ……………….”*

28. Learned Senior Counsel appearing for the petitioner, in support of his submissions, has also placed reliance on the judgment in **Secretary, Irrgation Department, Government of Orissa & ors. v. G.C. Roy20**, specially in the context, wherein the agreement does not provide either for grant or denial of interest and the question arises whether in such an event the Arbitrator has power and authority to accord pendente lite interest. For ready reference, the relevant portion of the said judgment is reproduced as under:-

*“………..10. Certain English decisions including the decisions in Chandris 1951 (1) K.B. 240 were brought to the notice of the learned Judges apart from certain passages from Halsbury's Law of England and Russell's Arbitration. The learned Judge however, refrained from referring to them in view of the abundance of authoritative pronouncements by this Court. The correctness of the decision in Jena’s case is challenged by the respondent. We therefore departed from the normal rule and heard learned Counsel for the respondent Mr. Milon Banerji before hearing the appellant's counsel. Mr. Banerji appearing for the respondent made the following submissions:*

*(1) The power of an Arbitrator to award interest is by virtue of an implied term in the arbitration agreement or reference i.e. by virtue of the arbitrator's implied authority to follow the ordinary rules of law;*

*(2) It is an implied term in every arbitration agreement that the arbitrator will decide the dispute according to Indian Law. Though Section 34 of the civil Procedure Code does not expressly apply to arbitrators, its principle applies, just as the principle of several other provisions (e.g., Section 3 of the Limitation Act) has been held applicable to the arbitratOrs. Inasmuch as the arbitrator is an alternative forum for resolution of disputes he must be deemed to possess all such powers as are necessary to do complete justice between the parties. The power to award interest pendente lite is a power which must necessarily be inferred to do complete justice between the parties. The principle is that a person who has been deprived of the use of money should be compensated in that behalf.*

*In short it is based upon the principle of compensation or restitution, as it may be called.*

*(3) In every case where the arbitration agreement does not exclude the jurisdiction of the arbitrator to award interest pendente lite, such power must be inferred.*

*(4) The decision in Jena does not take into account several earlier decisions of this Court where the power of the arbitrator to award interest pendente lite has been upheld. Many such decisions have been explained away as cases where reference to arbitration was in a pending suit, though as a matter of fact it is not so. Even on principle the said decision does not represent the correct view.*

*…………..*

***12. On the other hand, Shri Sanghi, learned Counsel appearing for the State of Orissa urged that interest was never regarded as a matter of right at common law. It is either a matter of agreement or a right created by statute. Of Course, interest can also be awarded on the ground of equity but that is applicable only to limited class of cases referred to in the decision of Privy Council in Bengal***

***Nagpur Railway Co. Ltd. v. Ruttanji Ramji and Ors. 65 LA. 66. This indeed is the basis of the judgment of this Court in Seth Thawardas Pherumal v. The Union of India: [1955]2SCR48 . According to learned Counsel, a reading of Sections 3, 17 and 41 of the Arbitration Act goes to establish that arbitrator is denied such a power. If this Court holds that the arbitrator has the power to award interest pendente lite on the ground that principle of Section 34 C.P.C. avails him though the section itself does not if apply, it will open the door for innumerable cases. It will create room for submitting that all the powers of the civil Court should be inferred in the case of arbitrator as well as by extending the same analogy. This would indeed amount to legislation by this Court which it ought to desist from doing.***

*(Emphasis added)*

*..........*

*40. The first decision relied upon by him is in Union of India v. West Punjab Factories Ltd. : [1966]1SCR580 . He referred to the passage at Page 590 to contend that the Constitution Bench in this case has approved decision in Thawardas. We do not agree. The question, the Constitution Bench was considering in the said paragraph was whether interest could be awarded for the period prior to the institution of the suit. (It was not a case under Arbitration Act but was a civil Suit). In that connection the Court referred to Thawardas, as laying down the correct law in that behalf, alongwith Bengal Nagpur Railway (supra) and Union of India v. A.L. Rallia Ram : [1964]3SCR164 . It is not possible to read this paragraph as approving or affirming the decision of Thawardas insofar as it held that an arbitrator had no power to award interest pendente lite.*

*........*

*43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:*

*(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, C.P.C., and there is no reason or principle to hold otherwise in the case of arbitrator.*

*(ii) an arbitrator is an alternative form for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the Court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.*

*(iii) An arbitrator is the creature of an agreement It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must*

*also act and make his award in accordance with the general law of the land and the agreement.*

*(iv) Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena's case almost all the Courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.*

*(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.*

*44. Having regard to the above considerations, we think that the following is the correct principle which should be followed in this behalf:*

*Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (alongwith the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes-or refer the dispute as to interest as such-to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.*

*…………..”*

29. Reliance has also been placed on the judgment in **LIC of India & Anr. v. S. Sindhu21**, wherein it is held that the courts cannot rewrite the contract of insurance and cannot direct the insurer to pay interest contrary to the terms of the contract. For ready reference, the relevant paras of the said judgment is reproduced as under:-

*“…….9. We will now examine whether award of interest can be sustained in any manner. It is now well-settled that interest prior to the date of suit/claim (as contrasted to pendente-lite interest and future interest) can be awarded in the following circumstances :*

*(a) Where the contract provides for payment of interest; or*

*(b) Where a statute applicable to the transaction/ liability, provides for payment of interest; or*

*(c) Where interest is payable as per the provisions of the Interest Act, 1978.*

*……….*

*13. Let us now consider the provisions of Interest Act, 1978 ('Act' for short) which deals with payment of interest upto the date of suit/claim. The Act was enacted to consolidate and amend the law relating to the allowance of interest in certain cases. The objects and reasons states that the Act was enacted to prescribe the general law of interest in a*

*comprehensive and precise manner, which becomes applicable in the absence of any contractual or statutory provision specifically dealing with interest. Sub-section (1) of Section 3 of the Act provides that in any proceedings for the recovery of any debt or damages, or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the Court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say, --*

*(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;*

*(b) if the proceedings do not relate to any such debt, then, from the date mentioned in that regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings.*

*………*

*15. Even assuming that interest can be awarded on grounds of equity, it can be awarded only on the reduced sum to be quantified and paid from the date when it becomes due under the policy (that is on the date of death of the assured) and not from any earlier date. We do not propose to examine the question as to whether interest can be awarded at all, on equitable grounds, in view of the enactment of Interest Act, 1978 making a significant departure from the old Interest Act (of 1839). The present Act does not contain the following provision contained in the proviso to section (1) of the old Act :"interest shall be payable in all cases in which it is now payable by law." How far the decisions of this Court in Satinder Singh v. Umrao Singh etc. [AIR 1961 SC 908] and Hirachand Kothari (D) by LRs. v. State of Rajasthan & Anr. [1985 Supp SCC 17] and the decision of the Privy Council in Bengal Nagpur Railway Co. Ltd., vs. Rultanji Ramji [AIR 1938 PC.67], holding that interest can be awarded on equitable grounds, all rendered with reference to the said proviso to section (1) of old Interest Act (Act of 1839), will be useful to interpret the provisions of the new Act (Act of 1978) may require detailed examination in an appropriate case.*

*……..*

*17. This takes us to the question whether the decision in Harshad J. Shah (supra) lays down any principle of law that LIC should pay such interest on the premium amounts, from the dates of payment of premium, as assumed by the Consumer Forum, State Commission and National Commission. We have carefully examined the said decision and find that no such principle is enunciated therein. In that case, one J. took out four insurance policies on 6.3.1986 through a general agent of LIC. The insured paid the first and second premiums. The third half- yearly premium which fell due on 6.3.1987 was not paid within the prescribed period. On 4.6.1987, the general agent of LIC obtained from J a bearer cheque dated 4.6.1987 for Rs.2,730/-, (being the half-yearly premium in regard to the four policies), encashed the cheque through his son, and deposited the premium with LIC on 10.8.1987. In the meanwhile, the insured died on 9.8.1987. The widow of the deceased, as the nominee under the policy, made a claim with LIC for payment of the sum assured under the four policies. It was repudiated by the LIC on the ground that the policies had lapsed on account of non-payment of half-yearly*

*premium which fell due on 6.3.1987, within the grace period. The widow of the insured submitted a complaint to the State Commission claiming the sum assured under the said 4 policies, namely, Rs.4,32,000/-. The State Commission held that LIC was negligent in its service to the policyholder and directed LIC to settle the claim. On the other hand, the National Commission held that the Insurance Agent was not acting as agent of LIC in receiving the bearer cheque from the insured and therefore, LIC was not liable. That order was challenged by the claimant before this Court. The question that arose for consideration of this Court in that case was whether the payment of premium in respect of a life insurance policy by the insured to the general agent of the LIC can be regarded as payment to the insurer so as to constitute a discharge of liability of the insured. This Court answered the said question in the negative. No other question was raised or considered by this Court. Consequent to its decision, the appeal was disposed of by this Court with the following directions :*

*"For the reasons aforementioned, we are unable to uphold the claim of the appellants. No ground is made out for interfering with the decision of the National Commission that Respondent 3 in receiving the bearer cheque for Rs.2730 from the insured was not acting as an agent of the LIC. But keeping in view the facts and circumstances of the case we direct the LIC to refund the entire amount of premium paid to the LIC on the four insurance policies to Appellant 2 along with interest @ 15% per annum. The interest will be payable from the date of receipt of the amounts of premium. "*

*[Emphasis supplied]*

…………

*21. However, we find that the following order had been passed on 7.8.2000 while granting leave :*

*"Learned Solicitor General has placed on record copy of the communication received by the instructing counsel dated 26th July, 2000, according to which amount payable to the respondent, as per directions of the Consumer Disputes Redressal Commission, have already been paid. It is submitted that irrespective of the result of the appeal, the amount which stands paid, shall not be sought for any adjustment, in the peculiar facts and circumstances of the case and no relief would be sought in that behalf against the respondent. It is submitted that the question of law involved in the case is of great importance and likely to arise in other cases."*

*22. In view of it, this decision does not render the respondent liable to refund any amount already received in pursuance of the order of the consumer forum, even though we have held that the respondent is not entitled to any interest on Rs.1,13,750/-. We may clarify the contents of this para is purely based on a concession made on 7.8.2000."*

30. Learned Senior Counsel appearing for the petitioner submitted by giving an example before this Court that suppose while X and Y may be parties operating under a particular contract, if any amount becomes payable by X to Y on account of an act, event or reason occurring outside the terms of that contract, X will not be liable to pay interest to Y on that amount on the basis of the said contract. He explained that if amounts A, B and C are items of consideration payable by X to Y under the terms of a contract, A and B being amounts with provisions for interest for delayed payment and C not even having

any such provision, and on account of some reason, though pertaining to the subject matter of the said contract but still outside the terms of that contract, a further amount D becomes payable by X to Y, then for any delayed payment on the amounts A, B, C or D:

a) Interest on amounts A and B will be payable as per their respective provisions for interest as stipulated in the terms of the said contract

b) Interest on amount C may be payable under the provisions of Interest Act.

c) No interest will be payable on amount D unless it has arisen due to a separate express or implied contract. If the reason for amount D is a separate express or implied contract, then (as in the case of C) interest on the amount D may also be payable under the provisions of Interest Act.

31. He submits that merely because an amount becomes payable by X to Y for some reason, interest does not ipso facto become payable for any delay in payment thereof unless the said amount has the legal character of a 'debt' or 'liability' under Interest Act. Interest on the ground of equity was granted only in specific circumstances which would attract the jurisdiction of an equity court, not because the claimant had taken a Bank loan and had himself been paying interest to the Bank, the Court could not award interest just because it thought it was reasonable to do so. In support of his submissions, he has placed reliance on the judgments in **Bengal Nagpur Railway Co. v. Ruttanji Ramji22, Seth Thawardas Pherumal v. Union of India23, Union of India v. A.L. Rallia Ram24 and Union of India v. West Punjab Factories25**.

32. Learned Senior Counsel appearing for the petitioner has assertively argued that the impugned demand for interest on additional compensation is also devoid of merit as the same was unilaterally and high-handedly fixed by the YEIDA authorities without pursuing the legal procedure and method available to it in law, namely, by filing a suit, claim petition or ‘proceeding’ in the capacity of a plaintiff or claimant itself praying for the relief of interest from the petitioner in the court constituted for that purpose under Section 3 of the Interest Act. Inspite of being a statutory body, the YEIDA has no independent right, jurisdiction or authority in law to raise a demand of interest from any citizen and allottee at its own sweet-will without following the due procedure and remedy prescribed by law. As such the interest, which has been asked by YEIDA through its demand notices on additional compensation is ultra vires the scheme of Interest Act and that so without jurisdiction and arbitrary.

33. In support of his submissions, he has placed reliance on the judgment in Jyothi Ltd. v. Boving Fouress (Supra), wherein it has been held by the Karnataka High Court that even in a petition for winding up of a company instituted by a creditor against a company, he cannot seek the relief of interest as a disputed sum from the court. The Court held that even though it may result in multiplicity of proceedings, the claim for interest should be made by the claimant in a regular and separate ‘proceeding’ brought by him squarely under the Interest Act for the specific relief of award of interest by the Court. For ready reference, para 21 of the said judgment is quoted as under:-

*“21. I may now summarise the legal position as to claims for "interest" in*

*a proceeding for winding up under section 433(e) of the Act:*

*(d) Where there is bona fide dispute in regard to interest, the court considering a petition under section 433(e) should not decide the issue, merely to avoid multiplicity proceedings. The purpose of winding up proceedings being completely different from the purpose of proceedings for recovery of a debt, winding up proceedings are not a substitute for a civil suit and therefore relegating parties to a civil suit, cannot be considered as resulting in multiplicity of proceedings.*

*(e) Interest under section 61(2)(a) of the Sale of Goods Act, can be awarded by a court in a suit for recovery of the price of goods. Interest under section 3 of the Interest Act, can be awarded in any proceedings for recovery of any debt or damages or in any proceedings for interest (on any debt or damages already paid). Both these provisions specifically provide that interest can be awarded only in proceedings to recover money. They do not contemplate award of interest in proceedings which are not for recovery of money. Proceedings for winding up being proceedings not for recovery of money, no interest can be permitted or granted under section 61(2)(a) of the Sale of Goods Act, 1930, or section 3 of the Interest Act.*

34. He has submitted that in the absence of any proceeding instituted by YEIDA as the plaintiff or claimant itself under Section 3 of the Interest Act, there is no scope for interest being claimed or justified by it or being awarded to it by this Court. He submitted that the impugned demands dated 15.12.2014 and 20.09.2022 insofar as they levy interest and / or penal interest, are without the basis of any substantive statutory law. On the one hand, it is clear that there is no written contract, implied agreement or trade usage warranting the levy of interest and on the other hand there is also no substantive enactment by the Legislature for the grant of interest as per Section 4 read with Section 3 of Interest Act. Moreso, the G.O. in question dated 29.08.2014 too did not provide for any interest on delay in the payment of additional compensation. As such the demand letters are without jurisdiction ultra vires, and violative of Articles 14 and 19 (1) (g) of the Constitution of India, illegal and unconstitutional. Ref. **V.V.S. Sugars v. State of AP (CB)26 and Shree Bhagwati Steel Rolling Mills v. CCE27.** For ready reference, the judgment in V.V.S. Sugars (Supra) is reproduced as under:-

*"We are concerned with the interpretation of Section 21 of the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1961, as amended by Act 25 of 1976. Principally, the provisions to be dealt with are sub-sections 3D, 4 and 5 of Section 21 which read thus:*

*(3-D) In relation to the tax levied under sub-section (1) and in respect of purchase of sugarcane on or after the date of commencement as aforesaid :-*

*(a) Sub-sections (4) and (5) shall not apply, and the tax shall be deemed due date of purchase of sugarcane or the date of commencement as aforesaid, whichever is later,*

*(b) Sub-section (3-C) shall apply with the modification that where the assessing authority is satisfied that the Occupier of a factory or Owner of Khandasari unit has removed or cause to be removed any sugar in contravention of the provision of this section or has failed to account fully for the sugar produced in the factory or Khandasari unit or deposited by him under the provision to sub-section (3),*

*the person liable to pay the tax shall in addition to the amount payable under sub-section (3) in respect of the quantity of sugar so removed or caused to be removed or unaccounted for, be also liable to pay by way of penalty a further sum not exceeding one hundred percent of the sum so payable;*

*(c) The provisions of the sub-section shall be without prejudice to the provisions of sub-section (3-C).*

*(4) The tax payable under sub-section (1) shall be levied and collected from the Occupier of the factory or Owner of the Khandasari unit in such manner and by such authority as may be prescribed.*

*(5) Arrears of tax shall carry interest at such rate as may be prescribed,*

*2. The question is whether, subsequent to the said provisions as amended, any interest could be levied on arrears of tax under sub-rule (4) of Rule 45 of the Andhra Pradesh Sugarcane (Regulation of Supply & Purchase) Rules, 1961. Rule 45, so far as it is relevant, reads thus :*

*45(3) Any amount of tax still remaining unpaid, as finally arrived at, at the end of the crushing season on the revised assessment of tax worked out and communicated by the assessing authority under sub-section (3-B) of Section 21, shall be treated as arrear under sub-section (5) of Section 21 of the Act.*

*(4) Such arrears shall carry interest at the rate of 16 percent per annum from the date following the date of closure of crushing till the amount is finally paid.*

*3. The argument on behalf of the appellants is that by reason of clause (a) of sub-section 3D of Section 21, as amended, sub-sections (4) & (5) thereof are not to apply in respect of purchases of sugarcane made on or after the date of the commencement of the Amending Act, which was 29th December, 1975; that sub-section (5) of Section 21 was the provision that required the payment of interest on arrears of tax; and that, having regard to the inapplicability of that provision for the relevant period, no interest could be levied. The High Court in the principal judgment, which was followed in the subsequent orders, took the view that the scope of sub-section 3D of Section 21 and its application was restricted to the crushing season 1975-76 during which the Amending Act had come into force.*

*4. The said Act is a taxing statute and a taxing statute must be interpreted as it reads, with no additions and no subtractions, on the ground of legislative intendment or otherwise.*

*5. On the plain wording of clause (a) of sub-section (3D) of Section 21 of the Act as amended, we find it difficult to agree with the High Court. The provisions thereof say that sub-section (5) shall not apply in relation to tax levied under sub-section (1) of Section 21 on purchase of sugarcane. The provisions came into force on the date of the commencement of the Amending Act. The provisions are open ended and are intended to apply upon the commencement of the Amending Act with no limitation in time.*

*6. This Court in India Carbon Limited & Ors. vs. State of Assam (1997 (6) SCC 479) has held, after analysing the Constitution Bench judgment in J.K. Synthetic vs. CTO (1994 (4) SCC 276), that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. There being no substantive provision in the Act for the levy of interest on arrears of tax that applied to purchases of sugarcane made subsequent to the date of commencement of the Amending Act, no interest thereon*

*could be so levied, based on the application of the said Rule 45 or otherwise.*

*7. The appeals are allowed. The judgments and orders under appeal are set aside.*

*8. This Court, by order dated 23rd Novemeber, 1983, had refused stay of the judgment and orders under appeal and had directed that, in the event the appeals succeeded and the respondents were held liable to refund the amounts recovered on account of refusal of stay, the entire amounts should be refunded within three months from the date of the order with 18% interest from the date of the payment till the amounts were refunded. The appeals having succeeded, the respondents shall refund the amounts that the appellants have paid within three months from today with interest at the rate of 18% per annum from the date of payment till the refund is made. No order as to costs."*

35. He further submitted that it is well settled principle of law that when the status is clear the equity has no role to play. Even if for the sake of argument the legal and jurisdictional precondition of Section 6 of the Interest Act are kept aside, in the special facts and circumstances of the petitioner's case, the Court would not think it fit and equitable to allow interest. He submits that equity stands excluded from Interest Act. Ref. LIC of India & Anr. v. S. Sindhu (Supra) (para 15). He submits that the equity has to follow law, if the law is clear and unambiguous. Ref. **Celir LLP vs. Bafna Motors (Mumbai) Pvt. Ltd. and Ors.28. Even otherwise in NTPC Ltd. vs. M.P. State Electricity Board and Ors.29,** Hon'ble Supreme Court has held that interest cannot be awarded on the ground of equity, if the circumstances of the case do not warrant the same. Heavy reliance has also been placed on the judgment of Hon'ble Supreme Court in **T.M.A. Pai Foundation v. State of Karnataka30.**

36. Lastly he has submitted that there are various reasons for refusal of interest as the petitioner is an educational society, which is inherently charitable and non-profitable in nature. The petitioner has used the land allotted to it not for establishing any profit making industry, therefore, the same is distinguishable from other commercial and profit making enterprises. Even if interest is awarded against the builders, colonisers and other allottees, who had given undertaking and entered into implied agreement with the authorities to pay additional compensation for being protected from the farmers' agitation, whereas in the present matter, the petitioner society has not faced any such crisis and accordingly had never given any such undertaking and even did not enter into any such implied agreement with the Government or YEIDA. Whereas other builders, at the time of farmers' agitation, had given undertaking to the Authorities and had made a commitment for payment of additional compensation for being protected from the farmers' agitation. Even they indulged in unjust enrichment by collecting additional compensation from their end users namely home buyers or flat owners. It is claimed that the petitioner has not collected any such sum from its end users namely the students. Therefore, the question of petitioner having any debt or liability to pay additional compensation did not arise as there is no default and there can be no interest.

37. We have also heard Shri H.N. Singh, learned Senior Advocate appearing in the connected matter, who has strenuously argued on various grounds. The said arguments are in line with the

arguments advanced by Shri Sunil Gupta, learned Senior Advocate appearing in the leading writ petition and as such, we do not find additional arguments, which are to be considered separately.

**ARGUMENTS ON BEHALF OF RESPONDENT-YEIDA**

38. Shri Manish Goyal, learned Senior Counsel appearing for YEIDA has submitted that the petitioner and other similarly situated persons had earlier invoked the extraordinary jurisdiction of the High Court for quashing the demand of additional compensation in respect of land leased out to it, Board Resolution in question and the G.O. in question, whereby the said demand was permitted and allowed to be recovered from the allottees. Even it was also prayed for a direction that the State as well as YEIDA be restrained from demanding any additional amount over and above as mentioned in the lease deed. The Division Bench of this Court vide judgment and order dated 28.05.2020 had allowed all such writ petitions in Shakuntla Educational and Welfare Society v. State of U.P. & Ors. (Supra). Thereafter, the YEIDA had challenged the same before Hon'ble Apex Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra).

39. Shri Manish Goyal, learned Senior Counsel appearing for YEIDA has vehemently submitted that the validity of demand of additional compensation along with interest thereon by the YEIDA is no more res integra in view of the judgment passed by Hon'ble Apex Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra), wherein Hon'ble Apex Court had dismissed the challenge to the demand for additional compensation including interest levied by YEIDA in the demand letters thereof. Present litigation is an attempt to reagitate the issue, which the Supreme Court has already conclusively decided and resolved the matter. The Supreme Court had set aside the Division Bench judgment in Shakuntla Educational and Welfare Society v. State of U.P. & Ors. (Supra) and dismissed the challenge to the demand of additional compensation including interest levied by YEIDA in first demand notice.

40. It is contended that the first demand notice sent to the petitioner for payment of additional compensation expressly stipulated three terms:-

a) Rate of additional compensation @ 600/sqm;
b) Four installments for payment of the entire additional compensation;
c) Levy of interest in case of failure to deposit additional compensation by the specified dates.

41. Admittedly the petitioner had challenged not only the first demand notice but also assailed the validity of the G.O. in question as well as the Board Resolution in question mainly on the ground that the decision of the Full Bench of the High Court in Gajraj (Supra) is not applicable in respect of land acquired for YEIDA. The burden of additional compensation cannot be shifted upon the allottees and the YEIDA cannot realize any amount over and above, which has been mentioned in the allotment letter or in the lease deed, which is a binding contract. Earlier writ petition was allowed by means of judgment and order dated 28.05.2020 and the Division Bench had quashed the G.O. in

question as well as the Board Resolution in question. Against the said judgment, the YEIDA had preferred SLP No.10034 of 2020 before Hon'ble Supreme Court, which was converted into Civil Appeal No.4218-4219 of 2022. The said appeals were allowed by Hon'ble Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) and the judgment of this Court dated 28.05.2020 had been reversed. Hon'ble Supreme Court while deciding the same had not only approved the G.O. in question of the State Government but also approved the Board Resolution in question of YEIDA regarding additional compensation by holding that the same was policy decision in public interest and it overrides the private treaty between the parties. He has vehemently submitted that even though the Supreme Court had approved the G.O. in question as well as the Board Resolution in question but the petitioner, inspite of first demand notice, did not turn up and deposit the requisite amount in response to the said notice. Consequently, another notice dated 20.09.2022 (consequential demand notice) was issued, which is impugned in the present writ petition, whereby YEIDA again demanded additional compensation with interest for default in payment of additional compensation.

42. He submitted that in the present petition the main grievance of the petitioner is the levy of interest on the additional compensation but the petitioner had deliberately challenged the demand for additional compensation on the ground of proportionality and the quantum. However, at the admission stage, the Division Bench while entertaining the present writ petition vide interim order in question had dismissed the challenge to the additional compensation on these two grounds and only on the issue of interest, the Court had entertained the writ petition and accorded a conditional stay order. The interim order in question was not challenged by the petitioners and the condition mentioned in the interim order in question was also complied with by the petitioner. Hence the scope of the present writ petition is now limited to the issue of interest only.

43. In the earlier petition the petitioner has already assailed the validity of the first demand notice and as per first demand notice issued by YEIDA the petitioner was required to pay additional compensation explicitly outlying the imposition of penal interest in the event of failure to deposit the additional compensation by the specific date. Consequently, the demand notice dated 09.02.2018, which was also known to the petitioner and also under challenge in earlier petition and thereafter the consequential demand notice (impugned in this writ petition), which are consequential to the first demand notice, cannot be questioned in the subsequent writ petition. The first demand notice was strictly in compliance with the Board Resolution in question. Even this Court in its interim order in question had also approved the first demand notice as the same was in compliance of the Board Resolution. Since the challenge of the petitioner was dismissed, it is not open to the petitioner to challenge it again. Moreover, the first demand notice has been upheld by Hon'ble Apex Court, therefore, at this stage, the challenge qua either the rate at which additional compensation has been demanded or levy of penal interest, the same is not open to be challenged by the petitioner.

44. It is contended that another application was also filed by another allottee-M/s Jai Prakash Associates (in short "JAL") before Hon'ble Supreme Court for directions regarding the YEIDA's ability to recover the additional compensation from the allottees, along with disputing the imposition of interest by YEIDA for delayed payment of additional compensation. One of the grounds in the said application was that *"without having paid the concerned farmers additional compensation itself, has imposed a component interest on the applicant for delay in payment of the additional compensation amount."* Hon'ble Supreme Court vide its order dated 10.08.2022 dismissed JAL's application. Furthermore, after the decision in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) an application was filed by JAL seeking a review of it but the same was also dismissed by the Supreme Court on 31.01.2023. Therefore, it is contended that the principle of constructive res judicata shall be applicable debarring the petitioner to challenge the demand on any ground especially on the interest in a subsequent writ petition. Reliance in this regard has been placed on **State Bank of India v. Gracure Pharmaceuticals Ltd.31.** The relevant paragraphs of the said judgment is reproduced as under:-

*"……….11. The above-mentioned decisions categorically lay down the law that if a plaintiff is entitled to seek reliefs against the defendant in respect of the same cause of action, the plaintiff cannot split up the claim so as to omit one part to the claim and sue for the other. If the cause of action is same, the plaintiff has to place all his claims before the Court in one suit, as Order 2 Rule 2, CPC is based on the cardinal principle that defendant should not be vexed twice for the same cause.*

*12. Order 2 Rule 2, CPC, therefore, requires the unity of all claims based on the same cause of action in one suit, it does not contemplate unity of distinct and separate cause of action. On the above- mentioned legal principle, let us examine whether the High Court has correctly applied the legal principle in the instant case.*

*……………*

*17. When we go through the above quoted paragraph it is clear that the facts on the basis of which subsequent suit was filed, existed on the date on which the earlier suit was filed. The earlier suit was filed on 15.03.2003 and subsequent suit was filed on 21.05.2003.* ***No fresh cause of action arose in between the first suit and the second suit.*** *The closure of account, as already indicated, was intimated on 20.03.2002 due to the alleged fault of the respondent in not regularizing their accounts i.e. after non-receipt of payment of LC, the account became irregular. When the first suit for recovery of dues was filed i.e. on 15.03.2001 for alleged relief, damages sought for in the subsequent suit could have also been sought for. Order 2 Rule 2 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action. Respondent is not entitled to split the cause of action into parts by filing separate suits.* ***We find, as such, that respondent had omitted certain reliefs which were available to it at the time of filing of the first suit and after having relinquished the same, it cannot file a separate suit in view of the provisions of sub- rule 2 of Order 2 Rule 2, CPC. The object of Order 2 Rule 2 is to avoid multiplicity of proceedings and not to vex the parties over and again in a litigative***

***process. The object enunciated in Order 2 Rule 2, CPC is laudable and it has a larger public purpose to achieve by not burdening the court with repeated suits………..***

*(Emphasis supplied)*

45. Shri Manish Goyal, learned Senior Counsel appearing for YEIDA submitted that learned Senior Counsel appearing for the petitioner has placed heavy reliance upon 'equity' and 'interest'. Therefore, the said aspect can be broadly analyzed by considering the following three questions:-

a) Whether the allottee is liable to pay interest during the pendency of litigation initiated by allottee?

b) Whether under the facts of the present case, interest can be claimed by way of restitution as part of an equitable right?

c) Whether the allottee, due to non-fulfilment of the conditions mentioned in the Board Resolution, is liable to pay penal interest from the date of the demand till the date of actual payment, especially considering that the Board Resolution has been upheld by the Supreme Court?

46. As regards the first question, he submitted that the additional compensation is nothing but the cost of the land. The said stand is also fortified in the light of G.O. in question, which unambiguously mandates that the additional compensation is an integral part of the cost of the allotted land. Only in the said light, the Board resolution was also passed. The lease deed constitutes a specific contractual arrangement between the Government and the private party but the Government Order in question as well as Board Resolution in question override its terms with respect to the consideration of the cost of land allocation. The said stand is further fortified, once the G.O. in question as well as the Board Resolution in question had been approved by the Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra).

47. Referring to the second question, he submitted that the first demand notice also stipulates that the installments would be commenced after three months and the principal amount was to be deposited in four quarterly installments. The said demand was raised as a cost of land. The first demand notice is of the year 2014 but the petitioner had deliberately evaded the payment of additional compensation in terms of G.O. and Board Resolution and as an afterthought he preferred previous writ petition in the year 2018. The interim order was accorded by the Division Bench on 29.08.2018 and the Government Order in question as well as Board Resolution in question was set aside on 28.05.2020. However, Hon'ble Supreme Court vide its judgment in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) had upheld the validity of G.O. in question and Board Resolution in question and set aside the judgment passed by the Division Bench dated 28.05.2020. Therefore, in the present matter, the concept of restitution is applicable and the same would not be governed by the provisions of Interest Act.

48. Learned Senior Counsel for YEIDA, in support of his submissions, has also placed reliance on the Constitution Bench judgment of the Supreme Court in **Indore Development Authority v.**

**Manoharlal & Ors.32.** The relevant para 335 of the said judgment, for ready reference, is quoted as under:-

*"335. The principle of restitution is founded on the ideal of doing complete justice at the end of litigation, and parties have to be placed in the same position but for the litigation and interim order, if any, passed in the matter.* ***In South Eastern Coalfields Ltd. v. State of M.P. 46, it was held that no party could take advantage of litigation. It has to disgorge the advantage gained due to delay in case lis is lost. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final order going against the party successful at the interim stage. Section 144 of the Code of Civil Procedure is not the fountain source of restitution. It is rather a statutory recognition of the rule of justice, equity and fair play. The court has inherent jurisdiction to order restitution so as to do complete justice. This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it.*** *In exercise of such power, the courts have applied the principle of restitution to myriad situations not falling within the terms of Section 144 CPC. What attracts applicability of restitution is not the act of the court being wrongful or mistake or an error committed by the court; the test is whether, on account of an act of the party persuading the court to pass an order held at the end as not sustainable, resulting in one party gaining an advantage which it would not have otherwise earned, or the other party having suffered an impoverishment, restitution has to be made. Litigation cannot be permitted to be a productive industry. Litigation cannot be reduced to gaming where there is an element of chance in every case. If the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order."*

*(Emphasis supplied)*

49. He vehemently submitted that on account of petitioner's inaction, the YEIDA had been denied payment of its lawful dues and the petitioner's endeavour was to litigate the matter and all efforts were made to delay the payment and deprive the YEIDA for its lawful dues and thereby undermine the public purpose. He submitted that in such situation YEIDA is having every right and claim to recover the interest for the period during which the petitioner obtained and enjoyed the interim protection. As a compensatory measure, YEIDA must be compensated for this delay. Moreover, though the demand of additional compensation has been found to be lawful by the Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) but the petitioner refused to pay the same and denied the said amount to YEIDA. In support of his submissions, he has placed reliance on the judgment in **South Eastern Coalfields Ltd. v. State of M.P.33.**

50. He submitted that the aforesaid principles laid down by the Supreme Court is also applied in the present matter and the action of YEIDA is fully justified and sustainable to levy interest on payment from petitioner since in the given facts it deserves to do so in the equity.

51. He also submitted that the Board Resolution clearly stipulates that YEIDA will procure loans from the banks and other

financial institutions to pay the additional compensation to the farmers. YEIDA borrows these loans because it provides the allottees with a two year period in the first demand notice to pay the additional compensation. However, that two year period has expired and the petitioner has not paid the amount in question.

52. Shri Manish Goyal, learned counsel for YEIDA has submitted that the G.O. in question as well as the Board Resolution in question, having been held to serve a larger public interest, constitute ‘law’ within the meaning of Article 13 (2) read with Article 13 (3) of the Constitution of India. Article 13 (3) (a) of the Constitution of India elaborates that “law” includes any Ordinance, order, bye-law, rule regulation, notification, custom, or usage having the force of law in India. He has also placed reliance on the seven Judge Bench judgment of the Supreme Court in **Pradeep Kumar Biswas v. Indian Institute of Chemical Biology34,** wherein it is held in para 94 as under:-

*“94. A reference to Article 13(2) of the Constitution is apposite. It provides-*

*"13 (2) The State shall not make any law which takes away or abridges the right conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void".*

*Clause (3) of Article 13 defines 'law' as including any Ordinance, order, bye-law, rule, regulation, notification, custom or uses having in the territory of India the force of law. We have also referred to the speech of Dr. B.R. Ambedkar in Constituent Assembly explaining the purpose sought to be achieved by Article 12. In RSEB's case, the majority adopted the test that a statutory authority "would be within the meaning of 'other authorities' if it has been invested with statutory power to issue binding directions to the parties, disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law". In Sukhdev Singh's case, the principal reason which prevailed with A.N. Ray, CJ for holding ONGC, LIC and IFC as authorities and hence 'the State' was that rules and regulations framed by them have the force of law.*

*In Sukhdev Singh's case, Mathew J. held that the test laid down in RSEB's case was satisfied so far as ONGC is concerned but the same was not satisfied in the case of LIC and IFC and, therefore, he added to the list of tests laid down in RSEB's case, by observing that though there are no statutory provisions, so far as LIC and IFC are concerned, for issuing binding directions to third parties, the disobedience of which would entail penal consequences, yet these corporations (i) set up under statutes, (ii) to carry on business of public importance or which is fundamental to the life of the people ___ can be considered as the State within the meaning of Article 12. Thus, it is the functional test which was devised and utilized by Mathew J. and there he said,*

*"the question for consideration is whether a public corporation set up under a special statute to carry on a business or service which Parliament thinks necessary to be carried on in the interest of the nation is an agency or instrumentality of the State and would be subject to the limitations expressed in Article 13(2) of the Constitution. The State is an abstract entity. It can only act through the instrumentality or agency of natural or juridicial persons. Therefore, there is nothing strange in the notion of the State*

*acting through a corporation and making it an agency or instrumentality of the State".*

*It is pertinent to note that functional tests became necessary because of the State having chosen to entrust its own functions to an instrumentality or agency in absence whereof that function would have been a State activity on account of its public importance and being fundamental to the life of the people………..”*

53. He has also placed reliance on para 12 of the Constitution Bench judgment of the Supreme Court in **H.C. Narayanappa v. State of Mysore35**, which, for ready reference, is reproduced as under:-

*“…….12. In any event, the expression " law " as, defined in Art. 13(3)(a) includes any ordinance, order, bye-law, rule, regulation, notification custom, etc., and the scheme framed under s. 68C may properly be regarded as " law " within the meaning of Art. 19(6) made by the State excluding private operators from notified routes or notified areas, and immune from the attack that it infringes the fundamental right guaranteed by Art. 19(1)(g)……”*

54. With regard to the third question, he has vehemently submitted that the G.O. in question as well as subsequent Board Resolution in question upheld by the Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) constitute ‘law under Art.13 (3) of the Constitution and as an instrumentality of the State, YEIDA is legally bound to implement these directives, which in the present case, serve a public duty by ensuring the equitable distribution of additional compensation among affected farmers. This legal framework mandates YEIDA’s compliance to uphold social justice and public interest, reinforcing the status of G.O. in question as lawful enactment in the pursuit of its statutory responsibilities.

55. He has further raised an objection that the land cannot be fragmented or compartmentalised on the ground that the land was developed sector wise and villages are e-phased. Sectors allotted to allottees do not explicitly mentioned the villages as area developed by the YEIDA as big chunk of land is being developed for planned development. The G.O. in question, the Board Resolution in question as well as judgment in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) do not recognise educational institutions as special class. Therefore, there is no justification for exempting them from liability of additional compensation specially when other allottees are being required to make the same payment. He vehemently submitted that the assertion of being an educational institution in the absence of any undertaking to the State Government regarding future liability and specially in the light of affidavit sworn by the petitioner in the year 2012, wherein it affirmed to bear any future liability arising towards lease rent, cannot be considered, as the said argument had already been held to be untenable by the Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra).

56. He has vehemently submitted that there is unjust enrichment by the

petitioner institution as it had claimed status of charitable institution but nowhere provided any credible evidence to substantiate their assertion of having meagre source of income. In this regard heavy burden lies upon the petitioner to demonstrate their limited financial capacity. In the present litigation, there is no scope and ambit to scrutinse the overall financial health/ status of the institution but as the petitioner claims the status of being a charitable institution, it does not automatically exempt the petitioner from their financial obligations, especially if the institution engages in profit-generating activities. From the information available on petitioner's official website, it is evident that they are private institutions primarily focused on profit-making endeavour under the guise of providing amenities such as luxury hotels, mess facilities and other services. Furthermore, they do not publicly disclose the fees for these amenities, raising questions about transparency and financial practices.

57. It is also submitted that the petitioner has established following institutions:-

a) Galgotias Institute of Management & Technology (GIMT)
b) Galgotias College of Engineering & Technology (GCET)
c) Galgotias College of Pharmacy (GCP)
d) Galgotias University GU

58. All the aforesaid institutions are situated in the District of Gautam Buddha Nagar. Galgotias University was granted the status of a university through an enactment known as "The Galgotias University Uttar Pradesh Act, 201136. The petitioner is not a minority private institution, and, therefore, the judgment in T.M.A. Pai Foundation v. State of Karnataka (Supra) cited by learned Senior Counsel for the petitioner is not applicable in the present matter as the minority private institutions have been explicitly excluded from the provisions of U.P. Private Universities Act, 201937.

59. Shri Manish Goyal, learned Senior Counsel appearing for YEIDA has vehemently submitted that Shakuntala Welfare and Education Society through Galgotias University must adhere to the regulatory requirements of both the Act, 2011 and the Act, 2019. He submitted that the Act 2019 mandates financial transparency and accountability for private universities in Uttar Pradesh but the petitioner's failure to disclose the complete fee structure for premium amenities contravenes the principles of transparency and casts doubt on its claimed charitable status. Despite claiming charitable status, the petitioner has not disclosed the full fee structure and amenities, therefore, violating transparency obligations in the present litigation.

60. This much is contended that under clause 1(A) of the Lease Deed, the Respondent Authority is entitled to levy interest (including penal interest) in case of default in payment of land premium. The clause 1 (A) provides as under:

*"(A) the premium of Rs 21,34,79,250/- (Rupees Twenty One Crore Thirty Four Lac Seventy Niue Thousand Two Hundred Fifty only) out of which an amount equivalent to 10% of the total premium of plot has been paid by the Lessee as reservation money and the lessor hereby acknowledges the receipt thereof, and balance amount of 90% to be paid by the lessee in installments as indicated*

*below along with interest @ 12% p.a. (for availing the facility of payment of the premium in installments). In case of default in payment of installment(s) interest @ 15% per annum compounded every half yearly, would be chargeable on the installment amount for the period of delay of each installment."*

61. Under clause 1(B) of the Lease Deed, the Respondent Authority is entitled to levy interest (including penal interest) in case of default in payment of EDC. The clause 1 (B) provides as under:

*"The external development charges @ Rs. 574/- (Rupees Five Hundred Seventy Four only) per square meter to be paid in 20 equal half yearly installment along with interest on reducing balance at an interest rate of 12% or SBI PLR whichever is higher as per the Schedule prescribed hereafter and in case of default in payment of any installment further interest @15% or 3% above the SBI PLR which ever is higher, shall be charges on the amount for the defaulted period."*

62. Learned Senior Counsel appearing for YEIDA, in support of his submissions, has placed reliance on the definition of 'unjust enrichment' given in American Jurisprudence, Second Edition, Volume 66, which is reproduced as under:-

*"3. Unjust enrichment.*

*The phrase "unjust enrichment is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benches result or ender such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrin and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.*

*Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. 26 However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. 28 It is defined as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. 30 Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.31*

*Generally, quasi-contractual liability for unjust enrichment is based upon the ground that a person received a benefit which it is unjust for him to retain ought to make restitution or pay the value of the benefit to the party entitled thereto. Recovery in an action of unjust enrichment depends upon whether, by the receipt of the funds in controversy, the defendant was enriched at the loss and expense of the plaintiff. A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good*

*conscience for one to retain a benefit which has come to him at the expense of another. A person who has been unjustly enriched at the expense of another is required to make restitution to the other.*

*While the most prevalent implied contract recognized under the doctrine of unjust enrichment is predicated upon a relationship between the parties from which the court infers an intent, the doctrine also recognizes an obligation imposed by law regardless of the intent of the parties, where good conscience dictates that under the circumstances the person benefited should make reimbursement. 30 Unjust enrichment arises not only where an expenditure by one person adds to the property of another, but also where the expenditure saves the other from expense or loss.37*

*One is not unjustly enriched, however, by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution. No person is unjustly enriched unless the retention of the benefit would be unjust."*

63. He has also placed reliance on American Jurisprudence Second Edition Volume 45, wherein it is provided that in the absence of a contract to the contrary, interest on money generally runs from the time that it becomes due and payable. (Ref. **Smyth v. U.S.38**). It is also provided that when a contract term is ambiguous as to when an amount is due, the court looks to the rest of the contract to determine the date, and interest will run from that date. (Ref.**Bangley Const. Development & Engineering Inc. v. All Phase Elec. & Maintenance, Inc.39.**

64. Learned Senior Counsel for YEIDA submits that in the present matter penal interest was mentioned in the first demand letter of the year 2014 and the interest was also shown while raising the second demand notice. Therefore, it is not in dispute that the interest and penal interest were mentioned. In this regard, he has placed reliance on the averments contained in the counter affidavit filed by YEIDA. He submitted that the State fulfills its responsibility by upholding the 'public conscience' by implementing initiative intended for public purposes specially for providing additional compensation of 64.7% additional compensation in view of the judgment in Gajraj (Supra). In support of his submissions, he has placed relinace in **Arnold Rodricks v. State of Maharashtra40 and State of Bombay v. BhanjiMunji41.**

65. It is also contended that in the judgment dated May 19, 2022 in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra), Hon'ble Supreme Court has, after detailed scrutiny and examination, held that the decision of the Respondent Authority to pay the additional compensation to the farmers whose lands have been acquired, was in public interest since its objective was to quell the farmers' agitation and prevent disruption in the development activity on that account.

66. While filing the counter affidavit, YEIDA has taken a precise objection that in view of the judgment passed by the Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra), the petitioner's objection regarding additional compensation, interest and penal interest demanded by YEIDA has finally been

settled and cannot be reagitated in the subsequent proceeding. Therefore, additional compensation qua quantum of proportionality is no more res integra. An objection is being taken that the additional compensation is infact demand of land premium and levy of interest (including penal interest) in case of default of land premium. For ready reference, paragraphs 22 to 34 of the counter affidavit filed by YEIDA in Writ Petition No.2674 of 2023 are reproduced as under:-

***"Levy of interest (including penal interest) in case of default of land premium***

*22. Under Clause 1(A) of the Lease Deed, the Respondent Authority is entitled to levy interest (including penal interest) in case of default in payment of land premium. The clause 1(A) provides as under:*

*"(A) the premium of Rs-32,02,18875/- (Rupees Thirty two crore two lacs eighteen thousand eight hundred seventy five only) out of which an amount equivalent to 10% of the total premium of plot has been paid by the Lessee as reservation money and the lesser hereby acknowledges the receipt thereof, and balance amount of 90% to be paid by the lessee in installments as indicated below along with interest @ 12% p.a. (for availing the facility of payment of the premium in installments). In case of default in payment of installment(s) interest @ 15% per annum compounded every half yearly would be chargeable on the installment amount for the period of delay of each installment."*

***Levy of Interest (including penal interest) on EDC***

*23. Under clause 1(B) of the Lease Deed, the Respondent Authority is entitled to levy interest (including penal interest) in case of default in payment of EDC. The clause 1(B) provides as under:*

*"(B) The external development charges Rs 574/- (Five hundred seventy four only) per square meter to be paid in 20 equal installments along with interest reducing balance at an Interest rate of 12% or SBI PLR whichever is higher as per the Schedule prescribed hereafter and incase of default in payment of any Installment further above the SBI PLR which ever is higher, shall be charged on the defaulted period."*

***Payment of Additional Compensation and Levy of Interest (including penal interest) on delayed payment of additional compensation***

*24. Without prejudice to the above, the Respondent Authority submits that in the Shakuntla judgment, the Hon'ble Supreme Court, having undertaken a thorough and meticulous review, has conclusively determined that the Respondent Authority's decision to disburse additional compensation to the farmers whose lands have been subject to acquisition was found to be in the interest of the public at large. This decision was made with the primary objective of quelling the farmers' agitation and averting any disruption in the ongoing development activities. In this respect, the Hon'ble Supreme Court held as follows:*

*"55. If we apply the principle as laid down in the case of Kasinka Trad Trading (supra) to the facts of the present case, it will be clear that the policy decision of the State Government was not only in the larger public interest but also in the interest of the respondents. The projects were stalled on account of the farmers' agitation. The farmers felt discriminated as they found that the compensation paid to them was much lesser than the one being paid to the equally circumstanced farmers*

*in NOIDA and Greater NOIDA. It was the allottees of the land who had approached the State Government for redressal of the problem. In these circumstances, the Government took cognizance of the problem and appointed the Commissioner recommended appointment of High- Level Committee, the Chaudhary Committee was appointed. The Chaudhary Committee had threadbare discussions with all the stakeholders. It also took into consideration that on account of stay orders passed by the High Court in various writ petitions, the development of the project was stalled. On account of pendency of the writ petitions, there was always a hanging sword over the entire acquisition of it being declared unlawful. In this premise in order to find out a workable solution and that too, on the basis of the law laid down by the High Court in the case of Gajraj (supra) as affirmed by this Court in the case of Savitri Devi (supra) and followed by this Court in the case of Savitri Mohan (Dead) (supra), recommendations were made by the Chaudhary Committee. The Chaudhary Committee specifically recommended that the additional compensation and other incentives would be paid only if the landowners agree to handover physical possession of the land to YEIDA and withdraw all the litigations.*

*56. It could thus be seen that the recommendations, which were accepted by the State Government and formulated in the policy, were made taking into consideration the interests of all the stakeholders. As held by this Court, it is not only the interest of a small section of the allottees, which should weigh with the Government, but the Government should also give due weightage to the interest of the large section of farmers, whose lands were acquired."*

*25. In order to redress the grievances of the farmers and forestall any hindrance to the progress of development activities, the Respondent Authority found it necessary to disburse the additional compensation prior to receiving the due amounts from the respective allottees. It is imperative to note that the Respondent Authority operates as a self- financing entity. Consequently, to secure the financial means for disbursing the additional compensation, it had to procure loans from established lending institutions.*

*26. Pursuant to the G.O., the total amount payable to the original landowners as additional compensation is Rs. 5245 crores. Out of the said amount, the Respondent Authority has already paid Rs.3436.18 crores (approximately) to the original landowners, and a sum of Rs. 1808.87 crores (approximately) are still payable.*

*27. It is further submitted that the Respondent Authority had raised a demand for Rs. 4562.60 crores from its allottees out of which a sum of Rs.1712.62 crores (approximately) have been deposited by several allottees. A balance sum of Rs. 2849.98 crore (approximately) is still outstanding.*

*28. The Respondent Authority issued another Demand Notice i.e., the Impugned Demand Notice to the Petitioner seeking to realize the amount of INR 53.26 crore, on account of default in payment of additional compensation (No- Litigation Incentive). The Petitioner, however, failed to comply with the Demand Notice and did not pay the amount demanded on account of additional compensation.*

*29. As mentioned above, the Respondent Authority has diligently proceeded with the disbursement of additional compensation to the farmers, a measure that has necessitated securing*

*bank loans in order to fund this process. In doing so, the Respondent Authority is also incurring interest expenses on these loans.*

*30. Conversely, the Petitioner has consistently failed to fulfill its financial obligations concerning the additional compensation, despite the fact that the Hon'ble Supreme Court has unequivocally validated the demand stipulated in the Impugned Demand Notice, deeming it legitimate and in the best interest of the public. Further, the Petitioner has failed to make timely payments of the sums owed pursuant to clauses 1(A), 1(B) and 1(C) of the Lease Deed.*

*31. In these circumstances, it is only just and equitable that the Respondent Authority's demand for interest (including penal interest) on the delayed payments be upheld, more so because Respondent Authority is a public authority engaged in public service and not in private enterprise driven by profit.*

***Rate of Interest leviable on delayed payment***

*32. As is apparent from the Lease Deed, for the delay and default in payment of land premium (including the balance amount) the Respondent Authority has levied interest rate stipulated in clause 1(A) of the Lease Deed and the Petitioner is not entitled to dispute such rate.*

*33. Similarly, for the delay and default in payment of EDC, the Respondent Authority has levied interest at the rate stipulated in clause 1(B) which too the Petitioner is not entitled to dispute.*

*34. The Respondent Authority has levied the same interest rate for both the delay and default in payment of additional compensation, as stipulated in the Demand Notice, and for the delay in payment of EDC in accordance with clause 1(B). It is submitted that application of the same rate is rational and reasonable as explained in the following paragraph."*

67. Learned Senior Counsel appearing for YEIDA also submitted that the principles of Order II Rule 2 & Section 11 Explanation IV of the Civil Procedure Code, 1908 are applicable to the writ proceedings. The abandonment of a relief and re-agitation in a fresh petition is a clear abuse of the process of court. (Ref.**Forward Constructions Co. v. Prabhat Mandal (Regd.)42, Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra43 and Sarguja Transport Service v. S.T.A.T.44)**

68. He further submitted that Art.144 of the Constitution of India is applicable in the matter and the writ jurisdiction cannot be invoked by a party not complying with Art.144 of the Constitution. (Ref. **Kantaru Rajeevaru (Sabarimala Temple Review-5 J.) v. Indian Young Lawyers Assn.45, Spencer & Co. Ltd. v. Vishwadarshan Distributors (P) Ltd.46 and State of Tamil Nadu v. State of Karnataka & Ors.47)**

**REJOINDER ARGUMENTS ON BEHALF OF THE PETITIONER**

69. Shri Sunil Gupta, learned Senior Counsel appearing for the petitioner, in rejoinder, has vehemently submitted that by no stretch of imagination the G.O. in question as well as Board Resolution in question could be placed in the category of 'law' and if it is 'law', it is so only for the limited context of Art.13 (3) of the Constitution of India namely to prevent any infringement of citizens' fundamental rights under Part III of the Constitution of India. Ref. **Union of India v. Colonel**

**L.S.N. Murthy and Anr.48; Pharmacy Council of India v. Rajeev College49; Bijoe Emmanuel v. State of Karala50 and Union of India v. Naveen Jindal51.**

70. He has also submitted that the private educational institutions are important and are charitable institutions. Ref.**Unni Krishnan, J.P. State of U.P.52** and T.M.A. Pai Foundation v. State of Karnataka (Supra). He submitted that the liability, rate, period etc. of interest had not been disclosed in G.O. in question, Board Resolution in question and YEIDA demand notice in 2014. First time the same has been disclosed in the counter affidavit of YEIDA dated 17.02.2023. Therefore, the said facts does not constitute any part of cause of action regarding the main demand of 64.7% additional compensation nor the petitioner was entitled to make any claim in respect of any such cause of action as regards interest in its earlier writ petition.

71. He submits that the judgment relied upon by YEIDA in **South Eastern Coal Fields v. State of M.P.53** is distinguishable from the present dispute as the said case involved liability to pay interest of mining lease.

## ANALYSIS BY THE COURT

72. Present writ petition is preferred against the demand of Rs.33.04 crores alleged and described as “No Litigation Incentive/ 64.7% Additional Compensation” in the impugned letter dated 20.09.2022 (consequential demand notice). It appears that some other demands have also been mentioned by YEIDA in the same letter, namely, Differential Amount @ Rs.1041/- per sq. m. and External Development Charges (EDC).

73. The petitioner has also challenged the orders dated 01.08.2022 and 02.08.2022 raising demand of differential amount by way of preferring Writ Petition No.24184 of 2022 in which interim order was accorded on 21.11.2022 keeping the demand of differential amount under the orders dated 01.08.2022 and 02.08.2022 in abeyance and directing the respondents to file counter affidavit. The said writ petition is stated to be still pending consideration. The petitioner had also challenged the demand dated 09.02.2018 for EDC in O.S. No.145 of 2018 before the Civil Court, Gautam Budh Nagar in which an injunction order dated 29.03.2019 has been passed for maintaining status quo as regards adverse action of cancellation of lease deed etc. against the petitioner. Against the said injunction order, the YEIDA has filed FAFO No.1635 of 2021, which is pending consideration in the High Court and there is no interim order in it.

74. In the present matter, after the judgment of Hon’ble Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra), non-payment of additional compensation is wholly attributable to the default on the part of the petitioner. The first demand notice was given to the petitioner in the year 2014 and first time he had challenged the same when another demand notice was given to him in the year 2018, which was questioned before the High Court in the year 2018. Initially the petitioner got interim order but finally the Division Bench had allowed the writ petition vide judgment and order dated 28.05.2020 holding that the decision of Gajraj (Supra) as approved by the Supreme Court in the case of Savitri Devi (Supra) was not a judgment in rem and could not

have been applied to the proceeding for acquiring the land under different notifications for YEIDA. It was observed that the G.O. in question as well as Resolution in question were violative of the provisions of Land Acquisition Act and the policy of the State Government was unfair, unreasonable, arbitrary and in violation of the provisions of Transfer of Property Act.

75. The said judgment of the Division Bench of this Court was challenged by YEIDA before the Supreme Court by way of filing SLPs. The main contention of YEIDA before the Supreme Court was to the effect that the G.O. in question was a policy decision of the State Government, taken in public interest. The said policy decision was taken after taking into consideration the farmers' agitation, the report of Chaudhary Committee and other relevant factors. The main thrust was in order to avoid acquisition from being declared illegal, the said policy was formulated and carved out on the basis of judgment of this Court in Gajraj (Supra), which was approved by the Supreme Court in Savitri Devi (Supra). Reliance was also placed before the Supreme Court in the case of Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) that the said policy was in consonance with the decision of the Supreme Court in the case of **Centre for Public Interest Litigation v. Union of India54,** wherein it is held that it is obligatory on the State to ensure that people are adequately compensated for the transfer of resource to the private domain. Reliance was also placed on the judgment in **Narmada Bachao Andolan v. Union of India55** and it was pressed by YEIDA before the Supreme Court that the policy of the State Government was formulated by looking at the welfare of the people at large rather than restricting the benefit to a small section of the society. In the light of above judgments of the Supreme Court, it can be safely concluded that when the change in the policy of the State is in public interest, it will override all private agreements entered into by the State.

76. For deciding the controversy, it would be appropriate to have a glance on the relevant grounds, which were taken by YEIDA in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra), which is as under:-

*"…….20. We have heard Shri C.A. Sundaram, Shri C.U. Singh and Shri Maninder Singh, learned Senior Counsel appearing on behalf of YEIDA, Shri Vinod Diwakar, learned Additional Advocate General appearing on behalf of the State of Uttar Pradesh, Shri Rakesh U. Upadhyay and Dr. Surat Singh, learned counsel appearing on behalf of the farmers whose lands were acquired, Shri Nakul Dewan, Shri Sunil Gupta, Shri Ravindra Srivastava and Shri Sanjiv Sen, learned Senior Counsel appearing on behalf of the respondentsoriginal allottees of land.*

*21. The main contention of the appellants in the present appeals is that the said G.O. was a policy decision of the State Government, taken in public interest. It is submitted that the said policy decision was taken after taking into consideration the farmers' agitation, the report of the Chaudhary Committee and all other relevant factors. It is submitted that in order to avoid acquisitions from being declared illegal, the Cabinet of Ministers of the State Government had taken a considered decision to adopt a formula, which was carved out by the judgment of*

*the Full Bench of the Allahabad High Court in the case of Gajraj (supra) and approved by this Court in the case of Savitri Devi (supra).*

*22. It is also the contention on behalf of the appellants that the policy of the State Government was in consonance with the decision of this Court in the case of Centre for Public Interest Litigation and others vs. Union of India and others 3, wherein this Court has held that it is obligatory on the State to ensure that people are adequately compensated for the transfer of resource to the private domain. Relying on the judgment of this Court in the case of Narmada Bachao Andolan vs. Union of India and others4, it is submitted that the policy of the State Government was formulated by looking at the welfare of the people at large rather than restricting the benefit to a small section of the society. Relying on various judgments of this Court, it is submitted that when the change in the policy of the State is in public interest, it will override all private agreements entered into by the State.*

*23. It is further submitted on behalf of the appellants that, as a matter of fact, on account of agitation of the farmers, development could not take place in the concerned area. It is submitted that various plot owners had approached the State Government and its authorities for finding out a solution to these problems, so that the development could proceed further. It is submitted that the proceedings of the Chaudhary Committee would itself reveal that all the stakeholders including the representatives of allottees were heard by the Chaudhary Committee. Not only that, but various allottees had, in writing, agreed that they are willing to pay the additional compensation so that the hindrance in the development is removed. It is therefore submitted that it does not lie in the mouth of the respondents to question the said G.O. and oppose the payment of additional compensation.*

*24. Relying on various judgments of this Court, it is further submitted on behalf of the appellants that the lease deed itself permitted additions, alterations or modifications in the terms and conditions of the lease. As such, even as per the lease deed, the appellants were entitled to modify or alter the terms and conditions of the lease. It is submitted that the word "modify" has to be used in a broader sense and not in a narrower sense.*

*25. Learned counsel for the appellants further submitted that the High Court fell in great error in holding that no writ petitions were pending. It is submitted that, as a matter of fact, more than 600 writ petitions were pending when the policy decision was taken by the State Government. It is submitted that the policy decision was taken so as to save the acquisition, which was otherwise liable to be quashed and set aside. It is submitted that it is, in fact, the respondents, who are the beneficiaries of the said measure and as such, having taken benefit of the said measure, they cannot be permitted to refuse to pay the additional compensation.*

*26. It is also submitted on behalf of the appellants that the allotees had an option, either to make additional payment or to take refund with interest. Having opted not to seek refund with interest, it does not lie in the mouth of the respondents to refuse to pay the additional compensation.*

*27. It is also submitted on behalf of appellantYEIDA that it had specifically submitted that stay orders passed by the High Court were in force in most of the cases related to residential plots, due to*

*which the development work could not be completed.*

*28. Learned counsel appearing on behalf of the farmers also support the stand of YEIDA. It is submitted that the builders had already recovered additional compensation from the homebuyers. As such, the additional compensation was already passed on by the builders to the homebuyers. It is submitted that if the contention of the respondents is accepted, it will amount to nothing else but allowing of unjust enrichment.*

*29. It is further submitted that the respondents were not entitled to the discretionary relief under Article 226 of the Constitution of India. The writ petitions filed by them before the Allahabad High Court were filed without impleading the farmers who were necessary parties as respondents to the writ petitions………..."*

77. The Supreme Court in the said judgment had also considered the objections of the respondents (petitioner herein), which were summarized in para 30, reproduced as under:-

*"……..30. Elaborate arguments have been advanced on behalf of the respondents. To summarize, they are as under:*

*(i) The respondents had not given any undertaking to pay additional compensation, as stated;*

*(ii) The term "modification/addition" with regard to payment was restricted only to any clerical or technical error;*

*(iii) The High Court has rightly held that Gajraj (supra) and Savitri Devi (supra) applied only to the peculiar facts and circumstances of those cases. In the case of Gajraj (supra), the High Court had done elaborate exercise of categorizing the cases into three types. In any case, it is submitted that the State itself was aggrieved by the decision in Gajraj (supra), which has been challenged by it before this Court;*

*(iv) In the present case, many of the acquisitions were by private negotiations and as such, there is no question of applicability of either Section 17 or Section 5A of the L.A. Act;*

*(v) There were concluded contracts entered between the allottees and YEIDA. As such, it was not open for YEIDA to unilaterally change the terms and conditions of the contract and enhance the lease premium;*

*(vi) The High Court has rightly held that the socalled policy of the State Government was arbitrary, irrational and therefore not sustainable in law;*

*(vii) On behalf of the respondent No.19Supertech Limited, an additional submission was made that the appropriate authority has already passed an order admitting the petition filed under Section 7 of the Insolvency and Bankruptcy Code, 2016;*

*(viii) On behalf of the individual plot owners, it is submitted that the said plot owners, who belong to the middle class section of the society cannot be burdened with the additional amount.*

*(ix) The respondents also placed reliance on the judgment of this Court in the case of ITC Limited vs. State of Uttar Pradesh and others5 to support the proposition that concluded contracts cannot be interfered with or reopened……."*

78. In Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra), the Supreme Court had also considered the policy decision of the State

Government formulated in the G.O. in question, as under:-

*"………42. After the decision of this Court in the cases of Gajraj (supra) and Savitri Devi (supra), 64.7% additional compensation and 10% of the land acquired of each of the land owners, instead of 5% and 6% was made available to the farmers whose lands were acquired for the benefit of NOIDA as well as Greater NOIDA. The lands acquired for the benefit of YEIDA were also for the development of adjoining areas. Feeling discriminated that they were being paid compensation at much lesser rate as compared to the farmers whose lands were acquired for NOIDA and Greater NOIDA, various farmers' organizations started agitations. It is some of the allottees who made representations to the CEO of YEIDA. One of such representations was made by the respondent No.19Supertech Private Limited to the CEO of YEIDA on 22nd November, 2013, stating therein that on account of agitation by the Bhartiya Kisan Union, they had to stop their work with effect from 20 th November, 2013. The said letter/representation stated that that the main grievance of the officeholders of the Bhartiya Kisan Union was that they want increased compensation and for compensating the same, the Authority wants money from the Builders. The said representation states that:*

*""the Authority is not resolving the problems of the Farmers. The main issue of farmers is that they want increased compensation, and for compensating the same, the Authority wants money from the Builders. Builders are not ready to pay this amount, due to which, we are stopping the construction works of Builders." During the discussion, it was said by the Company that "We are not against the farmers or against their rights and company gives it's consent on this fact that whatever the consent would be made out between the Authority and Government on the compensation amount of farmers, that would be accepted by the company."*

*43. The said letter/representation categorically states that the Company was not against the farmers or against their rights and that it was willing to abide by whatever decision was arrived at between the Authority and the Government on the compensation amount of farmers.*

*44. Similar representations were made by Orris Greenbay Golf Village on the same day, by Sunworld City Pvt. Ltd. on 26 th November, 2013, and by Gaursons Realtech Pvt. Ltd. on 4 th December, 2013.*

*45. It could thus be seen that on account of farmers' resistance and their agitation, the development work of the projects was stalled. When this was brought to the notice of the State Government, the State Government nominated the Commissioner, Meerut Division, Meerut vide order dated 10 th April, 2013, for looking into the issue. The Commissioner after holding various meetings with the farmers' organization/representatives submitted his report on 16 th July, 2013, stating therein that the lands have been acquired by YEIDA at large scale and taking into consideration the nature of demands having wide implications, it was necessary that a HighLevel Committee at the State Government level for examining the demands of farmers be constituted. In this background, the State Government vide order dated 3 rd September, 2013 constituted a Committee under the Chairmanship of Shri Rajendra Chaudhary, Minister of Prison, State of Uttar Pradesh. The Divisional Commissioner of the concerned Division*

*and the Collector of the concerned District were also the members of the Chaudhary Committee. The Chaudhary Committee was constituted for the purpose of resolving the problems of the villagers/farmers and the problems related to the industries. The Chaudhary Committee considered the following issues:*

*"a. Demands raised by the Farmers/ Farmers' Organizations/ Representatives and Memorandums/ Demand Letters produced by them and the favour put forth by them during the personal hearing.*

*b. Favour put forth by the Industrialists/ Builders/ Allottees during personal hearing.*

*c. Favour and opinion of Yamuna Expressway Authority."*

*46. The Chaudhary Committee conducted its proceedings on 30th September, 2013 with the representatives of the farmers. The said Committee thereafter held deliberations with the representatives of the allottees on 29 th October, 2013. It will be apposite to refer to the relevant part of the discussion that took place in the meeting held with the representatives of the allottees on 29th October,2013, which reads thus:*

*"2. It was informed by the representative of M/s. SDIL that due to the agitation of local farmers on the issues of their problems/demands, at present, we are not available to carry out any work on the spot, therefore, whatever the decision will be taken by the Committee/ Government for disposal of the problems of farmers, we will cooperate in the same.*

*3. It was informed by the representative of M/s. Supertech Pvt. Ltd. that the farmers are agitating in the entire area and they are interrupting the development work. It is necessary to solve the problems of farmers. It was also informed by him that he will cooperate in the decision to be taken by the Government/Committee for disposal of the problems.*

*4. It was informed by the representatives of M/s. Silverline and other Units/Institutions that due to interrupting their development works as a result of the demands being raised by the farmers of the area, the project cost is getting escalated. Due to solving the problems of farmers, the investment will be increased in the area and in disposal of the same, they will provide their assistance.*

*5. Regarding the demand of giving 10% abadi land in place of 7% abadi land to be given to the ancestral farmers, it was said by the representative of M/s. J.P. Infratech Pvt. Ltd. namely Sh. Sameer Gaur that earlier, they have been paid value of 7% abadi land and development charges, now, if any other cost is imposed, then, company is not in position to bear the same."*

*47. It could thus be seen that even the representatives of the allottees were of the opinion that on account of the agitation of the local farmers, the developers were not in a position to carry out any work on the spot. It was also impressed upon that on account of this, the cost of the project was getting escalated. As such, it was urged to solve the problem.*

*48. The Chaudhary Committee also considered the submissions made on behalf of the appellantYEIDA. It was submitted on behalf of the appellantYEIDA that on account of the judgment delivered in a similar case, i.e., in the case of Gajraj (supra), the farmers, whose lands were acquired, were also demanding the compensation on similar lines.*

*49. After considering the rival submissions, the Chaudhary Committee gave its recommendation as under:*

*"Recommendation of Committee:*

*The opinion of Authority as well as the demands of the Farmers' Organizations were carefully considered by the Committee. In the common order passed in the different Writ Petitions filed by Noida and Greater Noida Authorities, the Hon'ble High Court by not finding the proceedings conducted under Section 17 of Land Acquisition Act, 1894 to be proper, had directed that the Authority shall pay 64.7% additional compensation to the farmers and return them 10% developed land. Also in the Yamuna Expressway Authority, around 700 Writ Petitions have been filed by the farmers by challenging the different notifications, wherein, stay orders have been passed in the most of the Petitions, the circumstances which were existing in the acquisition made by Noida and Greater Noida Authority, same circumstances are also existed in the most of the cases of acquisition of Yamuna Expressway. The lands acquired by the Authority, have been allotted to the different allottees for different projects, due to which, the third party rights have been created in this acquired land and if order is passed against the Authority in the Petitioners filed against the Acquisition Proceedings, then, many difficulties would arise. Therefore, keeping in view the legal expected legal complications, it is required to do the out of court settlement with the affected farmers. At the time of discussion, it was assured by the farmers' representatives that if the Government/ Authority agrees to give 64.7% additional compensation, then, the farmers will withdraw the Petitions filed in the Court. Therefore, Committee recommends that:*

*I .(a) If, all the farmers/ Petitioners of a village related to the land acquired/ purchased by the Yamuna Expressway Authority, withdraw their Petitions filed in the Hon'ble High Court or in any other Court and if they give written assurance for future that they will not file any claim against the Authority or it's allottees in any Court and will not cause any obstruction in the Development Works, then, like the Greater Noida Authority, the Authority may consider to give amount equivalent to 64.7% additional compensation in the form of No Litigation Incentive/ Additional Compensation, which may be compensated proportionally from the concerned allottees and same may also be imposed proportionally in the costing of allotment of land available with the Authority.*

*These benefits shall be allowed also to those farmers, whose' lands have been purchased by the Authority vide Sale Deed on mutual consent basis.*

*(b) The process of payment of additional compensation, be completed villagewise in accordance with the Schemes/ Priorities of Authority after obtaining physical possession of on the spot and after withdrawal of all the Writ petitions/ Cases of concerned village after doing settlement with the farmers. In view of the financial condition of Authority, if the payment of additional compensation is not possible in lumpsum, then, the consideration could also be made regarding payment in installments or in the form of developed land.*

*2. Regarding allotment of 10% developed land in place of 7% developed land, the proceedings be conducted according to the order of Appeal/SLP filed by the Noida/Greater Noida Authorities.*

*3. The proceedings of amendment proposed by the Authority in Abadi Rules, are at final stage of approval, the proceedings be conducted as per the decision of Government.*

*4. Regarding abolishing the distinction between ancestral and non-ancestral, this decision has been taken in the 48th meeting dated 08.01.2014 of Yamuna Expressway Authority Board, that such land owners of the lands acquired or to be acquired/purchased by the Authority, whose' names have remained recorded in Six Yearly Register/ Khatauni on the acquired land prior to the date of establishment of Authority i.e. 24.04.2001, and the landowners are residents of any village related to any District lying within the notified area of Yamuna Expressway Authority, then, the benefit of 7% abadi land be granted to him against his acquired land. In the decision of Authority Board, this facility has also been allowed to the successors of eligible land owners, who fulfill the aforesaid conditions. The further proceedings be conducted as per the decision of Authority Board.*

*5. In view of the demands of farmers organizations and local public of District Mathura, after taking into consideration the proposal submitted by Concessionaire namely M/s. J.P. Infratech Ltd., in the 48th meeting dated 08.01.2014 of Yamuna Expressway Authority Board, a decision in principle has been taken for construction of Exist & Entry Ramps at BajnaNauhjheel Road at Yamuna Expressway and by making necessary amendments in DPR accordingly, a letter has been sent to the Concessionaire namely M/s. J,P. Infratech for necessary action. The further proceedings be conducted as per the decision of Authority Board.*

*It is recommended by the Committee that the aforementioned additional benefits be granted to the landowners only in that case when they will handover the physical possession of land to the Authority and withdraw Writ Petition/Case pending in Hon'ble High Court or any other Court and agreement for not causing any obstruction in future in the development works of allottees and for not filing any claim in any Court against the acquisition of land in future. Regarding the other demands, the Committee will give it's recommendation after further consideration."*

*50. It could thus be seen that the recommendations of the Chaudhary Committee were principally intended to resolve the issue between the farmers and the allottees, and to find out a workable solution to the problem. The Chaudhary Committee recommended similar treatment to be given to the farmers whose lands were acquired for YEIDA, as was given to the farmers whose lands were acquired for the benefit of NOIDA and Greater NOIDA. The Chaudhary Committee found that the same benefits as were given to the farmers whose lands were acquired for the benefit of NOIDA and Greater NOIDA in view of the judgment of the High Court in the case of Gajraj (supra), as affirmed by this Court in the case of Savitri Devi (supra) should also be given to the farmers whose lands were acquired for the benefit of YEIDA. However, this was made conditional. Additional benefit was granted to the landowners on the condition that they would handover the physical possession of land to YEIDA and withdraw the writ petitions/cases filed by them pending before the High Court.*

*51. The State Government vide the said G.O. gave effect to the recommendations of the Chaudhary Committee. YEIDA too, in its Board meeting dated 15 th September, 2014, resolved to implement the decision of the State Government. Accordingly, demand notices came to be issued to the allottees.*

*52. It could thus be seen that the policy decision of the State Government is*

*preceded by various factors. Firstly, the farmers' agitation, after they were denied the benefits which were granted to the farmers whose lands were acquired for the benefit of NOIDA and Greater NOIDA; the report of the Commissioner, the appointment of the Chaudhary Committee, the deliberations of the Chaudhary Committee with various stakeholders, and thereafter the recommendations of the Chaudhary Committee.*

*53. It will be relevant to refer to the judgment of this Court in the case of the Kasinka Trading and another vs. Union of India and another7, wherein this Court has referred to various earlier pronouncements and the treatise of Prof. S.A. de Smith on "Judicial Review of Administrative Action". The relevant paragraphs of the said judgment read thus:*

*"12. It has been settled by this Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority "to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make". There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation.*

*13. The ambit, scope and amplitude of the doctrine of promissory estoppel has been evolved in this country over the last quarter of a century through successive decisions of this Court starting with Union of India v. IndoAfghan Agencies Ltd. [(1968) 2 SCR 366 : AIR 1968 SC 718] Reference in this connection may be made with advantage to Century Spg. & Mfg. Co.Ltd. v. Ulhasnagar Municipal Council [(1970) 1 SCC 582 : (1970) 3 SCR 854] ; Motilal Padampat Sugar Mills Co.Ltd. v. State of U.P. [(1979) 2 SCC 409 :1979 SCC (Tax) 144 : (1979) 2 SCR 641] ; Jit Ram Shiv Kumar v. State of Haryana [(1981) 1 SCC 11 : (1980) 3 SCR 689] ; Union of India v. Godfrey Philips India Ltd. [(1985) 4 SCC 369 : 1986 SCC (Tax) 11] ; Indian Express Newspapers (Bom) (P) Ltd. v. Union of India [(1985) 1 SCC 641 : 1985 SCC (Tax) 121] ; Pournami Oil Mills v. State of Kerala [1986 Supp SCC 728 : 1987 SCC (Tax) 134] ; Shri Bakul Oil Industries v. State of Gujarat [(1987) 1 SCC 31 : 1987 SCC (Tax) 74 : (1987) 1 SCR 185] ; Asstt. CCT v. Dharmendra Trading Co. [(1988) 3 SCC 570 : 1988 SCC (Tax) 432] ; Amrit Banaspati Co. Ltd. v. State of*

*Punjab [(1992) 2 SCC 411] and Union of India v. Hindustan Development Corpn. [(1993) 3 SCC 499 : JT (1993) 3 SC 15] In Godfrey Philips India Ltd. [(1985) 4 SCC 369 : 1986 SCC (Tax) 11] this Court opined: (SCC p. 388, para 13)*

*"We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires; if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it."*

*14. In Excise Commissioner, U.P. v. Ram Kumar [(1976) 3 SCC 540 : 1976 SCC (Tax) 360 : AIR 1976 SC 2237] four learned Judges of this Court observed: (SCC p.545, para 19)*

*"The fact that sales of country liquor had been exempted from sales tax vide Notification No. ST1149/X802 (33)51 dated 641959 could not operate as an estoppel against the State Government and preclude it from subjecting the sales to tax if it felt impelled to do so in the interest of the revenues of the State which are required for execution of the plans designed to meet the ever increasing pressing needs of the developing society. It is now well settled by a catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers."*

*15. Prof. S.A. de Smith in his celebrated treatise Judicial Review of Administrative Action, 3rd Edn., at p. 279 sums up the position thus:*

*"Contracts and covenants entered into by the Crown are not to be construed as being subject to implied terms that would exclude the exercise of general discretionary powers for the public good. On the contrary they are to be construed as incorporating an implied term that such powers remain exercisable. This is broadly true of other public authorities also. But the status and functions of the Crown in this regard are of a higher order. The Crown cannot be allowed to tie its hands completely by prior undertakings is as clear as the proposition that the Courts cannot allow the Crown to evade compliance with ostensibly binding obligations whenever it thinks fit. If a public authority lawfully repudiates or departs from the terms of a binding contract in order to have been bound in law by an ostensibly binding contract because the undertakings would improperly fetter its general discretionary powers the other party to the agreement has no right whatsoever to damages or compensation under the general law, no matter how serious the damages that party may have suffered."*

*54. It has been held by this Court that the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large. It has been held that while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while*

*considering the applicability of the doctrine. It has been held that the doctrine being an equitable doctrine, it must yield when the equity so requires, if it can be shown by the Government or Public Authority that having regard to the facts and circumstances as they have transpired, it would be inequitable to hold the Government or the Public Authority to the promise, assurance or representation made by it. The judgment of this Court in the case of Kasinka Trading (supra) has been consistently followed.*

*55. If we apply the principle as laid down in the case of Kasinka Trading (supra) to the facts of the present case, it will be clear that the policy decision of the State Government was not only in the larger public interest but also in the interest of the respondents. The projects were stalled on account of the farmers' agitation. The farmers felt discriminated as they found that the compensation paid to them was much lesser than the one being paid to the equally circumstanced farmers in NOIDA and Greater NOIDA. It was the allottees of the land who had approached the State Government for redressal of the problem. In these circumstances, the Government took cognizance of the problem and appointed the Commissioner to look into the issue. Since the Commissioner recommended appointment of a HighLevel Committee, the Chaudhary Committee was appointed. The Chaudhary Committee had threadbare discussions with all the stakeholders. It also took into consideration that on account of stay orders passed by the High Court in various writ petitions, the development of the project was stalled. On account of pendency of the writ petitions, there was always a hanging sword over the entire acquisition of it being declared unlawful. In this premise, in order to find out a workable solution and that too, on the basis of the law laid down by the High Court in the case of Gajraj (supra) as affirmed by this Court in the case of Savitri Devi (supra) and followed by this Court in the case of Savitri Mohan (Dead) (supra), recommendations were made by the Chaudhary Committee. The Chaudhary Committee specifically recommended that the additional compensation and other incentives would be paid only if the landowners agree to handover physical possession of the land to YEIDA and withdraw all the litigations.*

*56. It could thus be seen that the recommendations, which were accepted by the State Government and formulated in the policy, were made taking into consideration the interests of all the stakeholders. As held by this Court, it is not only the interest of a small section of the allottees which should weigh with the Government, but the Government should also give due weightage to the interest of the large section of farmers, whose lands were acquired……."*

79. Hon'ble Apex Court in the said judgment had also approved the policy decision of the State Government with categorical terms in following paragraphs:-

*"……….57. We further find that the High Court fell in error in observing that no writ petitions were filed challenging the acquisition for YEIDA. The report of the Chaudhary Committee itself would clarify that YEIDA had itself submitted that insofar as the residential plots are concerned, there were stay orders operating in majority of the writ petitions due to which the development of the project work was stalled.*

*58. We are therefore of the considered view that the policy decision of*

*the State Government was in the larger public interest. It was taken considering entire material collected by the Chaudhary Committee after due deliberations with all the stakeholders. The factors which were taken into consideration by the State Government were relevant, rational and founded on ground realities. In this view of the matter, the finding of the High Court that the policy decision of the State Government was arbitrary, irrational and unfair, is totally incorrect.*

*59. The law with regard to interference in the policy decision of the State is by now very well crystalized. This Court in the case of Essar Steel Limited vs Union of India and others8 had an occasion to consider the scope of interference in the policy decision of the State. After referring to various decisions of this Court, the Court observed thus:*

*"43. Before we can examine the validity of the impugned policy decision dated 63 2007, it is crucial to understand the extent of the power vested with this Court to review policy decisions.*

*44. In DDA [DDA v. Allottee of SFS Flats, (2008) 2 SCC 672 : (2008) 1 SCC (Civ) 684] on issue of judicial review of policy decisions, the power of the Court is examined and observed as under: (SCC pp.69798, paras 6465)*

*"64. An executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty gritty of the policy, or substitute one by the other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review.*

*65. Broadly, a policy decision is subject to judicial review on the following grounds:*

*(a) if it is unconstitutional;*

*(b) if it is dehors the provisions of the Act and the Regulations;*

*(c) if the delegatee has acted beyond its power of delegation;*

*(d) if the executive policy is contrary to the statutory or a larger policy."*

*45. Thus, we will test the impugned policy on the above grounds to determine whether it warrants our interference under Article 136 or not. Further, this Court neither has the jurisdiction nor the competence to judge the viability of such policy decisions of the Government in exercise of its appellate jurisdiction under Article 136 of the Constitution of India. In Arun Kumar Agrawal v. Union of India [Arun Kumar Agrawal v. Union of India, (2013) 7 SCC 1] , this Court has further held as under: (SCC p. 17, para 41)*

*"41. ... This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or taken for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economic factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be a correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately*

*proved to be wrong, that itself is not a ground to hold that the decision was mala fide or taken with ulterior motives." (emphasis supplied)*

*46. In Villianur Iyarkkai Padukappu Maiyam v. Union of India [Villianur Iyarkkai Padukappu Maiyam v. Union of India, (2009) 7 SCC 561] , it was held as under: (SCC p. 605, para 169)*

*"169. 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. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts." (emphasis supplied)*

*47. A threeJudge Bench of this Court in Narmada Bachao Andolan v. Union of India [Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664] cautioned against courts sitting in appeal against policy decisions. It was held as under:(SCC p. 763, para 234)*

*"234. In respect of public projects and policies which are initiated by the Government the courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in public interest to require the court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the court to go into the matter afresh and, in a way, sit in appeal over such a policy decision." (emphasis supplied)*

*48. A similar sentiment was echoed by a Constitution Bench of this Court in Peerless General Finance & Investment Co. Ltd. v. RBI [Peerless General Finance & Investment Co. Ltd. v. RBI, (1992) 2 SCC 343] , wherein it was observed as under:(SCC p. 375, para 31)*

*"31. ... Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts."*

*49. A perusal of the abovementioned judgments of this Court would show that this Court should exercise great caution and restraint when confronted with matters related to the policy regarding commercial matters of the country. Executive policies are usually*

*enacted after much deliberation by the Government. Therefore, it would not be appropriate for this Court to question the wisdom of the same, unless it is demonstrated by the aggrieved persons that the said policy has been enacted in an arbitrary, unreasonable or mala fide manner, or that it offends the provisions of the Constitution of India."*

*60. It is trite law that an interference with the policy decision would not be warranted unless it is found that the policy decision is palpably arbitrary, mala fide, irrational or violative of the statutory provisions. We are therefore of the considered view that the High Court was also not right in interfering with the policy decision of the State Government, which is in the larger public interest.*

*61. It will also be apposite to refer to the following observations of this Court in the case of APM Terminals B.V. vs. Union of India and another9:*

*"67. It has been the consistent view of this Court that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest and provided such change in policy was guided by reason. Several decisions have been cited by the parties in this regard in the context of preventing private monopolisation of port activities to an extent where such private player would assume a dominant position which would enable them to control not only the berthing of ships but the tariff for use of the port facilities."*

*62. It could thus be seen that it is more than settled that a change in policy by the Government can have an overriding effect over private treaties between the Government and a 9 (2011) 6 SCC 756 private party, if the same was in the general public interest. The additional requirement is that such change in policy is required to be guided by reason.*

*63. Insofar as the reliance placed by the respondents on the judgment of this Court in the case of ITC Limited (supra) is concerned, in our considered view, the said judgment would not be of any assistance to the case of the respondents. This Court in the said case in paragraph 107.1 has clearly observed that in the case of conflict between public interest and personal interest, public interest should prevail.*

*64. A number of judgments of this Court have been cited at the Bar by the respondents in support of the proposition that in view of concluded contracts, it was not permissible for the appellants to unilaterally increase the premium by framing a policy.*

*65. We have hereinabove elaborately discussed that when a policy is changed by the State, which is in the general public interest, such policy would prevail over the individual rights/interests. In that view of the matter, we do not find it necessary to refer to the said judgments. The policy of the State Government as reflected in the said G.O. was not only in the larger public interest but also in the interest of the respondents.*

*66. We further find that the respondents have indulged into the conduct of approbate and reprobate. They have changed their stance as per their convenience. When their projects were stalled on account of the farmers' agitation, it is they who approached the State Authorities for finding out a solution. When the State Government responded to their representations and came up with a policy which was equitable and in the interest of both, the farmers and the allottees and when the said policy paved the way for development, when called upon*

*to pay the additional compensation, the respondentsallottees somersaulted and challenged the very same policy before the High Court, which benefitted them. We have already hereinabove made reference to the various communications made by the allottees of the land for intervention of the State Government.*

*67. Insofar as the individual plot owners are concerned, it will be worthwhile to mention that the residential plot owners in Sectors 18 and 20 of Yamuna Expressway city have formed an association, viz., Yamuna Expressway ResidentialPlotOwners Welfare Association (hereinafter referred to as "the YERWA"). The communication addressed by the president of the YERWA to the CEO of YEIDA would reveal that 98.5% of the allottees/owners have voted in favour of paying the additional premium demanded by the Authority. The only request made by the YERWA is with regard to making a provision for paying additional premium in installments.*

*68. It can thus be seen that even insofar as the individual residential plot owners are concerned, more than 98% of the plot owners do not have any objection to the payment of the additional compensation.*

*69. With respect to the contention of the respondent No.19 Supertech with regard to initiation of CIRP, we are not concerned with the said issue in the present proceedings. The law will take its own course.*

*70. In conclusion, we are of the considered view that the policy decision of the State Government as reflected in the said G.O. dated 29th August, 2014 and the Resolution of the Board of YEIDA dated 15th September, 2014 were in the larger public interest, taking care of the concerns of the allottees as well as the farmers. As already discussed hereinabove, had the said decision not been taken, there was a hanging sword of the acquisition being declared unlawful. The development of the entire project was stalled on account of farmers' agitation. Before taking the policy decision, the State Government, through the Chaudhary Committee, had done a wide range of deliberations with all the stakeholders including the allottees, farmers and YEIDA. The policy decision was taken after taking into consideration all relevant factors and was guided by reasons. In any case, it is a settled position of law that in case of a conflict between public interest and personal interest, public interest will outweigh the personal interest. The High Court was therefore not justified in holding that the policy decision of the State was unfair, unreasonable and arbitrary. We are of the considered view that the High Court has erred in allowing the writ petitions. The present appeals, therefore, deserve to be allowed.*

*71. In the result, we pass the following order:*

*(i) The appeals are allowed;*

*(ii) The impugned judgment and order dated 28 th May, 2020, passed by the Allahabad High Court in Writ Petition No. 28968 of 2018 and companion matters is quashed and set aside;*

*(iii) The writ petitions filed by the respondents covered by the impugned judgment and order dated 28th May, 2020 passed by the Allahabad High Court are dismissed;*

*72. Applications for Intervention are allowed. Pending applications, including the applications for directions, shall stand disposed of in the above terms. There shall be no order as to costs."*

80. We find that as an instrumentality of the State, YEIDA is legally bound to implement the directives of the Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra), once the same serve a public duty by ensuring the equitable distribution of additional compensation among affected farmers. This legal framework mandates YEIDA's compliance to uphold social justice and public interest, reinforcing the status of G.O. in question as lawful enactment in the pursuit of its statutory obligations. We also find that the petitioner's attempt to contest the additional compensation and the associated levy of interest through repeated litigation is to be seen in the light of these constitutional provisions. Moreover, once the Supreme Court had validated the Government Order in question as well as the Board Resolution in question, therefore, the duty is cast upon YEIDA to enforce the Government Order in question as well as Board Resolution in question in its entirety. Pick and choose policy cannot be adopted by YEIDA. In the present mater, the G.O. in question as well as Board Resolution in question are not only lawful but also essential qua equitable and efficient administration of public policy. Once the additional compensation has decisively been settled by the Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) and the Board Resolution in question does contain a provision for payment of interest, particularly in view of G.O., which entitles YEIDA to levy not only interest but the penal interest upon the allottees, the same were also reflected from all the three demand notices, the same has binding effect to be enforced by YEIDA in the pursuit of its statutory obligations.

81. After going through the first demand notice, we find that it clearly provides in categorical terms that the amount of additional compensation was demanded in the light of G.O. in question, which was issued qua the farmers affected by land acquisition in the form of no litigation incentive/ additional compensation, which shall be compensated from the concerned allottees in proportionate manner. It talks about 51st Board Meeting of Authority, wherein it has been decided to realize Rs.600/- per sq. mtr. as additional dues other than rate of allotment for compensating the burden of extra compensation on the plots allotted under the Mini SEZ (25 to 250 acres) Scheme. In terms of the aforesaid notice, the extra compensation installment was due w.e.f. 16.03.2015. The same had commenced after three months of notice and the same was to be paid in four half yearly installments without any interest or penal interest. While demanding the extra compensation installments, request was also made to ensure to deposit due demand of the extra compensation on the prescribed date in the prescribed bank, otherwise in case of default, the penal interest will be imposed.

82. Therefore, at this stage, it can be safely said that while giving first demand notice the Authority had relied upon the G.O. in question as well as resolution of 51st Board meeting of the Authority and provided that in case of default penal interest will be levied. Surprisingly, last and fourth installment had to be paid on or before 13.09.2016 but there is nothing on record to show that the

petitioner had made any endeavor to pay the installments in time though the same was without interest towards extra compensation of 64.7% and even though the Supreme Court had already approved the judgment of Gajraj (Supra) in Savitri Devi (Supra) on the basis of considering the ground realities of the matter and arrived at more practical and workable solution.

83. In the subsequent notice dated 20.08.2018 the YEIDA has reiterated the demand of additional compensation along with interest. The petitioner had challenged the demand notices and the Board resolution in question in writ proceeding in which initially an interim order was passed on 29.08.2018. Eventually all such writ petitions were allowed by the Division Bench and the demand notices as well as G.O. in question were set aside on 28.05.2020. The judgment and order dated 28.05.2020 was challenged by YEIDA in SLPs. The SLPs were allowed by Hon'ble Apex Court on 19.05.2022 in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra). Thereafter, consequential demand notice dated 20.09.2022 was issued by YEIDA against which present writ petition is preferred.

84. In the present matter, vide interim order in question dated 05.01.2023, the Coordinate Bench had dismissed the challenge to the additional compensation on the ground of proportionality and quantum and only on the issue of interest, the response was asked from YEIDA.

85. In the connected Writ-C No.2674 of 2023 (M/s Maruti Educational Trust v. State of U.P. & Anr.), the petitioner has challenged the demand notice dated 20.09.2022 of Rs.53.56 crores. The interim order was accorded by this Court on 17.02.2023 subject to deposit of Rs.30 crores. However, on modification, the amount was modified to the tune of Rs.18,21,15,000/-, which the petitioner had already deposited.

86. In the present matter, the respondent authority has vehemently pressed that there is unjust enrichment. The first demand notice was given to the petitioner on 15.12.2014 and once G.O. in question as well as Board Resolution in question were upheld by the Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra), which mandates the payment of additional compensation as part of the land allotment cost, therefore, we find that the directives in the said judgment are authoritative and legally binding and established the petitioner's obligation to pay both principal and interest on the delayed payment. The conduct of the petitioner was not bonafide as it never made any payment, following the first demand notice dated 15.12.2014. Only part payment of Rs.15 crores was made only in compliance of the interim order in question dated 05.01.2023. The record clearly reflects that at no point of time prior to interim order in question the petitioner was ever inclined to deposit even the additional compensation. Hon'ble Supreme Court in **Dr. Sham Lal Narula v. Commissioner of Income-Tax, Punjab56** has observed in para 8 as under:-

*"……..8. The Legislature expressly used the word "interest" with its well konwn connotation under s. 34 of the Act. It is, therefore, reasonable to give that*

*expression the natural meaning it bears. There is an illuminating exposition of the expression "interest" by the House of Lords in Westminster Batik, Ltd. v. Riches(1). The question there was whettier where in an action for recovery of any debt or damages the court exercises its discretionary power under a statute and orders that there shall be included in the sum for which the judgment is given interest on the debt or damages, the sum of interest so included is taxable under the Income-tax Acts. If the said amount was "interest of money" within Schedule D and the General Rule 21 of the All Schedules Rules of the Income Tax Act, 1918, income-tax was payable thereon. In. that context it was contended that money awarded as damages for the detention of money was not interest and bad not the quality of interest. Lord Wright observed: "The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied, or a statute, or whether the money was due for any other reason in law. In either case the money was due to him and was not paid or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute, as for instance under section 57 of the Bills of Exchange Act, 1882, or was unliquidated and claimable under the Act as in the present case. The essential quality of the claim for compensation is the same, and the compensation is properly des- cribed as interest".*

*This passage indicates that interest, whether it is statutory or contractual, represents the profit the creditor might have made if he had the use of the money or the loss he suffered, because he had not that use. It is something in addition to the capital amount, though it arises 'out of it. Under s. 34 of the Act when the Legislature designedly used the word "interest" in contradistinction to the amount awarded, we do not see any reason why the expression should not be given the natural meaning it bears. The scheme of the Act and the express provisions there,of establish that the statutory interest payable under s. 34 is not compensation paid to the owner for depriving him of his right to possession of the land acquired, but that given to him for the deprivation of the use of the money representing the compensation for the land acquired………..."*

87. We find that the judgment in **South Eastern Coalfields Ltd. v. State of M.P. (Supra)** is fully applicable upon the present case, wherein the State Government, enhanced the royalties payable on coal by the mine lessees, similar to the additional compensation in the present case, which initially was not part of the lease deed. The High Court initially accorded interim orders protecting the recovery of enhanced royalties from the mining companies but finally quashed the notification enhancing the royalties. However, the Supreme Court upheld the demand for enhanced royalty. Subsequently, interest was demanded as restitution along with royalty, which was considered and the Supreme Court upheld the demand for interest as restitution, even for the period during which the opposite party benefitted from the interim order. Furthermore, the Supreme Court held that interest is an obligation to pay in equity, even in the absence of an agreement or custom to that effect. The ratio of the judgment in South Eastern Coalfields

(Supra) is principally based upon the law of equity and has been followed in numerous subsequent cases. At this stage, it is not amenable to the petitioner to press the relief that the interest cannot be charged except in accordance with law. The G.O. in question, Resolution in question and subsequent demand notice had been approved by the Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) and the interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement. For ready reference, the relevant paragraphs of the judgment in South Eastern Coalfields Ltd. (Supra) is reproduced as under:-

*"......21. Interest is also payable in equity in certain circumstances, me rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (See : Chitty on Contracts, Addition 1999, Vol. II, Part 38-248, at page 712). Interest in equity has been held to be payable on a market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.*

*22. We may refer to the decision of this Court in Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Ors. v. N.C. Budharaj (Deceased) by Lrs. and Ors., (2001) 2 5CC 721, wherein the controversy relating to the power of an arbitrator (under the Arbitration Act 1940) to award interest for pre-reference period has been settled at rest by the Constitution Bench. The majority speaking through Doraiswamy Raju, J., has opined that the basic proposition of law that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by whatever name it may be called, viz., interest, compensation or damages and this proposition is unmistakable and valid; the efficacy and binding nature of such law cannot be either diminished or whittled down. It was held that in the absence of anything in the arbitration agreement, excluding the jurisdiction of the arbitrator to award interest on the amount due under the contract, and in the absence of any other prohibition, the arbitrator can award interest.*

.........

*24. We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest for the period for which the consumers/purchasers did not pay the amount of enhanced royalty which is a constituent part of the price of the mineral for the period for which it remained unpaid. The justification for award of interest stands fortified by the weighty factor that the Coalfields themselves are obliged to pay interest to the State on such amount. It will be a travesty of justice to hold that though the Coalfields must pay the amount of interest to the State but the consumers/purchasers in whose hands the money was actually withheld be exonerated from liability to pay the interest.*

***Liability of the consumers/purchasers to pay interest to the Coalfields :***

*(b) (for the period for which the restraint order passed by the Court remained in operation)*

*………..*

*26. In our opinion, the principle of restitution takes care of this submission. The word 'restitution' in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution or decree or order or the court or in direct consequence of a decree or order (See : Zafar Khan and Ors. v. Board of Revenue, U.P., and Ors., . In law, the term 'restitution' is used in three senses; (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, Seventh Edition, p.1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that 'restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done.*

*"Often, the result in either meaning of the term would be the same. ..... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortuous misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed."*

*The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 of the C.P.C. speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with ail expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing, wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.*

*27. Section 144 of the C.P.C. is not the fountain source of restitution; it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play.*

*That is why it is often held that even away from Section 144 the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In Jai Berham v. Kedar Nath Marwari (1922) 49 LA. 351, their Lordships of the Privy council said:*

*"It is the duty of the Court under Section 144 of the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved.*

*Cairns, L.C., said in Rodger v. Comptoir d'Escompte de Paris, (1871) L.R. 3 P.C.:*

*"One of the first and highest duties of all Courts is to take cars that the act of the Court does no injury to any of the suitors and when the expression, the act of the Court is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case".*

*This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it, A.A. Nadar v. S.P. Rathinasami, (1971) 1 MLJ 220. In the exercise of such inherent power the Courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.*

*……….*

*29. Once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution. Such interest is not controlled by the provisions of the Interest Act of 1839 or 1978."*

88. Similar view has also been taken by Hon'ble Apex Court in **T.N. General & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd.57.** For ready reference, the relevant paragraphs 73 ad 74 of the said judgment is reproduced as under:-

*"….73. With regard to the issue raised about the interest on late payment, APTEL has considered the entire matter and come to the conclusion that interest is payable on compound rate basis in terms of Article 10.6 of the PPA. In coming to the aforesaid conclusion, APTEL has relied on a judgment of this Court in Central Bank of India vs. Ravindra & Ors. [19]. In this judgment it has been held as follows:*

> *"………The essence of interest in the opinion of Lord Wright, in Riches v. Westminster Bank Ltd.All ER at p. 472 is that:*

*….it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation; the money due to the creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute.*

*A Division Bench of the High Court of Punjab speaking through Tek Chand, J. in CIT v. Dr Sham Lal*

*Narula thus articulated the concept of interest:*

*the words 'interest' and 'compensation' are sometimes used interchangeably and on other occasions they have distinct connotation. 'Interest' in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, 'interest' is understood to mean the amount which one has contracted to pay for use of borrowed money. ...*

*In whatever category 'interest' in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."*

*74. Similar observations have been made by this Court in Indian Council of Enviro-Legal Action vs. Union of India & Ors. [20] wherein it has been held as follows:*

*"178. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of time value of money, restitution and unjust enrichment noted above—or to simply levelise—a convenient approach is calculating interest. But here interest has to be calculated on compound basis—and not simple—for the latter leaves much uncalled for benefits in the hands of the wrongdoer.*

*179. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors i.e. use of the money and the inflationary trends, as the market forces and predictions work out.*

*180. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law reform which the Law Commission must take note and more so, because the serious effect it has on the administration of justice. However, [pic]the power of the Court to order compound interest by way of restitution is not fettered in any way. We request the Law Commission to consider and recommend necessary amendments in relevant laws……."*

89. A plea has also been taken by learned Senior Counsel for the petitioner before this court as well as before the Supreme Court that being an educational institution, the petitioner had never given an undertaking to the State Government for payment of additional compensation. Hon'ble Apex Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) did not accept these pleas and upheld the validity of G.O. in question as well as Board Resolution in question along with consequential demand of all allottees equally. It was also argued by Shri Manish Goyal that the petitioner had given undertaking on 07.06.2014 affirming to pay any future liability arising towards lease rent. Hon'ble Apex Court while passing the judgment in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) had already rejected the plea of the petitioner qua educational institution and observed that the educational institution cannot be exempted from obligation to pay additional

compensation as this could create an unfair disparity among farmers, whose land has been acquired. Moreover all the farmers are entitled to equal compensation irrespective of any use of land by the allottees.

90. We find that initially the object of the 51st Board Resolution was to pay additional compensation to the farmers and even in case of allottees, who did not agree to pay additional compensation, leave was accorded to them to surrender the plot and get refund of the deposited amount (other than penal interest) along with interest @ 6% p.a. However, no such endeavour or serious efforts reflected from the record that the petitioner was even willing to pay up the additional compensation.

91. The demand notice of the year 2014 sent by YEIDA to the petitioner for payment of additional compensation specifically stipulated two terms i.e. (a) rate of additional compensation @ 600/sqm; (b) levy of penal interest in case of failure to deposit additional compensation by the specified dates. Finally the Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) had approved the demand notice of the year 2014. The demand letter of the year 2014, which was subject matter of challenge before the Division Bench in earlier round of litigation in which initially interim order was accorded but later on the writ petition was allowed. However, finally in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra), the G.O. in question; resolution in question as well as the demand was approved by the Supreme Court.

92. In view of the above uncontroverted facts, the issue with regard to liability of petitioner for payment of additional compensation to be paid to the farmers has been set at rest. Therefore, the computation made by YEIDA while raising the first demand in the year 2014 and later on through second demand of the year 2018 is no longer res integra in view of the judgment in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra). In the aforesaid circumstances, if the petitioner is entitled to seek relief against YEIDA in respect of the same cause of action, the petitioner cannot split up the claim so as to omit one part to the claim and sue for the other cause i.e. interest in the subsequent petition. If the cause of action is same, the petitioner has to place all his claims before the Court in one proceeding, as Order 2 Rule 2 CPC is based on the cardinal principle that the respondent-YEIDA should not be vexed twice for the same cause of action.

93. It is well settled that Order 2 Rule 2 CPC requires the unity of all claims based on the same cause of action in one suit, it does not contemplate unity of distinct and separate cause of action. The earlier proceeding, which were drawn by the petitioner while filing the earlier writ petition, wherein he has challenged the demand of 2014 and the Government Order in question as well as Resolution in question, the same was put at rest by the Supreme Court on 19.05.2022 in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra). Subsequently, present proceeding has been drawn in the year 2022. Considering the relief, we find that no fresh cause of action arose between first proceeding and second proceeding.

94. The penal interest was shown in the first demand as well as interest and

penal interest were also indicated in the second demand of the year 2018 due to alleged default of the petitioner. The subsequent (third) notice has been challenged in the present proceeding. Surprisingly earlier petition was filed in the year 2018 and at the same time it was known to the petitioner qua interest and penal interest. After finalisation of the earlier proceeding and approval of demand of YEIDA based upon Government Order in question and the Resolution in question, present proceeding has been drawn questioning the validity of impugned demand letter dated 20.9.2022 sent by YEIDA to the extent that the said letter pertains to demand of 64.7% additional compensation (inasmuch as other demands mentioned in the letter already stand challenged by way of other legal remedies adopted by the petitioner as stated in para 5 of the present writ petition). Alternatively, it had also been prayed for a direction to YEIDA not to recover from the petitioner any amount other than the amount of 64.7% additional compensation. The impugned demand notice dated 20.9.2022 is only reiteration of earlier first and second demand notices of the year 2014 and 2018 respectively.

95. Order 2 Rule 2 CPC provides that every proceeding (suit) shall include the whole of the claim, which the petitioner (plaintiff) is entitled to make in respect of same cause of action. The petitioner is not entitled to split the cause of action into parts by filing separate proceedings (suits). We find, as such, that the petitioner had not omitted present relief but infact challenged the demand letter in the light of G.O. in question and resolution in question in the previous litigation. Even in such situation, it cannot be presumed that the petitioner had omitted certain reliefs, which they want to press in the present proceeding. Present relief was available to the petitioner and infact it had also been challenged in the previous proceeding, therefore, it cannot be permitted to reagitate the same cause of action in the subsequent writ petition. The object of Order 2 Rule 2 CPC is to avoid multiplicity of proceedings and not to vex the parties again and again in a litigative process. The object is very noble and laudable and it has a larger public purpose to achieve by not burdening the court with repeated proceedings.

96. We cannot, at this juncture, ignore the facts that the petitioner in its attempt had challenged the Government Order dated 29.8.2014 and demands raised on its basis and the Division Bench of this Court had clubbed all such matters and allowed the same vide its judgment and order dated 28.05.2020 and held that the G.O. dated 29.8.2014 and its acceptance by YEIDA is patently illegal. It is violative of the provisions of the L.A. Act and is otherwise without jurisdiction as no such Government Order is liable to be issued in equity by the Government and that the policy behind it is unfair, unreasonable and arbitrary which is in violation of the provisions of the T.P. Act. Thereafter, the Government Order dated 29.08.2014 was held to be invalid and consequentially, all actions and demands of the YEIDA based upon it were held to be illegal. The aforesaid judgment and order passed by the Division Bench of this Court was challenged by YEIDA before Hon'ble Apex Court by way of SLPs and the SLPs were allowed by way of judgment in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra). The relevant paragraph nos.70, 71 and 72 of the said judgment are again reproduced as under:-

*70. In conclusion, we are of the considered view that the policy decision of the State Government as reflected in the said G.O. dated 29th August, 2014 and the Resolution of the Board of YEIDA dated 15th September, 2014 were in the larger public interest, taking care of the concerns of the allottees as well as the farmers. As already discussed hereinabove, had the said decision not been taken, there was a hanging sword of the acquisition being declared unlawful. The development of the entire project was stalled on account of farmers' agitation. Before taking the policy decision, the State Government, through the Chaudhary Committee, had done a wide range of deliberations with all the stakeholders including the allottees, farmers and YEIDA. The policy decision was taken after taking into consideration all relevant factors and was guided by reasons. In any case, it is a settled position of law that in case of a conflict between public interest and personal interest, public interest will outweigh the personal interest. The High Court was therefore not justified in holding that the policy decision of the State was unfair, unreasonable and arbitrary. We are of the considered view that the High Court has erred in allowing the writ petitions. The present appeals, therefore, deserve to be allowed.*

*71. In the result, we pass the following order:*

*(i) The appeals are allowed;*

*(ii) The impugned judgment and order dated 28 th May, 2020, passed by the Allahabad High Court in Writ Petition No. 28968 of 2018 and companion matters is quashed and set aside;*

*(iii) The writ petitions filed by the respondents covered by the impugned judgment and order dated 28th May, 2020 passed by the Allahabad High Court are dismissed;*

*72. Applications for Intervention are allowed. Pending applications, including the applications for directions, shall stand disposed of in the above terms. There shall be no order as to costs."* .

97. Since the relief, as has been prayed for, is already negated by the Supreme Court, therefore, at this stage, the petitioner cannot be permitted to turn back and challenge the demand on the ground that the liability, rate, period etc. of interest had not been disclosed in G.O. in question, Resolution in question and YEIDA's demand notices. The matter in issue is already decided for the parties interse by Hon'ble Apex Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra), hence the principle of resjudicata would also be attracted. (Ref. **M.P. Palanisamy & Ors. v. A Krishnan & Ors.58 and Pondicherry Khadi & Village Industries Board v. P. Kulothangan & Ors.59)**. For ready reference, paragraph 39 of the judgment in M.P. Palanisamy & Ors. v. A Krishnan & Ors. (Supra) is reproduced as under:-

*"39. We cannot, at this juncture, ignore the fact that the appellants in their first attempt before the Tribunal, challenged only the first condition regarding the appointment and chose not to challenge the second condition. At that juncture, they had the full opportunity of challenging the second condition also. They conveniently interpreted the G.O.Ms. No. 1813 in their favour, and in our opinion, wrongly, and ignored to challenge the second condition. This is not permissible. They could not thereafter turn back and challenge the second condition in the second or third round of litigation. It is*

*for this reason also, that the claim of the appellants must fail."*

98. We find that the principles of resjudicata laid down under Section 11 CPC including the principles of constructive resjudicata are applicable in the present matter. Since the Supreme Court has already approved the G.O. in question, resolution in question as well as first and second demand notices in the earlier proceeding, therefore, it is not amenable to the petitioner to turn around and press the present relief, which is barred by principles of resjudicata.

99. The principle of res judicata fully operates in the court proceeding. It is the courts, which are prohibited from trying the issue, which was directly and substantially in issue in the earlier proceedings between the same parties, provided the court trying the subsequent proceeding is satisfied that the earlier court was competent to dispose of the earlier proceedings and that the matter had been heard and finally decided by such court. While deciding the matter by the Supreme Court, not only G.O. in question and resolution in question but the demand notices were also under challenge and the matter had been heard and finally decided by the Supreme Court. In the instant case, the parties were the same. Hon'ble Supreme Court was competent to decide the issue, which it did with a reasoned order on merits after the contested hearing. In the earlier proceeding, the ground of interest and penal interest were also the subject matter in view of the first and second demand notice, which the YEIDA claimed and the Supreme Court had approved the G.O. in question and the Resolution in question, therefore, the decision was final and at present it is not open to the petitioner to reagitate the issue. (Ref. **K. Ethiajan (dead) by Lrs. v. Lakshmi & Ors.60 and Gorte Gouri Naidu (minor) and Anr. v. Thandrothu Bodemma & Ors.61. For ready reference, paragraphs 13 to 20 of K. Ethiajan (dead) by Lrs. v. Lakshmi & Ors.** (Supra) are reproduced as under:-

*"……..13. After considering the rival contentions advanced by the counsel for the parties and on perusal of the record of this case, we find that there was no justification for the High Court in second appeal to reverse the concurrent findings and judgments of the two courts below.*

*14. As held by this Court in the two decisions in cases of Ramalinga Samigal Madam and R. Manicka Naicker (supra), erders or decisions of the Settlement Officers granting patta under the Act of 1948 are not conclusive with regard to the dispute of title between parties to the lands in question and civil court alone is competent to decide the question of title. In the present case, the question of title to the suit properties, particularly on the plea of claim of ownership by deceased K. Ethirajan, directly and substantially arose between the same parties in earlier Original Suit No. 9003 of 1973 and the Apeal Suit No. 389 of 1977 arising therefrom. In the aforesaid previous litigation deceased M.Gurunathan sought eviction of deceased K. Ethirajan claiming exclusive title to the suit properties.*

*15. Deceased K. Ethirajan as defendant to the previous suit resisted it both on the ground of adverse possession as well as on the alleged co-ownership of the parties recognised by grant of joint patta (Ex. A-7).*

*16. We have perused the contents of the two judgments in Civil Suit No. 9003 of 1973 (Ex. A-22) and appellate judgment*

*dated 24.4.1979 (Ex. A-32). We find that the High Court has clearly erred in observing in the impugned judgment that in the earlier suit, co-ownership to the suit property was not claimed by deceased - plaintiff (K. Ethirajan). In the paper book containing additional documents, copies of the judgments of Exs. A-22 and A-23 have been placed before us. The trial court dismissed the suit of deceased - respondent (M. Gurunathan) on the ground that the case of grant of leave and licence set up by him was not poved and the defendant being in possession since 1940 onwards has perfected his title by adverse possesion. The appellate court negatived the plea of adverse possession set up by Ethirajan as defendant but by relying on the joint patta (marked as Ex. B-6 in that Suit) came to the conclusion that the parties were co-owners. It was held that between co-owners, plea of adverse possession cannot accepted. The decree of dismissal of the suit for eviction of deceased - K. Ethirajan granted by the trial court was upheld by the appellate court on the ground that plea of grant of licence by deceased M. Gurunathan was not proved and the parties were co-owners under the joint patta in their favour. The appellate judgment upholding the dismissal of the suit on the finding of co-ownership of the parties was not challenged by any further appeal. The said judgment has thus attained finality. The learned counsel appearing for the respondents is right in his submission that the dispute of title to the suit properties between the parties was an issue directly and substantially involved in the earlier suit and on the principle of res judicata, in the present suit defendant - M. Gurunathan or his LRs are estopped from questioning the claim of co-ownership urged by deceased K. Ethirajan and his LRs. The following observations at para 26 in the case of Hope Plantations Ltd (supra) relied upon by the counsel appearing for the appellant fully support his argument based on the principle of res judicata and estoppel :*

*"26. It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises."*

*17. Learned counsel appearing for the respondents in his reply to the plea based on res judicata and estoppel contended that if at all the judgments in the earlier suits (Exs. A-22 and A-23) can be held to operate as res judicata between the parties, it would fee operative only in*

*respect of a portion of the suit property measuring 37'x20' with super-structure thereon which alone was the subject matter of dispute in the earlier suit.*

*18. The above contention advanced in reply of the learned counsel appearing for the respondents, cannot be accepted. In the earlier suit, deceased - M. Gurunathan sought eviction of deceased - K. Ethirajan from a portion of the suit property by claiming exclusive title to the whole property involved in the present suit. The case of deceased - K. Ethirajan in that suit was of adverse possession and alternatively co-ownership on the basis of joint patta (Ex. A-7). Looking to the pleadings of the parties in that suit (copies of which are placed before us in additional paper-book), the ground urged by the respondent that in the earlier litigation, claim of exclusive ownership set up by deceased - M. Gurunathan was restricted only to a portion of the whole property involved in this suit, does not appear acceptable. On the basis of pleadings of the earlier suit, we find that the issue directly involved was claim of exclusive ownership of deceased - M. Gurunathan to the whole property left behind by deceased Gangammal although eviction was sought of the defendant from a particular portion of the land on which he had built a hut for residence. The suit was resisted by deceased K. Ethirajan claiming adverse possession and alternatively as co- owner on the basis of joint patta (Ex. A-7).*

*19. It is true that joint patta (Ex. A-7) granted by Settlement Authorities in proceedings under the Act of 1948 cannot itself be a source of title to claim ownership and right of partition but as has been found by the trial court and the first appellate court, the plaintiffs claim for partition is not based on joint patta (Ex. A-7) alone but judgments rendered between same parties [Exs. A-22 and A-23] in the previous suit and appeal, have also been relied wherein the claim of the present plaintiff to remain in possession of the suit property without any interference by deceased M. Gurunathan and now his LRs had been crystalised by decree of dismissal of suit for eviction agains him. Based on the judgment in the previous litigation an indefeasible right to continue to occupy the suit property as owner had been created in favour of the present plaintiff and the said judgment has attained finality between the same parties and their LRs.*

*20. The argument that principle of res judicata cannot apply because in the previous suit only a part of the property was involved when in the subsequent suit the whole property is the subject matter cannot be accepted. The principle of res judicata under Section 11 of the Code of Civil Procedure is attracted where issues directly and substantially involved between the same parties in the previous and Subsequent suit are the same - maybe - in the previous suit only a part of the property was involved when in the subsequent suit, the whole property is the subject matter……..”*

100. For ready reference, the relevant paragraph 4 of the judgment in Gorte Gouri Naidu (minor) and Anr. v. Thandrothu Bodemma & Ors. (Supra) is also reproduced as under:-

*“......4. It however appears to us that previously between the parties another suit was instituted in the Court of the learned Subordinate Judge Srikakulam being original suit No.50 of 1954. In the said suit, the validity of the deed of gifts made by Sowaramma was questioned. It was held by the learned Subordinate Judge that the said deed of gifts were not valid*

*under the Hindu Law. The appeal was taken to the Andhra Pradesh High Court being appeal No.514 of 1968 and by judgment dated 12.2.1971, the High Court disposed of the said appeal No.514 of 1968 wherein the High Court disposed of the said appeal No.514 of 1968 wherein the High Court held that such dead of gift was invalid in law. By the impugned judgment, the Division Bench of the Andhra Pradesh High Court has held that in view of such declaration of the said deed of gifts as invalid, no claim of title on the basis of the said deed of gift or family settlement can be made. In our view, such decision of the division Bench is Justified since the said earlier decision in declaring the deeds of gift as invalid, is binding between the parties. There is no occasion to consider the principle of estoppel since considered by the learned Single Judge in the facts and circumstances of the case for holding the said transfers as valid, in view of the earlier adjudication on the validity of the said deeds in the previous suit between the parties. The law is well settled that even if erroneous, an inter party judgment binds the party if the court of competent jurisdiction has decided the lis. We, therefore, find no reason to interfere with the impugned decision of the High Court. This appeal therefore fails and is dismissed without any order as to costs.*

**CONCLUSION**

101. Considering the facts and circumstances of the case, we find that the petitioner is liable to pay interest on additional compensation during the pendency of litigation initiated by it, as per the doctrine of restitution upheld by the Hon'ble Supreme Court. The interest acts as compensation for the period during which the petitioner was unjustly enriched by withholding the lawful dues owed to YEIDA. Interest on the additional compensation can be claimed by YEIDA as part of equitable restitution, given that the petitioner benefited from the interim relief granted during the litigation. The Principle of restitution is founded on the ideal of complete justice, entitling the successful party to compensation, including interest, for the period it was deprived of its lawful dues.

102. We find that the petitioner is also liable to pay penal interest from the date of accrual of demand till the date of actual payment, as mandated by the Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra) in which the validity of G.O. in question as well as Board Resolution in question had been affirmed and non-compliance thereof attracts the imposition of penal interest as a lawful consequence. We find that G.O. in question as well as Board Resolution in question, having been held to serve a larger public interest, constitute "law" within the meaning of Article 13(2) read with Article 13(3)(a) of the Constitution. These directives derive their legal force from the Constitution and must be treated with the same deference as statutory law. YEIDA's issuance of demand notices and enforcement of the G.O. in question and Board Resolution in question constitute acts in aid of the Supreme Court's order. YEIDA's actions align with its constitutional obligation to uphold the rule of law and facilitate the implementation of judicial directives. Conversely, the petitioner has consistently disregarded the legal obligations inspite of the mandate in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla

Education and Welfare Society & Ors. (Supra) by which the G.O. in question as well as the Board Resolution in question had been upheld.

103. We find that while common law provisions like the Interest Act and Contract Act provide a supplementary framework, they do not supersede the constitutional directives governing the imposition of additional compensation in this case. The G.O. in question and Board Resolution in question, upheld by the Supreme Court, override the lease deed and establish a higher legal authority integrating principles of justice, equity, and public interest. The petitioner's claim of unjust enrichment on YEIDA's part is unsubstantiated and lacks merit. The interest levied is a legitimate exercise of YEIDA's rights under the law and serves as compensation for the delay in fulfilling a lawful obligation, rather than being an unjust benefit. We find that the principle of constructive res judicata precludes the petitioner from re- litigating the issue of interest on additional compensation, as it was an integral part of the cause of action in the earlier litigation.

104. We also find that the Petitioner's plea of being an educational institute and the absence of an undertaking to pay future liabilities cannot be considered valid, as this argument was already dismissed by Hon'ble Supreme Court in Yamuna Expressway Industrial Development Authority etc. v. Shakuntla Education and Welfare Society & Ors. (Supra). The said judgment did not recognize any exemption for educational institutions regarding the liability to pay additional compensation. Moreover, the Petitioner's claim of having meagre sources of income contradicts the information available on their official website, which clearly suggests that the petitioner is focused on profit-making through undisclosed fees for premium amenities. There is nothing on record to convince us that the petitioner is not indulged in profit making. Moreover, all the farmers are entitled to equal compensation irrespective of any use of land.

105. We find that the petitioner's contentions lack legal and factual merit, as they disregard the binding nature of the Supreme Court's judgments and the constitutional framework governing YEIDA's actions. The principles of restitution, public interest, and the rule of law converge to uphold YEIDA's demand for additional compensation and the interest thereon. The petitioner's repeated attempts to evade its lawful obligations jeopardize the distribution of additional compensation intended for the affected farmers. The government directives, validated by the Hon'ble Apex Court, serve as a bulwark against such actions, ensuring that the benefits reach their rightful beneficiaries. The Petitioner's claim of charitable status and financial hardship are contradicted by their operational practices, which suggest a profit-driven approach. Nonetheless, these claims cannot override their legal obligations or the constitutional mandate in the public interest. In the interest of justice, equity, and the larger public good, it is imperative that the petitioner adheres to the lawful demands. YEIDA, as an instrumentality of the state, is duty-bound to enforce these directives without deviation, ensuring the distribution of additional compensation to the farmers and maintaining the rule of law.

106. The principles of constructive res judicata further reinforce the finality of

the matter, precluding the petitioner from re-litigating settled issues. Continued defiance would not only undermine the authority of the judiciary but also impede the timely fulfillment of YEIDA's public duty to disburse the additional compensation to the farmers. In the face of such compelling legal and constitutional imperatives, the petitioner's contentions fail to withstand scrutiny. We find that YEIDA's actions in levying interest and demanding additional compensation are legally justified and essential for upholding legal obligations in the public interest, and ensuring equitable treatment of all stakeholders involved.

107. In the aforesaid facts and circumstances, we are not inclined to interfere in the matters. Both the writ petitions lack merit and are accordingly **dismissed.**

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**(2024) 7 ILRA 391**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.07.2024**
**BEFORE**

**THE HON'BLE MANJIVE SHUKLA, J.**

Writ C No. 62734 of 2015

**Sunit Kumar Verma** ...**Petitioner**
**Versus**
**State of U.P. & Ors.** ...**Respondents**

**Counsel for the Petitioner:**
Sri Yogesh Kumar Saxena

**Counsel for the Respondents:**
C.S.C., Sri Alok Dwivedi

**Societies Registration Act, 1860-**Petitioner aggrieved by order accepting the registration of Manav Vikas Siksha Samiti and further directing the Deputy Registrar to renew the registration of the society u/s 3-A of the Act, 1860- claiming the jurisdiction of the Deputy Registrar, (Head quater), Lucknow to be beyond jurisdiction as the said authority has transferred the matter to itself from Kanpur-Petitioner claims himself to be office bearer of the Committee of Management of Manav Vikas Shiksha Samiti-on the strength that another society-Manav Vikas Shiksha Sansthan having Petitioner as a member merged in the earstwhile Samiti-as a result Petitioner claim that he became member of the general body of the Samiti-the said claim rejected by Prescribed Authority in the absence of evidence-despite this order-Deputy Registrar renewed the registration of the Samiti-Committee of Management challenged it –High Court quashed the said order and held the Petitioner as rank trespasser -both the orders not challenged by the Petitioner-quashing the order will lead to perpetuating an illegality and will give leverage to the Petitioner to raise his claim despite rejection of his claim by High Court.

**Writ Petition dismissed.** (E-9)

**List of Cases cited:**

1. Writ Petition No. 11073 of 2011 (Manav Vikas Shiksha Samiti Vs St. of U.P. & ors.)

2. Jai Bahadur Singh & ors. Vs St. of U.P. & ors. 2016 (1) UPLBEC 368

3. Chandra Singh Vs St. of Raj. & anr. (2003) 6 S.C.C. 545

(Delivered by Hon’ble Manjive Shukla, J.)

1. Heard Mr. Yogesh Kumar Saxena, learned counsel appearing for the petitioner, learned Standing Counsel appearing for Respondents No. 1 to 4 and learned counsel appearing for Respondent No. 5.

2. Petitioner through this writ petition has assailed the order dated 24.08.2015 passed by the Deputy Registrar, Firms, Societies and Chits, (Headquarter), U.P. at Lucknow whereby

claim of Respondent No. 5 in respect of the renewal of registration of Manav Vikas Siksha Samiti has been accepted and direction has been issued to the Deputy Registrar, Firms Societies and Chits, Kanpur Nagar to issue necessary order for renewal of registration of the society in terms of Section 3-A of the Societies Registration Act, 1860 and further to register the list of the office bearers and members of the Committee of Management of the Society filed by Mr. Gyan Chandra Tripathi and Mr. Vinod Chandra Srivastava.

3. Facts of the case, in brief, are that Mahatama Gandhi Shiksha Samiti, Kanpur was registered on 16.11.1951 and was assigned Registration No. 127/1951-52. Later on name of the aforesaid society was changed on 09.05.1976 to Manav Vikash Shiksha Samiti. The said society continued to perform its work and its registration remained valid till 10.10.1995, thereafter the registration of the society could not be renewed.

4. It appears that taking advantage of non renewal of the registration of Manav Vikas Siksha Samiti, petitioner got one society registered in the name of Manav Vikas Shiksha Sansthan, Kanpur Nagar having Registration No. 331 of 1989 and thereafter claimed that the said Manav Vikas Shiksha Sansthan has been merged in Manav Vikas Shiksha Samiti and thereby presented proceedings of the elections of the Committee of Management of Manav Vikas Shiksha Samiti before the Deputy Registrar, Firms, Societies and Chits, Kanpur Region, Kanpur. Another election proceeding was also placed before the Deputy Registrar by the actual office bearers of the Manav Vikas Shiksha Samiti before the Deputy Registrar.

5. Since there were two rival claims in respect of elections of the Committee of Management of Manav Vikas Shiksha Samiti, the Deputy Registrar, Kanpur Nagar referred the matter for decision to Prescribed Authority/Sub Divisional Magistrate, Sadar, Kanpur Nagar under Section 25(1) of the Societies Registration Act, 1860 on 16.11.2005.

6. The Prescribed Authority/Sub Divisional Magistrate, Sadar, Kanpur Nagar decided the aforesaid reference vide order dated 17.03.2008 wherein he has recorded a finding that present petitioner i.e. Mr. Sunit Kumar Verma could not produce the documents regarding registration of his society and also could not produce any document to show that at any point of time merger of Manav Vikas Shiksha Sansthan in Manav Vikas Shiksha Samiti has taken place and thereby it was held that election proceedings filed by Mr. Sunit Kumar Verma are not in respect of the elections of the Manav Vikas Shiksha Samiti. The Prescribed Authority vide its order dated 17.03.2008 further directed Mr. Vinod Chandra Srivastava to file application for renewal of the registration of Manav Vikas Shiksha Samiti before the Deputy Registrar, Firms, Societies and Chits, Kanpur Nagar with a direction that Deputy Registrar may decide the said application.

7. Though the claim of the present petitioner was rejected by the Prescribed Authority/Sub Divisional Magistrate, Kanpur Nagar but the Deputy Registrar in a very cursory manner passed an order on 05.02.2011 whereby he accepted the claim of Mr. Sunit Kumar Verma and renewed the registration of the society in his favour and also registered the list of the members of the general body of the society for the

year 2010-11 provided by Mr. Sunit Kumar Verma. In the aforesaid circumstances, Manav Vikas Shiksha Samiti challenged the order dated 05.02.2011 passed by the Deputy Registrar, Firms, Societies and Chits, Kanpur Nagar by filing Civil Misc. ***Writ Petition No. 11073 of 2011 (Manav Vikas Shiksha Samiti Vs. State of U.P. & Ors.)*** and this Court decided the writ petition vide order dated 23.02.2011 wherein categorical finding has been recorded that once the Prescribed Authority vide order dated 17.03.2008 had rejected the claim of Mr. Sunit Kumar Verma, the Deputy Registrar cannot sit in appeal over the decision of the Prescribed Authority and therefore the Deputy Registrar was only required to pass order for renewal of registration on the basis of application filed by Mr. Vinod Chandra Srivastava. The aforesaid judgment and order dated 23.02.2011 passed by this Court in Civil Misc. Writ Petition No. 11073 of 2011 has attained finality as no one has raised any challenge against the said judgment.

8. Pursuant to the judgment and order dated 23.02.2011 passed in Civil Misc Writ Petition No. 11073 of 2011 proceedings started before the Deputy Registrar, Firms, Societies and Chits, Kanpur Nagar but an application was filed by Mr. Gyan Prakash Tripathi Manager of the Manav Vikas Shiksha Samiti on 20.06.2014 before the Registrar, Firms, Societies and Chits, (Headquarter) U.P. at Lucknow for transfer of the case from the Deputy Registrar, Kanpur Nagar to any other Deputy Registrar on the ground that the Deputy Registrar, Kanpur Nagar is relative of Mr. Sunit Kumar Verma. The Registrar on the said application passed an order on 01.07.2014 whereby he directed for transfer of the aforesaid case to the Headquarter at Lucknow.

9. Pursuant to the order dated 01.07.2014 passed by the Registrar, all the concerned parties appeared before the Deputy Registrar (Headquarter) U.P. at Lucknow and contested their matter without raising any issue in respect of the jurisdiction of the Deputy Registrar (Headquarter) U.P. at Lucknow. The Deputy Registrar, Firms, Societies and Chits (Headquarter) U.P. at Lucknow after hearing all the parties had passed a detailed order on 24.08.2015 whereby direction was given to renew the registration of the society on the basis of the papers filed by Mr. Gyan Prakash Tripathi and Mr. Vinod Chandra Srivastava and also a direction for registration of the list of the office bearers and the members of the Committee of Management of the society. The petitioner has challenged the aforesaid order dated 24.08.2015 by filing this writ petition.

10. Learned counsel appearing for the petitioner has vehemently argued that the Deputy Registrar under the Societies Registration Act, 1860 exercises the same powers which are exercised by the Registrar, Firms, Societies and Chits, therefore the Registrar was not empowered to transfer the case from the Deputy Registrar, Kanpur Nagar to the Deputy Registrar (Headquarter) U.P. at Lucknow, accordingly the order dated 24.08.2015 passed by the Deputy Registrar, Firms, Societies and Chits (Headquarter) U.P. at Lucknow is without jurisdiction and thus cannot sustain in the eyes of law.

11. Learned counsel appearing for the petitioner in support of his arguments has relied on the judgment rendered by a co-ordinate Bench of this Court in the case ***of Jai Bahadur Singh & Ors. Vs. State of U.P. & Ors. 2016 (1) UPLBEC 368***, wherein it has been held that under the

Societies Registration Act, 1860 Registrar, Firms, Societies and Chits does not have power to transfer a case pending before one Deputy Registrar to another Deputy Registrar.

12. Learned counsel appearing for the petitioner has thus vehemently argued that his case is squarely covered by the judgment rendered by this Court in the case of Jai Bahadur Singh (Supra) and therefore, this writ petition is liable to be allowed.

13. Per contra, learned Standing Counsel appearing for Respondents No. 1 to 4 has argued that the Prescribed Authority/Sub Divisional Magistrate vide order dated 17.03.2008 had declared that the petitioner is a rank trespasser in respect of Manav Vikas Shiksha Samiti and the said order has already been affirmed by this Court vide judgment and order dated 23.02.2011 passed in Civil Misc. Writ Petition No. 11073 of 2011 wherein it has been categorically held that petitioner has no concern with the Manav Vikas Shiksha Samiti. The Judgment and order dated 23.02.2011 has attained finality, therefore by no stretch of imagination registration of the society in question can be renewed in favour of the petitioner and further his list of office bearers for managing affairs of the society cannot be registered.

14. Learned Standing Counsel has vehemently argued that even if this court comes to the conclusion that transfer of the case from the Deputy Registrar, Kanpur Nagar to the Deputy Registrar (Headquarter) U.P. at Lucknow was without jurisdiction and thereby the impugned order dated 24.08.2015 cannot sustain in the eyes of law, this court may not interfere in the matter as by interfering in the impugned order dated 24.08.2015 only illegality shall be perpetuated as it has already been held by this court vide judgment and order dated 23.02.2011 passed in Civil Misc. Writ Petition No. 11073 of 2011 that petitioner has no concern with the Manav Vikas Shiksha Samiti.

15 . Learned counsel appearing for Respondent No. 5 has argued that the case was transferred from Deputy Registrar, Kanpur Nagar to Deputy Registrar, (Headquarter) U.P. at Lucknow vide order dated 01.07.2014 passed by the Registrar, Firms, Societies and Chits, (Headquarter) U.P. at Lucknow but petitioner at no point of time has challenged the said order and even the said order is not under challenge in the present writ petition and further petitioner himself participated in the proceedings before the Deputy Registrar (Headquarter) U.P. at Lucknow without raising any protest in respect of his jurisdiction, therefore now the petitioner cannot be allowed to challenge the impugned order dated 24.08.2015 only on the ground of lack of jurisdiction.

16. It has further been argued by the learned counsel appearing for Respondent No. 5 that petitioner has no concern with the Manav Vikas Shiksha Samiti and he is just trying to enter in the affairs of the society by creating fake paper work and once this court by recording categorical findings in the judgment and order dated 23.02.2011 passed in Civil Misc. Writ Petition No. 11073 of 2011 had held that the registration of the society cannot be renewed in favour of the petitioner and he has not challenged the said order till date, there may not be any occasion for this Court to interfere in the impugned order dated 24.08.2015 on the ground of lack of jurisdiction as the said interference will only perpetuate illegality.

17. Learned counsel appearing for Respondent No. 5 has vehemently argued that if interference by this Court in an order leads to perpetuating an illegality, then this Court may deny to exercise its extraordinary jurisdiction enshrined under Article 226 of the Constitution of India, even if the order under challenge is without jurisdiction.

18. Learned counsel appearing for the Respondent No. 5 has thus concluded his arguments and has submitted that the writ petition filed by the petitioner is liable to be dismissed by this Court.

19. I have considered the rival arguments advanced by the learned counsels appearing for the parties, and I find that petitioner claims himself to be the office bearer of the Committee of Management of Manav Vikas Shiksha Samiti on the strength that another society which was registered in the name of Manav Vikas Shiksha Sansthan having petitioner as member was merged in Manav Vikas Shiksha Samiti and therefore as as result of the said merger petitioner became member of the general body of the Manav Vikas Shiksha Samiti.

20. The aforesaid claim raised by the petitioner has not been accepted by the Prescribed Authority/Sub Divisional Magistrate vide his order dated 17.03.2008 on the ground that the petitioner could not produce any document to show that at any point of time merger of Manav Vikas Shiksha Sansthan with Manav Vikas Shiksha Samiti has taken place. The Prescribed Authority negated the claim of the petitioner and vide order dated 17.03.2008 directed the Deputy Registrar to renew the registration of the Manav Vikas Shiksha Samiti on the application filed by Mr. Vinod Chandra Srivastava. In spite of the categorical order passed by the Prescribed Authority negating the claim of the present petitioner, the Deputy Registrar in the garb of the proceedings for renewal of registration of the society entertained the application given by present petitioner i.e. Mr. Sunit Kumar Verma and renewed the registration of Manav Vikas Shiksha Samiti in his favour and also registered the list of members of the general body of the society provided by him vide order dated 05.02.2011.

21. The Committee of Management of the Manav Vikas Shiksha Samiti challenged the order dated 05.02.2011 passed by the Deputy Registrar by filing ***Civil Misc. Writ Petition No. 11073 of 2011 ( Manav Vikas Shiksha Samiti Vs. State of U.P. & Ors.)*** and the said writ petition has been allowed by a co-ordinate Bench of this Court vide order dated 23.02.2011. The relevant paragraphs of the order dated 23.02.2011 are extracted as under :-

"The challenge is to the order passed by the Deputy Registrar, Firms, Societies & Chits, Kanpur Nagar, dated 5.2.2011, whereby on a request for renewal of the Society known as Manav Vikas Samiti of the petitioners has been rejected and the Society has been renewed through the respondent No.3 as an office-bearer of the Society. The petitioners have come up questioning the correctness of the said order primarily on the ground that it is without jurisdiction and that it proceeds on a presumption as if the respondent No.3 was the rightful claimant to get the Society renewed through him. It is urged by Sri Dwivedi that this procedure adopted by the Assistant Registrar virtually accepts a rank trespasser as an office-bearer which is also

in teeth of the final order passed by the Prescribed Authority on 17.3.2008 in relation to the same Society. The contention, therefore, in short is that the Respondent No.3 had virtually no right to get the renewal of the Society made in his favour that too even after the order of the Prescribed Authority dated 17.3.2008.

Sri Saxena contends that as a matter of fact the Assistant Registrar has taken into consideration all the documents that were on record to conclude that the answering respondent was the rightful claimant and therefore there being no error, the petitioners should, if aggrieved, raise the dispute elsewhere and the same cannot be gone into by exercising jurisdiction under Article 226 of the Constitution of India. Learned Standing Counsel has also adopted the same arguments.

Having heard learned counsel for the parties, it is evident that the dispute relating to the validity of the elections and office-bearers was allegedly raised before the Prescribed Authority. The Prescribed Authority called for comments and objections and it was ultimately found that there was no dispute which remained to be decided, on the premise that the claim of the petitioners was in respect of Manav Shiksha Samiti whereas the claim of Sunit Kumar Verma emanated on the strength of a Society by the name of Manav Vikas Sansthan that had ultimately merged with Manav Vikas Samiti. The Prescribed Authority found that no document was produced by Sunit Kumar Verma to establish the alleged merger and, therefore, the order dated 17.3.2008 virtually rejected the claim of Sunit Kumar Verma and directed the petitioner - Vinod Chandra Srivastava to approach the Deputy Registrar for renewal after payment of late fee. The said order dated 17.3.2008 remained unchallenged and in pursuance thereof, the petitioners appears to have approached the Deputy Registrar for renewal which remained pending for the past 3 years.

The impugned order proceeds to accept the claim of Sunit Kumar Verma, which, in the opinion of the Court, had already been rejected by the Prescribed Authority under the order dated 17.3.2008. In this view of the matter, the Deputy Registrar has virtually sat in Appeal over the order of the Prescribed Authority which is impermissible in law. The Deputy Registrar could have proceeded to decide the claim of renewal only under the provisions of Section 3A of the Societies Registration Act, 1860, but it was not open to the Deputy Registrar to have ignored the impact of the order dated 17.3.2008.

In this view of the matter, the writ petition is allowed. The order dated 5.2.2011 is unsustainable and is hereby quashed. All the consequential actions pursuant to the impugned order are also quashed. The Deputy Registrar - Respondent No.2 shall now proceed to pass fresh orders in accordance with law and in the light of the observations made herein above."

22. The Co-ordinate Bench of this court in its order dated 23.02.2011 passed in Civil Misc. Writ Petition No. 11073 of 2011 has recorded a categorical finding that present petitioner i.e. Mr. Sunit Kumar Verma could not prove merger of Manav Vikas Shiksha Sansthan in the Manav Vikas Shiksha Samiti and therefore, his claim in respect of Manav Vikas Shiksha Samiti stood rejected, as such the Deputy Registrar, Firms, Societies and Chits,

Kanpur Nagar while renewing the registration of the society in favour of Mr. Sunit Kumar Verma and registering the list of the members of the general body of the Society provided by him has acted illegally and thereby this Court quashed the order dated 05.02.2011 passed by the Deputy Registrar.

23. This Court finds that order dated 17.03.2008 passed by the Prescribed Authority/Sub Divisional Magistrate, Sadar, Kanpur Nagar and judgment and order dated 23.02.2011 passed by the co-ordinate Bench of this court in Civil Misc. Writ Petition No. 11073 of 2011 have not been challenged by the present petitioner. Once the petitioner has not challenged the aforesaid orders wherein it has been categorically held that petitioner has no connection with the Manav Vikas Shiksha Samiti then he cannot be allowed to raise any claim in respect of the Manav Vikas Shiksha Samiti.

24. So far as the argument advanced by the learned counsel appearing for the petitioner that the Registrar does not have any jurisdiction under the provisions of the Societies Registration Act, 1860 to transfer any case from one Deputy Registrar to another Deputy Registrar and thereby the Registrar while transferring the case in question from the Deputy Registrar, Kanpur Nagar to Deputy Registrar (Headquarter) U.P. at Lucknow has acted without jurisdiction and consequently the impugned order dated 24.08.2015 passed by the Deputy Registrar (Headquarter) U.P. at Lucknow is without jurisdiction is concerned, this Court finds that issue as to whether the Registrar can transfer a case from one Deputy Registrar to another has already been thrashed out by a co-ordinate Bench of this court vide its judgment rendered in the case of **Jai Bahadur Singh & Ors. Vs. State of U.P. & Ors. 2016 (1) UPLBEC 368** wherein it has been held that the Registrar does not have power to transfer the case from one Deputy Registrar to another Deputy Registrar.

25. The relevant paragraphs of the judgment rendered in the case of Jai Bahadur Singh (supra) are extracted as under :-

*"So far as the Registrar is concerned, the Legislature itself by enacting the Act has vested certain authority and power in him, however, it is the Legislature itself which has empowered the State Government for conferring the functions of Registrar to an Additional Registrar or a Joint Registrar or a Deputy Registrar or an Assistant Registrar. The Additional Registrar or other such officers who are administratively subordinate to the Registrar, thus, can not exercise any of the functions assigned to the Registrar under the Act merely because they are appointed in the department to hold such posts. They will have their jurisdiction or power vested in them to exercise the functions of Registrar under the Act only and only when the State Government confers such power or authority on these officers by a general or special order. Once conferment by the State Government by a general or special order is made on these officers to discharge the functions and powers of Registrar under the Act, these officers no more remain subordinate to the Registrar so far as discharge of statutory functions under the Act is concerned. Once conferment by the State Government has been made upon these officers, the powers and functions to be exercised by the Additional Registrar/Joint Registrar/Deputy Registrar/Assistant Registrar become co-*

*extensive with the powers and functions of the Registrar. Thus, these subordinate officers, in so far as the statutory functions under the Act as conferred by the State Government are concerned, cannot be termed to be subordinate to the Registrar. The proceedings relating to a Society are drawn and conducted by the Deputy Registrars and such officers under the Act only when the State Government confers such powers on these officers and they conduct their authority and proceedings under the Act and not administratively.*

*The proceedings which in the present case are pending consideration and for decision before the Deputy Registrar are statutory in nature and they are to be decided as per the requirement and in terms of the provisions contained in Sections 4-B and 15 of the Act. Thus, the Deputy Registrar while dealing with the proceedings in question between the parties in this case is not acting in his capacity as an ordinary administrative officer, rather he has to consider and decide the matter statutorily.*

*Submission of learned counsel for the petitioner that since there is only one Registrar in the State of Uttar Pradesh and all the Deputy Registrars are his subordinate, as such the Registrar will have ample power, authority and jurisdiction to transfer the proceedings, in my considered opinion, is not tenable for the reason that the nature of proceedings, as observed above, are not administrative in their terms, rather the same are statutory in nature as the proceedings are to be decided as per the requirement of the Act. It may be true that the Registrar in certain administrative matters may exercise certain powers over the Deputy Registrars, however, when it comes to the proceedings under the Act, it cannot be said that the Registrar will have supervisory jurisdiction or power. I may reiterate that the Deputy Registrar and such other officers as are mentioned in Section 21 of the Act are conferred with the powers of the Registrar under the Act by the State Government and once such conferment is in existence, they have the same authority which is at par with that of the Registrar under the Act, in other words, the powers of the Deputy Registrar are co-extensive with those of the Registrar*

*It may also be noticed that the State Government by a notification dated 20.07.1981 has established three regional offices in addition to the office of Registrar at Lucknow. These regional offices have been set up at Varanasi, Bareilly and Meerut. The said notification further states that the functions being discharged by the Registrar pertaining the districts falling in the Divisions mentioned in the said notification will be discharged by the offices mentioned in the said notification. The State Government by means of another notification dated 07.01.1982 issued under Section 21 of the Act conferred the powers of Registrar on all the Deputy Registrars and Assistant Registrars. The said notification dated 07.01.1982 is quoted below:*

*"सोसाइटी रजिस्ट्रीकरण अधिनियम 1860 (अधिनियम संख्या 21 सन 1860) की धारा 21 के अधीन शक्ति का प्रयोग करके राज्यपाल रजिस्ट्रार, फर्म और सोसाइटी, उत्तर प्रदेश के संगठन के समस्त उप रजिस्ट्रार और सहायक रजिस्ट्रार को उपर्युक्त अधिनियम के अधीन रजिस्ट्रार की समस्त शक्तियों प्रयोग प्रदान करते है, जिनका प्रयोग वे अपनी-अपनी अधिकारिता के क्षेत्र के भीतर करेंगे"*

*By means of another notification dated 31.07.1985, apart from Varanasi,*

*Bareilly and Meerut, regional offices at Kanpur, Agra and Gorakhpur as well were established and the territorial jurisdiction was, thus, distributed. According to said notification, the Registrar at the headquarter at Lucknow was to exercise his jurisdiction on all the districts of Lucknow and Faizabad Divisons, that is to say the Registrar at Lucknow was to exercise his jurisdiction on all the disputes relating to the Societies Registration Act arising in all the districts of Lucknow and Faizabad Divisions. The said jurisdiction of the regional offices was altered by a notification dated 24.01.1987. By means of another notification dated 29.10.1991, the territorial jurisdiction of regional offices was further altered and determined, according to which, the regional office of the department at Faizabad is to exercise the jurisdiction relating to all the districts of Faizabad Division. There was some discrepancy in the english version of the notification dated 07.01.1982 which was rectified by another notification dated 28.07.1994 which reads as under:*

*"In exercise of the powers under Section 21 of the Societies Registration Act, 1860 (Act no.XXI of 1860) the Governor is pleased to confer on all the Deputy Registrars and Assistant Registrars of the organization of the Registrar of firms and Societies, Uttar Pradesh, all the powers of the Registrar under the aforesaid Act to be exercised within the area of their respective jurisdiction."*

*On the basis of the occurrence of the words 'इनके अधीनस्थ क्षेत्रीय कार्यालयों का कार्यक्षेत्र निम्नानुसार निर्धारित करने की सहर्श स्वीकृति प्रदान करते है' in the notification dated 29.10.1991, it has been submitted by the learned counsel for the petitioners that all the regional offices are subordinate to the office of Registrar and hence, the officers working in the regional offices will be subordinate to the Registrar as well.*

*The aforesaid submission of learned counsel for the petitioners may be true but only in respect of and in regard to the general administrative powers which are exercised by the Registrar while working as the Head of the Department, however, the said submission cannot be taken to be correct in so far as the statutory functions under the Act, as conferred by the State Government on these officers including the Deputy Registrar under Section 21, are concerned. The distinction between the statutory functions under the Act and general administrative functions are to be kept in mind while dealing with the submissions being advanced by the learned counsel for the petitioners. There are various functions assigned to the Registrar as Head of the Department in his organization. He will have all the authority and power to exercise his administrative control over the Deputy Registrars. However, unless and untill the Legislature while enacting the Act vests an express authority in the Registrar to transfer the proceedings being drawn and continued under the Act by the Deputy Registrar, in my considered opinion, the Registrar will have no source of power or authority backed by the legislation to withdraw the proceedings from one Deputy Registrar and transfer the same to some other Deputy Registrar.*

*A close scrutiny of the scheme of the Act does not leave any room of doubt that the Legislature has not vested any authority on the Registrar to transfer the proceedings under the Act from one Deputy Registrar to the other Deputy Registrar.*

*The Registrar may only exercise certain control over the Deputy Registrars administratively such as issuing certain instructions and circulars for the guidance of the Deputy Registrars or taking departmental action in case he receives any complaint.*

*Assuming that the Registrar, being the highest authority in the department/in his organization, is vested with the power to transfer the statutory proceedings under the Act from one Deputy Registrar to the other Deputy Registrar, it will amount to vesting an authority in the Registrar which the Legislature never intended to vest in him.*

26. This Court is in complete agreement with the aforesaid judgment rendered by the co-ordinate Bench of this court in the case of Jai Bahadur Singh (supra) but certain issues which are peculiar in the case in hand are to be taken note of i.e. case in question was transferred by the Registrar vide his order dated 01.07.2014 from the Deputy Registrar, Kanpur Nagar to the Deputy Registrar (Headquarter) at Lucknow but petitioner did not challenge the said order rather he appeared before the Deputy Registrar (Headquarter) at Lucknow and contested the matter. Even till today petitioner has not challenged the order dated 01.07.2014 passed by the Registrar whereby the case was transferred. The petitioner has only challenged the order dated 24.08.2015 passed by the Deputy Registrar (Headquarter) at Lucknow on the ground that the said order is without jurisdiction. Apart from the ground of jurisdiction the petitioner has not taken any other ground on merits to challenge the aforesaid order dated 24.08.2015.

27. Once the petitioner did not challenge the order of transfer of the case passed by the Registrar and in fact contested the matter before the authority where the case was transferred, that changes the complete texture of the case that too when the petitioner even in this writ petition has not challenged the order dated 24.08.2015 on merits and the challenge is based on only on the ground of jurisdiction.

28. This Court finds that once the Prescribed Authority vide order dated 17.03.2008 had declared petitioner to be a rank trespasser in respect of the Manav Vikas Shiksha Samiti and even the co-ordinate Bench of this Court in its judgment and order dated 23.02.2011 passed in Civil Misc. Writ Petition No. 11073 of 2011 had recorded a finding that petitioner has no concern with the Manav Vikas Shiksha Samiti and the said judgment had attained finality, there cannot be any occasion for the Deputy Registrar to revisit the matter and by hook and crook induct the petitioner in the affairs of Manav Vikas Shiksha Samiti.

29. Though this Court finds that the impugned order dated 24.08.2015 passed by the Deputy Registrar, Firms, Societies and Chits (Headquarter) at Lucknow may be an order without jurisdiction but if the said order is interfered by this Court at this stage that may lead to perpetuating an illegality and it is settled proposition of law that this court may refuse to interfere with an order if the said interference leads to perpetuating an illegality, even if the order is patently illegal.

30. The Hon'ble Supreme Court vide its judgment rendered in the case of ***Chandra Singh Vs. State of Rajasthan & Anr. (2003) 6 S.C.C. 545*** had categorically

held that the High Court can refuse to exercise its extraordinary jurisdiction enshrined under Article 226 of the Constitution of India in the cases where such exercise of jurisdiction may lead to perpetuating an illegality.

31. The relevant paragraphs of the judgment rendered by the Hon'ble Supreme Court in the case of Chandra Singh (supra) are extracted as under :-

*" 42. In any event, even assuming that there is some force in the contention of the appellants, this Court will be justified in following Taherakhatoon vs. Salambin Mohammad (1999) 2 SCC 635 wherein this Court declared that even if the appellants contention is right in law having regard to the overall circumstances of the case, this Court would be justified in declining to grant relief under Article 136 while declaring the law in favour of the appellants.*

*43. Issuance of a Writ of Certiorari is a discretionary remedy. [See Champalal Binani vs. CIT, AIR 1970 SC 645]. The High Court and consequently this Court while exercising its extra-ordinary jurisdiction under Articles 226 or 32 of the Constitution of India may not strike down an illegal order although it would be lawful to do so. In a given case, the High Court or this Court may refuse to extend the benefit of a discretionary relief to the applicant. Furthermore, this Court exercised its discretionary jurisdiction under Article 136 of the Constitution of India which need not be exercised in a case where the impugned judgment is found to be erroneous if by reason thereof substantial justice is being done. [See S.D.S. Shipping (P) Ltd. vs. Jay Container Services Co. (P) Ltd. & Ors. [2003 (4) Supreme 44]. Such a relief can be denied, inter alia, when it would be opposed to public policy or in a case where quashing of an illegal order would revive another illegal one. This Court also in exercise of its jurisdiction under Article 142 of the Constitution of India is entitled to pass such order which will do complete justice to the parties."*

32. This court is of the categorical view that the co-ordinate Bench of this Court had already considered the petitioner's case in detail and vide judgment and order dated 23.02.2011 rendered in Civil Misc. Writ Petition No. 11073 of 2011 had affirmed that the petitioner is a rank trespasser in respect of Manav Vikas Shiksha Samiti, Kanpur Nagar and the said judgment had attained finality, therefore, even if the impugned order dated 24.08.2015 may be without jurisdiction, this Court in exercise of its extraordinary jurisdiction enshrined under Article 226 of the Constitution of India should not interfere in the said order as the same will lead to perpetuating an illegality and the consequence of setting a aside the order dated 24.08.2015 would give leverage to the petitioner to raise his claim before the concerned Deputy Registrar even though the co-ordinate Bench of this Court had already rejected the petitioner's claim.

33. In view of the aforesaid reasons, this writ petition lacks merit and accordingly is **dismissed.**

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**(2024) 7 ILRA 401**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 10.07.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Writ C No. 1007064 of 2015

**Priyanka Dubey** **...Petitioner**
**Versus**
**State of U.P. & Ors.** **...Respondents**

**Counsel for the Petitioner:**
Sri Avinash Chandra, Sri Sukumar Srivastava

**Counsel for the Respondents:**
C.S.C., Savitra Vardhan Singh

**A. Constitution of India,1950 - Article 226 - Inquiry - Allegation of transplantation of answer sheets - Mere possibility cannot substitute a definitive conclusion regarding the culpability in the alleged transplantation of answer sheets. Mere passing of an adverse order during an inquiry is insufficient; it is essential and mandatory to communicate such an order to the delinquent at the conclusion of the inquiry proceedings. Non-communication renders the order non-est and non-existent, and no action can be sustained based on such an uncommunicated order. The callous and negligent actions of Lucknow University caused unnecessary delay and inconvenience to the petitioner, warranting compensatory costs.**

**B. Petitioner, a B.Sc. 3rd-year student, appeared for her examinations in 2009. Her result was withheld due to alleged manipulation of answer sheets. A cryptic show-cause notice was issued without providing copies of the incriminating answer sheets. Despite the petitioner denying the allegations, the University failed to communicate any decision and subsequently cancelled her examination based on presumptions. After a lapse of five years, she was offered the opportunity to reappear for the 2014-15 examinations. Held: University's actions, based on presumptions and without any definitive finding of misconduct, violated the principles of natural justice. Enquiry committee failed to establish the petitioner's culpability in transplanting answer sheets. Non-communication of adverse orders rendered such orders non-est and non-existent. University was held responsible for ruining the petitioner's academic career, and costs of ₹2,00,000 was imposed on the University to compensate for the delay inconvenience caused to the petitioner.(Para 11, 22)**

**Allowed.** (E-5)

**List of Cases cited:**

1. Bachhittar Singh Vs St. of Punj. & anr., AIR 1963 SC 395

2. St. of Punj. & anr.Vs Resham Singh & ors., AIR 1966 SC 1313

3. Laxminarayan R. Bhattad Vs St. of Mah., (2003) 5 SCC 413

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

1. Heard Shri Sidharth Nath Singh, Advocate holding brief of Shri Avinash Chandra, learned counsel on behalf of the petitioner and learned Standing Counsel on behalf of the respondent no.1 and Shri Savitra Vardhan Singh, appearing on behalf of the Lucknow University- respondent no. 2 to 5.

2. The present case clearly demonstrates callous and negligence attitude and actions of the Lucknow University with regard to the petitioner, who was a student of B.Sc. 3rd year and had appeared in the examinations in 2009. The result of the said examinations were declared, but the result of the petitioner was withheld. Subsequently, the petitioner came to know that the result has been withheld on account of certain allegations attributable to the petitioner, according to which the answersheets were manipulated in six subjects.

3. Despite repeated attempts made by the petitioner, no order was passed by the respondent-University either scoring her answersheets in the aforesaid subjects nor passing any order which may indicate

her misconduct due to which the said examination was cancelled. No order was passed by the Lucknow University till a show cause notice was given to the petitioner for the first time on 20.02.2010. In the said show cause notice dated 20.2.2010 passed by the office of the Controller of Examination the petitioner was asked to respond to the allegations with regard to the subjects which were coded as S-648, S-649, S-650, S-671, S-672 and S-673 the answersheets were transplanted and the petitioner was directed to respond to the said allegations within a period of 15 days. The petitioner duly responded to the said show cause notice by a reply dated 12.03.2010 and denied the said allegations and further stated that she was never made aware of the aforesaid allegations. After submitting a reply on 12.03.2010, the respondent University did not communicate any decision in pursuance of the show cause notice given to the petitioner.

4. It seems that the Lucknow University on receiving the response of the petitioner had constituted an Examination Committee to take a decision with regard to the petitioner. It has been informed that the said committee came to a decision on 21.05.2012 to the effect that the petitioner be permitted to appear as an exempted candidate in the year 2012-13 and also took a decision that her examinations in the year 2009 stood cancelled. There is no dispute that the decision of the examination committee dated 21.05.2012 was never communicate to the petitioner and it is on account of the said fact that the petitioner could not even appear in 2012-13 examination. It seems that respondent University realised their mistake that the order of the Examination Committee dated 21.05.2012 was never communicated to the petitioner, and in the meanwhile the petitioner had approached this Court by filing a writ petition being Writ Petition No.6992 (MS) of 2014. It is during hearing of the said writ petition, Counsel for the Lucknow University informed the Court that a decision in this regard has been taken by the University on 15.11.2014. When the counsel for the petitioner was informed about the fresh decision having been taken by the Lucknow University, he prayed for dismissal of the the writ petition as withdrawn with a liberty to file afresh petition assailing the decision of the Lucknow University. It is the subsequent decision dated 15.11.2014 passed by the Examination Committee that the present writ petition has been filed by the petitioner.

5. A perusal of the order dated 15.11.2014 would clearly indicates that there is no finding the petitioner had in fact transplanted the answersheets and was guilty of misconduct. For sake of convenience, paragraph No.1(v) of the said order is quoted herein below:-

''परीक्षा समिति की बैठक दिनांक 21.05.2012 को बी0एस0सी0 तृतीय वर्ष की छात्रा प्रियंका दुबे की वर्ष 2008–09 के प्रकरण के सम्बन्ध में समिति द्वारा गहन विचार विमर्श किया गया तथा सर्वसम्मति से यह निर्णय प्रदान किया गया कि समिति द्वारा गठित उपसमिति की रिर्पोट में यह स्पष्ट किया गया है कि ऐसा प्रतीत होता है कि उत्तर पुसितिकाओं में प्रत्योरापण किया गया है परन्तु प्रत्यारोपण किस स्तर पर हुआ है इसकी पुष्टि नहीं हो सकी है। अतः समिति द्वारा सर्वसम्मिति से यह निर्णय प्रदान किया गया कि छात्रा प्रियंका दुबे की वर्ष 2008–09 की परीक्षा निरस्त की जाती है तथा यदि छात्रा पुनः बी0एस0सी0 तृतीय वर्ष की परीक्षा में सम्मिलित होना चाहती है तो उसे वर्ष 2012–13 की परीक्षा में एग्जम्टेड अभ्यर्थी के रूप में सम्मिलित करा दिया जाए।''

6. The aforesaid order clearly indicates that the Committee was of the

view that there was **possibility** of the answersheets having been transplanted but no fact leading to such presumption was even narrated in the said order. It is merely on account of the aforesaid presumption, surmises and conjectures that the Committee proceeded to cancel the examinations and offered the petitioner to appear in the subsequent examinations of 2014-15. In the said order, the Lucknow University itself has admitted that the order dated 21.05.2012 was never communicated to the petitioner and a decision has already been taken previously that the examination for 2009 of the B.Sc. 3rd Year Examination stood cancelled. In the last paragraph of the said order, it has been stated that considering the serious nature of the allegation against the petitioner and also considering the serious lapse on the part of the University Authorities, a detailed enquiry ought to be instituted to fix the responsibility of the person, who is responsible for the same and the said enquiry to be produced in the next meeting of the Committee. At this stage, it is sufficient to indicate that despite the counter affidavit having been filed by the Lucknow University on 27.11.2016, there is no whisper with regard to any enquiry proceedings having been conducted or concluded as per the order dated 15.11.2014. While assailing the order dated 15.11.2014, counsel for the petitioner has vehemently submitted that no opportunity has been given to the petitioner and the entire proceedings have been conducted exparte in gross violation of principle of nature justice.

7. A cryptic show cause notice was given to the petitioner on 20.02.2010, merely narrating the allegation against the petitioner without even supplying a photocopy of the answersheets, on the basis of which such allegations were made. In the said show cause notice, a mention has been made to an enquiry which was got conducted previously where the allegations were found true against the petitioner but surprisingly, the enquiry report was also never submitted to the petitioner nor does the same find mentions in the show cause notice.

8. A perusal of the order dated 21.05.2012 by which the paper of the petitioner was cancelled and she was held responsible for transplantation of the answersheets, even the enquiry committee could not come to a definite conclusion with regard to the culpability of the petitioner for transplanting the answersheets and the Controller of the Examinations has only held that there was a possibility of transplantation of the answersheets. Mere possibility can never be a substitute for coming to a definitive conclusion with regard to the culpability of the petitioner being involved in transplantation of the answersheet which could have been a misconduct, had the same been proved by the authority concerned.

9. From the aforesaid, it is clear that merely on account of the possibility of involvement of the petitioner in transplantation of the ordersheets, she has been held to be guilty on the basis of which her examinations for the 3rd year B.Sc. has been cancelled and after a lapse of more than 5 years was offered to appear again in the examinations of 2014-15.

10. Considering the first submission of counsel for the petitioner that the proceedings were in gross violation of principle of nature justice, it is abundantly clear that after show cause

notice, the petitioner had submitted her response. But, no order was communicated to the petitioner on the conclusion of the inquiry proceedings. Even the show cause notice is bereft of the relevant material relied upon in the show cause notice itself, neither the copies of the answersheets were provided to the petitioner nor was the copy of the inquiry report, which was an existence at the time of passing of the show cause notice was supplied to the petitioner.

11. In the aforesaid circumstances, this Court is of the considered view that the proceedings conducted by the respondents were clearly in gross violation of principle of natural justice and such proceedings cannot be sustained. The second aspect of the matter is with regard to the non-communication of the order dated 21.05.2012. Merely passing of the order is not sufficient to hold a person guilty during an inquiry but it is equally essential and mandatory that such an order should in fact be communicated to the delinquent at the conclusion of the enquiry proceedings. Non-communication of the order renders the same non-est and non-existing and no action can be taken in furtherance of the order which has not been communicated to the party concerned.

12. The impugned order dated 15.11.2014 has been passed only on the basis of previous order dated 21.05.2012. Once we have held the order dated 21.05.2012 being illegal and non-est, then the subsequent order dated 15.11.2014 based solely on the previous order dated 21.05.2012 would suffer the same fate and is also illegal and arbitrary to the extent it cancels the papers of the petitioner pertaining to the examinations held in 2009.

13. The pronouncements of the Supreme Court in the case **of Bachhittar Singh v. State of Punjab and another reported in AIR 1963 SC 395** and the **State of Punjab and another v. Resham Singh and others** reported in **AIR 1966 SC 1313** have firmly established the rule that an administrative order takes effect from the date it is communicated to the person concerned or is otherwise published in the appropriate manner.

14. The Hon'ble Supreme Court in a catena of cases have clearly laid down the consequences of non-communication of orders to the affected party and in this regard one may gainfully refer to the decision in **Sethi Auto Service Station vs. DDA** reported in **(2009) 1 SCC 180** wherein the Hon'ble Supreme Court after referring to the case of **Bachhittar Singh vs. State of Punjab** reported in **AIR 1963 SC 395** made the following observation:-

*"14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.*

15. In **Bachhittar Singh v. State of Punjab AIR 1963 SC 395**, a Constitution Bench of this Court had the

occasion to consider the effect of an order passed by a Minister on a file, which order was not communicated to the person concerned. Referring to Article 166(1) of the Constitution, the Court held that order of the Minister could not amount to an order by the State Government unless it was expressed in the name of the Rajpramukh, as required by the said article and was then communicated to the party concerned. The Court observed that business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. Before an action is taken by the authority concerned in the name of the Rajpramukh, which formality is a constitutional necessity, nothing done would amount to an order creating rights or casting liabilities to third parties. It is possible, observed the Court, that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion which may be opposed to the earlier opinion. In such cases, which of the two opinions can be regarded as the "order" of the State Government? It was held that opinion becomes a decision of the Government only when it is communicated to the person concerned."

16. To the like effect are the observations of this Court in **Laxminarayan R. Bhattad v. State of Maharashtra [Laxminarayan R. Bhattad v. State of Maharashtra, (2003) 5 SCC 413],** wherein it was said that a right created under an order of a statutory authority must be communicated to the person concerned so as to confer an enforceable right."

17. From the above, it is clear that the manner of conducting the inquiry by the Lucknow University in the present case was clearly illegal and arbitrary as no opportunity given to the petitioner and the first order dated 21.05.2012 it seems was passed three years after the alleged incident with regard to transplantation of the order sheets. The matter directly pertains to the educational future of the student, who was deprived from sitting in the examinations of the B.Sc. 3rd year and even pursuing further education, to which the candidate may have been entitled. The action of the Lucknow University in not only in violation of principle of nature justice but has deleterious effect on the future of the candidate and such an action is deplorable.

18. It is in the aforesaid circumstance, this Court is of the considered view that merely permitting the petitioner to sit in the examinations of 2014-15 does not in any way justify the negligent and careless conduct of the University.

19. In the impugned order dated 15.11.2024 an inquiry was also ordered by the Vice-Chancellor to inquire into the circumstances as to why the order dated 21.05.2012 was not communicated to the petitioner. The counter affidavit of the University is silent on this aspect of the matter. It seems that the University is not serious about such directions and even the Vice-Chancellor has not cared to see that his orders are complied.

20. In light of the above, the writ petition is **allowed** and the order dated 15.11.2014 stands quashed except Clause 3 which provides for conduct of inquiry, in view of the fact that I have already held that the previous order dated 21.05.2012 is non-est and non-existing.

21. Before parting, it is pertinent to add, as recorded above, no opportunity was given to the petitioner nor there is a definite

finding with regard to the culpability of the petitioner, coupled with the fact that the order dated 21.05.2012 was not communicated to the petitioner and hence she was not permitted to sit in the examinations for the year 2012-13, the Lucknow University is responsible for ruining the career of a student without there being any definite and concrete finding of misconduct in the alleged transplantation of answersheets.

22. The courts have consistently laid down that for unnecessary delay and inconvenience, the opposite party must be compensated with costs. Discussing the purpose, Hon'ble Supreme Court in the case of **Revajeetu Builders and Developers versus Narayanswamy and sons and others** reported in **(2009) 10 Supreme Court Cases 84** has held :

*"62. The purpose of imposing costs is to:*

*(a) discourage mala fide amendments designed to delay the legal proceedings;*

*(b) compensate the other party for the delay and the inconvenience caused;*

*(c) compensate the other party for avoidable expenses on the litigation which had to be incurred by the opposite party for opposing the amendment; and*

*(d) to send a clear message that the parties have to be careful while drafting the original pleadings."*

23. In view of the above, cost must be compensatory in nature so as to provide remedy for the inconvenience and anguish suffered by the aggrieved due to negligence and failure to discharge duty enshrined upon the authority.

24. In these circumstances, the petitioner at best can only be compensated and accordingly, the petition is **allowed** at the cost of rupees two lakhs, which shall be paid by the respondent University to the petitioner within a period of two months from the date a certified copy of the order is produced before the concerned authority.

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**(2024) 7 ILRA 407**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 03.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ C No. 3000070 of 2002

**State of U.P. ...Petitioner**
**Versus**
**Addl. Commissioner Admn., Lucknow. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Standing Counsel

**Counsel for the Respondents:**
C.S.C., Sri Vijay Kumar Pandey

**A. U.P. Imposition of Ceiling on Land Holdings Act,1960 - Section 5(6) - Explanation I(b) - In determining the ceiling area any *transfer of land made after the twenty-fourth day of Jan., 1971*, which but for the transfer would have been declared surplus land under this Act, is ignored and not taken into account. The expression '*transfer of land made after the twenty-fourth day of Jan. 1971*' includes any admission, acknowledgment, relinquishment or declaration in favour of a person to the like effect made in any other deed or instrument or in any other manner (Para 16)**

**B. U.P. Imposition of Ceiling on Land Holdings Act, Section 5(6) - In the instant case Prescribed Authority declared land surplus under the Ceiling Act on 16.01.1975. Predecessors of the private respondents sought redetermination of the ceiling and surplus area, claiming Seeradari rights by adverse possession before the enforcement of the amended Ceiling Act. Prescribed Authority rejected their objections, noting that the claimants were not recorded as tenure holders on the reference or declaration date. Claimants, who had filed suits under Section 229-B of the U.P.Z.A.L.R. Act, colluded with Murlidhar Hakim (recorded tenure holder of the land), who did not contest the appeals. The appellate court allowed the appeals, declaring the claimants as Seerdars of the land. Held: Appeal was allowed based on the tenureholder's implied admission of the claimant's adverse possession. Declaration of the claimant's title by the appellate orders based on implied admission of adverse possession constituted a *"transfer of land made after 24th January, 1971,"* which is liable to be ignored and not taken into account while determining the surplus land of the tenure holder u/s 5(6) of the Ceiling Act. No illegality in the order passed by the Prescribed Authority rejecting the claim of the private respondents based on the plea of adverse possession. The order of the Prescribed Authority was restored and affirmed. (Para 18, 20, 23, 25)**

**Allowed.** (E-5)

**List of Cases cited:**

Ziley Singh Vs State: 1978 All.L.J. 772

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

1. By means of the instant Writ Petition filed under Article 226 of the Constitution of India, the petitioner – State of U.P. has sought quashing of an order dated 23.05.1998 passed by the Additional Commissioner (Administration), Lucknow Division, Lucknow allowing Appeal No. 287/291/92-93 under Section 13 (1) of the U.P. Imposition of Ceiling on Land Holdings Act, 1961.

2. Briefly stated, facts of the case are that a notice dated 19.11.1974 under Section 10(2) of the U.P. Imposition of Ceiling on Land Holdings Act, 1961 (which will hereinafter be referred to as 'the Ceiling Act') was issued to Sri. Murlidhar Hakim, the recorded tenure holder of the land in question. He did not submit any reply to the notice and on 16.01.1975, the Prescribed Authority Ceiling (Second) Nighasan passed an order declaring land bearing Gata No. 197 Ga having an area of 7.78 acres, Gata No. 200 Kh having an area of 8.72 acres, Gata No. 202 M having an area of 7.812 acres, Gata No. 203 having an area of 1.00 acres and Gata No. 207 Sa having an area of 3.62 acres, total 28.93 acres, situated in village Mahangapur, Pargana Palia, Tahsil Nighasan, District Kheri to be the surplus land of Sri. Murlidhar Hakim.

3. On 28.06.1978, Anokh Singh, Pyara Singh and Hazara Singh, the predecessors in interest of the private respondents, filed an application for their impleadment and for redetermination of the ceiling and surplus area of Murlidhar Hakim, stating that the applicant no. 1 Anokh Singh was the Seerdar/Bhumidhar of land bearing Gata No. 207 Kh/3.62 acres, Pyara Singh was the Seerdar/Bhumidhar of land bearing Gata No. 197 Ga/7.78 and 200 Kh/8.75 acres and Hazara Singh was the Seerdar/Bhumidhar of land bearing Gata No. 202/25.85 acres and that they had acquired the Seeradari rights by adverse possession much before the enforcement of

the amended Ceiling Act. They had filed suits under Section 229-B of the U. P. Zamindari Abolition and Land Reforms Act, 1950 (which will hereinafter be referred to as 'the U.P.Z.A.L.R.Act') and their rights were acknowledged vide orders dated 01.08.1975, 20.12.1973 and 12.01.1977 passed by the Divisional Commissioner, Lucknow Division, Lucknow. The land in their possession had wrongly been declared as surplus land of Murlidhar Hakim. It was stated in the application that the applicants came to know about the order dated 16.01.1975 passed by the Prescribed Authority on 17.04.1978, when they obtained a copy of the extract of Khatauni.

4. The applicants were impleaded and they were given an opportunity to present their case. They filed copies of the relevant extract of Khatauni for the year 1380 to 1382 Fasli, copies of plaint filed in the three suits no. 187, 383/355 and 37 filed under Section 229-B of the U.P.Z.A.L.R. Act and copies of the orders passed by the Additional Commissioner, Lucknow in appeals and they got their statements recorded.

5. The State filed objections against the application and got the statement of Lekhpal recorded.

6. The Prescribed Authority had rejected the claim of the predecessors of the private respondents by means of an order dated 30.04.1988. Appeals were filed against the aforesaid order, which were allowed by a composite order dated 31.01.1992 passed by the Additional Commissioner (Judicial) and the matter was remanded to the Prescribed Authority for being decided afresh.

7. The objectors had relied upon a decision of this Court in the case of Ziley Singh versus State: 1978 All.L.J. 772,

8. The Prescribed Authority rejected the objections by means of an order dated 24.02.1993 holding that in Ziley Singh (Supra), the land in question was recorded in the name of the claimant on the reference date whereas in the present case, the claimants' name was not recorded as the tenure holders of the land in question on the date of reference or on the date of declaration. The suits filed by them under Section 229-B of the U.P.Z.A.L.R. Act were dismissed by means of orders dated 20.04.1972, 31.12.1973 and 05.07.1974. The Prescribed Authority accepted the submission of the State that before filing of appeals against the orders dismissing the suits under Section 229-B, the claimant's had got knowledge of the provisions of the Ceiling Act and in these circumstances, it was natural that the claimants had colluded with the tenure holders and for this reason, the tenure holder Murlidhar Hakim did not contest the appeals and the appellate Court allowed the appeals and declared the objectors to be the Seerdars of the land in question. The order passed by the Additional Commissioner was not an order on the merits of the case and it was not binding on the Ceiling Authorities. The claimants had not filed any documentary evidence in the shape of Khatauni etc. to prove their claim and they had based their claims merely on the ex-parte orders passed by the Additional Commissioner.

9. The claimants filed appeal no. 287/291/92-93 against the aforesaid order passed by the Prescribed Authority, which was disposed off by an order dated 23.05.1996. However, the order dated 23.05.1996 was recalled by means of an

order dated 05.03.1997 upon an application dated 17.06.1996 filed by the claimants and thereafter the appeal was allowed by the impugned order dated 23.05.1998 passed by the Additional Commissioner (Administration), Lucknow Division, Lucknow holding that the appeals preferred by the claimants had been decided after hearing the State and the Prescribed Authority erred in holding that appellate orders had not been passed on merits of the case.

10. It has inter alia been stated in the Writ Petition that the land in dispute stood vested in the State upon its declaration as surplus land by means of the order dated 06.06.1975 passed by the Prescribed Authority and the State Government had taken possession of the land on the same date.

11 . An interim order was passed in this Writ Petition on 09.10.2002 directing the parties to maintain status quo.

12. Notices were issued to the private respondents, who put in appearance through Sri. V. K. Pandey Advocate. The following order was passed in this case on 05.03.2022: -

*"1. Private opposite parties have claimed to be sirdar of the land in question on the basis of the ex-parte judgement and decree/order passed by the appellate authority after their claim was rejected by the Sub-Divisional Magistrate under Section 229-B of the U.P.Z.A. & L.R. Act. However, the orders passed by the Sub-Divisional Magistrate and the appellate authority have not been placed on record.*

*2. Sri V.K. Pandey, learned counsel for the private opposite parties is directed to place on record the two orders passed by the Sub-Divisional Magistrate rejecting the claim of the opposite parties to be sirdar of the land in question on the basis of their adverse possession and the ex-parte judgment and decree/order passed by the appellate authority within two weeks.*

*3. List this petition in the first week of April, 2022 peremptorily."*

13. Thereafter the case was adjourned on plural occasions, but the private opposite parties did not file any counter affidavit and they have not brought on record the orders passed by the Sub-Divisional Magistrate rejecting the claim of the opposite parties to be Sirdar of the land in question and the ex-parte judgment and decree/order passed by the appellate authority. Thus there is no material available on record to substantiate the pleas taken by the private respondents and the pleas taken by the State in the Writ Petition remain uncontroverted.

14. While assailing the validity of the impugned appellate order, Sri S. K. Khare, the learned Standing Counsel for the petitioner – State of U. P., has submitted that after dismissal of the suits filed under Section 229-B of the the U.P.Z.A.L.R.Act filed by the claimants, the appeals filed by them were allowed without any contest by the tenure holder, which indicates that the tenure holder had colluded with the claimants. He has further submitted that the Appellate Authority had no jurisdiction to recall / review the earlier order dated 23.05.1998.

15. Per contra, Sri V.K. Pandey, the learned counsel for the respondents, has submitted that the State and the Gaon

Sabha are necessary parties to a Suit under Section 229-B of the U.P.Z.A.L.R. Act and as the State had contested the appeal, the appellate order was not an ex-parte order.

16. Before proceeding to decide the controversy, it will be appropriate to have a look at the provision contained in Section 5(6) of the U. P. Imposition of Ceiling on Land Holdings Act, which is being reproduced below: -

*"(6) In determining the ceiling area applicable to a tenure-holder, any transfer of land made after the twenty-fourth day of Jan., 1971, which but for the transfer would have been declared surplus land under this Act, shall be ignored and not taken into account;*

*Provided that nothing in this sub-section shall apply to—*

*(a) a transfer in favour of any person (including Government) referred to in sub-sec. (2).*

*(b) a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable instrument not being a benami transaction or for the immediate or deferred benefit of the tenure holders or other members of his family.*

*Explanation I—* ***For the purposes of this sub-section the expression 'transfer of land made after the twenty-fourth day of Jan. 1971' includes****—*

*(a) a declaration of a person as a cotenure holder made after the twenty-fourth day of Jan., 1971 in a suit or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the twenty-fourth day of January, 1971;*

*(b)* ***any admission, acknowledgment, relinquishment or declaration in favour of a person to the like effect made in any other deed or instrument or in any other manner.***

*Explanation II— The burden of proving that a case falls within Cl. (b) of the proviso shall rest with the party claiming its benefit."*

17. The claimants had filed suits under Section 229-B of the U.P.Z.A.L.R. Act claiming to have acquired rights in respect of the land in question by adverse possession. The suits were dismissed by means of orders dated 20.04.1972, 31.12.1973 and 05.07.1974. The claimants filed appeal against the aforesaid orders dismissing their suits. The tenure holder did not contest the appeal and thus he impliedly admitted the contention of the claimants that they had perfected their title by adverse possession. Thus the appeal was allowed on the basis of the implied admission made by the tenure holder regarding the claimant's claim of being in adverse possession of the tenure-holder's land.

18. The declaration of the claimant's title by the appellate orders dated 01.08.1975, 20.12.1973 and 24.03.1975 on the basis of the impliedly admitted plea of adverse possession would certainly fall within the expression "transfer of land made after the twenty-fourth day of Jan. 1971" on the basis of an admission, acknowledgment, relinquishment or declaration in favour of a person to the like effect made in any other manner occurring in Explanation I

appended to Section 5(6) of the Ceiling Act and, therefore, this will be a transfer of land made after the twenty-fourth day of Jan., 1971, which is liable to be ignored and not taken into account while determining the surplus land of the tenure holder.

19. It is also significant to note that the plea taken by the State in the writ Petition that the proceedings under Section 229-B of the U.P.Z.A.L.R. Act were collusive, remains uncontroverted.

20. In view of the aforesaid discussion, I am of the considered view that the Prescribed Authority had rightly held that the claimants had colluded with the tenure holders and for this reason, the tenure holder Murlidhar Hakim did not contest the appeals and the appellate Court allowed the appeals and declared the Seerdars of the land in question. The order passed by the Additional Commissioner was not an order on the merits of the case and keeping in view the aforesaid facts and circumstances of the case, it did not bar the jurisdiction of the Ceiling Authorities to proceed under the Ceiling Act in accordance with the law.

21. The claimants had not filed any documentary evidence in the shape of Khatauni etc. before the Prescribed Authority to prove their claims and they had based their claims merely on the ex-parte orders passed by the Additional Commissioner.

22. In spite of a specific direction issued by this Court directing the private respondents to bring on record the orders passed by the Sub-Divisional Magistrate rejecting the claim of the opposite parties to be sirdar of the land in question on the basis of their adverse possession and the ex-parte judgment and decree/order passed by the appellate authority, they have not brought the same on record.

23. In these circumstances, there appears to be no illegality in the order dated 24.02.1993 passed by the Prescribed Authority rejecting the claim of the private respondents based on the plea of adverse possession.

24. The order dated 23.05.1998 passed by the Additional Commissioner (Administration), Lucknow Division, Lucknow allowing Appeal No. 287/291/92-93 and setting aside the order dated 24.02.1993 passed by the Prescribed Authority, is unsustainable in law and is liable to be quashed.

25. Accordingly, the Writ Petition stands ***allowed.*** The order dated 23.05.1998 passed by the Additional Commissioner (Administration), Lucknow Division, Lucknow allowing Appeal No. 287/291/92-93 is quashed. The order dated 24.02.1993 passed by the Prescribed Authority Ceiling / Additional Collector, Kheri in Case No. 266/92/11/39/14 under Section 10(2) of the Ceiling Act is restored and affirmed.

26. The parties will bear their own costs of litigation.

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**(2024) 7 ILRA 412**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 01.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ C No. 3003820 of 1989

**Ram Swaroop** ...**Petitioner**
**Versus**
**State of U.P. & Ors.** ...**Respondents**

**Counsel for the Petitioner:**

Sri Mohd. Arif Khan, Sri Mohd. Aslam Khan

**Counsel for the Respondents:**
C.S.C., Sri Shishir Pradhan

**A. U.P.Z.A.L.R. Act, 1950 - Section 18 - *Settlement of certain lands with intermediaries or cultivators as Bhumidhar.* All lands held by a grove-holder, on the date immediately preceding the date of vesting, shall be deemed to be settled by the State Government with such grove-holder, who shall be entitled to take or retain possession thereof as a Bhumidhar - U.P. Imposition of Ceiling on Land Holdings Act, S. 11(2) - U.P. Land Revenue Act, 1901, S. 57 - Presumption as to entries. All entries in the record-of-rights shall be presumed to be true until the contrary is proved - U.P. Consolidation of Holdings Act, S. 27 - Section 27(2) of the U.P. Consolidation of Holdings Act provides that all entries in the records of rights shall be presumed to be true until the contrary is proved.**

**B. Petitioner application u/s 11(2) of the Ceiling Act, was dismissed on the ground that the land continued to be recorded in the name of Rana Uma Nath Bux Singh, and thereafter the name of his heir Rana Swayambar Singh was recorded in the new revenue record of rights prepared u/s 27(1) of the U.P. C.H. Act on CH Form 45, and the petitioner had not challenged the entry. When the land in question continued to be recorded in the name of Rana Swayambar Singh without any protest by the petitioner, the Ceiling authorities did not commit any illegality in passing the order whereby the land in question was declared to be surplus land of the tenure holder Rana Swayambar Singh. Solitary evidence of possession relied upon by the petitioner was CH Form 2-A, which was prepared after the commencement of consolidation operations in the year 1963. Entry made in CH Form 2-A does not establish that the petitioner was in possession of the land in dispute *'on the date immediately preceding the date of vesting.'* Subsequent entry made in CH Form 45, which is the new record of rights, shall be presumed to be correct, and the burden to prove that the entry in CH Form 45 is incorrect would lie on the petitioner, and the petitioner has failed to discharge this burden (Para 15).**

**Dismissed.** (E-5)

**<u>List of Cases cited:</u>**

1. Lal Behari & ors. Vs Ram Adhar: 1987 RD 206 = 1985 SCC OnLine All 1197

2. Gurmukh Singh & ors. Vs Dy. Director of Consolidation/A.D.M. (F. and R.) & ors..: 1997 RD 276

3. Shafir Vs District Judge, Gonda & ors.: 1987 R.D. 113

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

1. Heard Sri Mohd. Arif Khan Senior Advocate assisted by Sri Mohammad Aslam Khan Advocate, the learned counsel for the petitioner and the learned Standing Counsel.

2. By means of the instant writ petition filed under Article 226 of the Constitution of India the petitioner has challenged validity of an order 28.10.1987 passed by the Additional District Magistrate (Finance and Revenue), Raebareli in Case No. 5 (85-86) under Section 11(2) read with Section 14(3) of U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as 'the Ceiling Act'), whereby the application filed by the petitioner under Section 11(2) of the Ceiling Act had been rejected. The petitioner has also challenged validity of an order dated 15.03.1989 passed by the Additional Commissioner (Judicial), Lucknow Division, Lucknow, dismissing Appeal No. 21(87-88) filed by

the petitioner under Section 13 of the Ceiling Act against the aforesaid order dated 28.10.1987.

3. It has been pleaded in the writ petition that the petitioner's father had planted a grove on land bearing plot no. 150 (of third settlement), new plot number whereof is 61/3, having an area of 1 Bigha, 2 Biswa and 10 Biswansi situated in Village Alipur Khalso, Pargana, Tehsil and District Raebareli with the permission of Rana Uma Nath Bux Singh – the then proprietor of Khajoorgaon Estate. Consolidation proceedings commenced in the village in the year 1963 and after survey, a Khasra Chakbandi was prepared on C.H. Form 2-A, wherein it is mentioned that Ram Swaroop Baghdar was found in possession whereas Rana Uma Nath Singh was recorded as the chief tenant of the land in question.

4. The petitioner claims that when C.H. Form 2-A mentioned that he was found in possession of the land as the grove holder, the Assistant Consolidation Officer ought to have referred the matter to the Consolidation Officer, but it was not done and no notice was sent to the petitioner. The land in question was included in the surplus land of Raja Khajoorgaon under the Ceiling Act. The petitioner claims that the land being in the nature of grove and in possession of the petitioner, it could not have been declared to be surplus land of Raja Khajoorgaon. The land was declared as surplus and was allotted to the opposite party no. 8 without the petitioner having any knowledge of the proceedings under the Ceiling Act. Upon coming to know about this fact, the petitioner filed an application under Section 198(4) of U.P. Zamindari Abolition and Land Reforms Act for cancellation of the lease deed granted in favour of opposite party no. 8. A commission was issued in those proceedings and the commissioner submitted a report stating that 10 Mango trees aged between 50-75 years, a Mahua tree aged about 50 years, a Ber tree aged about 5 years and 3 Neem trees aged about 5 to 25 years were standing on the land in question. No crop had been sown on the land and the petitioner's payaal ki khahi was found there. However, as the proceedings under Section 198(4) of the U.P.Z.A.L.R. Act were not maintainable, the petitioner did not pursue the same and the proceedings were dismissed for want of prosecution.

5. Thereafter, the petitioner filed objections under Section 11(2) of the Ceiling Act along with an application under Section 5 of the Limitation Act and he prayed for cancellation of the patta granted in favour of the opposite party no. 8 and the order declaring the land in question to be surplus land of Rana Swayambar Singh.

6. The opposite party no. 8 filed objections stating that the land in question had been leased to him. In support of this submission, the opposite party no. 8 filed a copy of the relevant extract of khataunis of Village Alipur Khalso and a copy of C.H. Form 41, which showed that the old plot number of land bearing Gata No. 150 is 61/3 and it was recorded that the land was in possession of Ramau son of Matau. It is recorded in khatauni for the year 1387-92 Fasli that the land had been declared surplus by the Prescribed Authority.

7. The Additional District Magistrate (Finance and Revenue), Raebareli rejected the petitioner's application by means of the impugned order dated 28.10.1987, holding that the

petitioner could not produce any evidence to establish his possession in respect of the land in dispute. He had not submitted any objections in proceedings under the Consolidation of Holdings Act during consolidation proceedings and, therefore, his claim regarding ownership is barred by the provisions of Section 49 of the Consolidation of Holdings Act.

8. Being aggrieved, the petitioner filed an Appeal No. 21 (87-88) against the aforesaid order dated 28.10.1987, which has been dismissed by means of a judgment and order dated 15.03.1989 passed by the Additional Commissioner (Judicial), Lucknow Division, Lucknow.

9. The petitioner had contended before the appellate court that he had not filed any objection during consolidation proceedings because the land was in the shape of a grove and there was no dispute at that time. The appellate court found that as the petitioner had not filed any objection during consolidation proceedings, his claim regarding title is barred by Section 49 of the Consolidation of Holdings Act.

10. While assailing the validity of the aforesaid orders, the learned counsel for the petitioner has submitted that the petitioner's name was recorded as the grove holder in C.H. Form 2-A and, therefore, the grove land stood vested in the petitioner by virtue of the provisions contained in Sections 18 and 21 of the U.P.Z.A.L.R. Act. He has relied upon decisions of this Court in the case of **Lal Behari and others versus Ram Adhar:** 1987 RD 206 = 1985 SCC OnLine All 1197, **Gurmukh Singh and Ors. versus Dy. Director of Consolidation/A.D.M. (F. and R.) and Ors**.: 1997 RD 276 and **Shafir versus District Judge, Gonda and others:** 1987 R.D. 113.

11. In **Lal Behari and others versus Ram Adhar**, this Court held that: -

*"6. It is well settled that under Section 57 of the Land Revenue Act the entries in the current records of the latest settlement are presumed to be correct unless rebutted by cogent evidence. However, in this connection the question which sometimes arises for consideration is, whether the entries made in the subsequent settlements, which are different with those of the earlier settlements, would stand rebutted by the earlier settlement entries or not? It goes without saying that at each settlement the entries are made in accordance with the prescribed procedure contained in Chapter IV of the U.P. Land Revenue Act. Therefore, the entries in the record-of-rights prepared in accordance with the provisions of Chapter IV would be presumed to be true unless the contrary is proved as provided under Section 57 of the Act. Thus, where the entries made at the earlier and subsequent settlements are conflicting, the entries made in subsequent settlement can be given preference with those of the previous settlement unless the contrary is proved by cogent and strong evidence. During the course of every subsequent settlement proceeding the then existing entries in the record-of-right are checked and verified and the same are corrected, if found to be wrong, after following the prescribed procedure under Chapter IV of the Land Revenue Act. Thus, the entries at the latest settlement would be presumed to be correct and the earlier conflicting settlement entries would not be enough evidence to rebut the correctness of the subsequent settlement entries. The entries in the record of rights of the latest*

*settlement would, therefore, be presumed to be correct unless rebutted by cogent evidence and the same cannot be discarded merely on the ground* of conflicting entries in the earlier settlement records."

(Emphasis added)

12. In **Gurmukh Singh and Ors**. (Supra) it was held that: -

*"5. It is clear from para 102-C of the Land Records Manual that the entries will have no evidenciary value if they are not made in accordance with the provisions of Land Records Manual. There is presumption of correctness of the entries provided it is made in accordance with the relevant provision of Land Records Manual and secondly, in case where a person is claiming adverse possession against the recorded tenure holder and he denies that he had not received any P.A. 10 or he had no knowledge of the entries made in the revenue records, the burden of proof is further upon the person claiming adverse possession to prove that the tenure holder was duly given notice in prescribed form…*

*6. In Jamuna Prasad v. Dy. Director of Consolidation, Agra, 1981 RD 112, this court repelled the contention that the burden of proof was upon the person who challenges the correctness of the entries. It was observed:—*

*"Learned counsel for the petitioner argued that there was a presumption of correctness about the entries in the revenue records and the onus lay upon the respondent to prove that the entries showing the petitioner's possession had not been in accordance with law. This contention is untenable. Firstly, it is not possible for a party to prove a negative fact. Secondly, the question as to whether the notice in form P.A. 10 was issued and served upon the petitioner also is a fact which was within his exclusive knowledge."*

*"Petitioner's contention that the burden lay on the respondents to disprove the authenticity and destroy the probative value of the entry of possession cannot be accepted. In my opinion, where possession is asserted by a party who relies mainly on the entry of adverse possession in his favour and such possession is denied by the recorded tenure holder, the burden is on the former to establish that the entries in regard to his possession were made in accordance with law."*

13 . Section 57 of the U. P. Land Revenue Act, 1901 provides as follows: -

***"Section 57 - Presumption as to entries***

*All entries in the record-of-rights prepared in accordance with the provisions of this Chapter shall be presumed to be true until the contrary is proved ; and all decisions under this Chapter in cases of dispute shall, subject to the provisions of sub-section (3) of section 40, be binding on all Revenue Courts in respect of the subject-matter of such disputes; but no such entry or decision shall affect the right of any person to claim and establish in the Civil Court any interest in land which requires to be recorded in the registers prescribed by Section 32."*

14. However, the petitioner's name was not recorded in any record of settlement prepared under the Land Revenue Act. The Consolidation proceedings commenced in the village in

the year 1963 and it was mentioned in the Khasra Chakbandi prepared on C.H. Form 2-A that Ram Swaroop Baghdar was found in possession whereas Rana Uma Nath Singh was recorded as the chief tenant of the land in question. Khasra Chakbandi is prepared under Rule 21 of the U.P. Consolidation of Holdings Rules, 1954, which provides for recording the findings of the field to field partal (enquiry) carried out by the Consolidator. However, after preparation of Khasra Chakbandi, the Assistant Consolidation Officer checks the same under Rule 24 and thereafter the Assistant Consolidation Officer in consultation with the Consolidation Committee prepares the 'Statement of Principles' under Rule 24-A, which is published and objections against the same are invited under Section 9 of the U. P. Consolidation of Holdings Act. The Assistant Consolidation Officer decides the objections and ultimately the Khatauni is prepared under Section 27 of the Consolidation of Holdings Act on CH Form 45, which is the new revenue record of rights.

15. In the Khatauni prepared under Section 27 of the Consolidation of Holdings Act on C.H. Form 45, the petitioner's name does not find any mention. Therefore, even as per the principle of law laid down in **Lal Behari**, the subsequent entry made in CH Form 45, which is the new record of rights, shall be presumed to be correct and as per the law laid down **in Gurmukh Singh** (Supra), the burden to prove that the entry in CH Form 45 is incorrect, would lie on the petitioner and the petitioner has failed to discharge this burden.

16. In **Shafir v. District Judge, Gonda**, 1985 SCC OnLine All 220 : 1987 RD 113, this Court relied upon an earlier decision and held that:

*"8. In Dilbagh Singh's case (Dilbagh Singh v. State of U.P., 1978 All.L.J. 717) it was held by the Division Bench that Section 11(2) permits a tenure-holder to file objections. Such tenure-holders may be those who have been served with a notice and a statement under Section 10(2). It also includes tenure-holders who have not been given or served with any such notice or statement. The construction put by the Full Bench also embraces persons who claim to be tenure-holders and who having come to know of the declaration of their land as surplus land of some other person wish to challenge that declaration or notification thereof in the gazette under Section 14. They are all entitled to file an objection under Section 11(2) and get an adjudication thereon as required by Section 12…."*

17. The petitioner's objections have not been rejected as not maintainable on the ground that he was not recorded as a tenure holder and the same have been entertained an decided on their merits. Therefore, the principle of law laid down in Dilbagh Singh v. State of Uttar Pradesh, 1978 SCC OnLine All 393, and followed in Shafir (Supra) has been followed in the present case.

18. The learned Counsel for the petitioner has paced reliance upon the provisions contained in Sections 18 and 21 of the U.P.Z.A.L.R. Act, 1950, which are being reproduced below: -

**"*18. Settlement of certain lands with intermediaries or cultivators as Bhumidhar.—(1) Subject to the provisions of Sections 10, 15, 16 and 17, all lands*—**

*(a) in possession of or held or deemed to be held by an intermediary as sir, khudkasht or an intermediary's grove,*

*(b) held as a grove by, or in the personal cultivation of a permanent lessee in Avadh,*

*(c)held by a fixed-rate tenant or a rent-free grantee as such, or*

*(d) held as such by—*

*(i) an occupancy tenant,*

*(ii) a hereditary tenant, possessing the right to transfer the holding by sale,*

*(iii) a tenant on Patta Dawami or Istamrari referred to in Section 17,*

*(e)* ***held by a grove holder,***

***on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such intermediary, lessee, tenant, grantee or grove-holder, as the case may be, who shall, subject to the provisions of this Act, be entitled to take or retain possession as a bhumidhar thereof.***

*(2) Every person belonging the class mentioned in Section 3 or sub-section (2) of Section 3-A of the United Provinces Agricultural Tenants (Acquisition of Privileges) Act, 1949 (U.P. Act X of 1949), who has been granted the declaration referred to in Section 6 of the said Act in respect of any holding or share thereof shall, unless the declaration is subsequently set aside, be deemed to be the bhumidhar of the holding or the share in respect of which the declaration has been made and continues in force.*

*(3) Notwithstanding anything contained in the United Provinces Agricultural Tenants (Acquisition of Privileges) Act, 1949 (U.P. Act X of 1949), any declaration granted under Section 6 of the said Act in favour of a tenant whom sub-section (2) of Section 10 applies, shall be and is hereby cancelled and the amount deposited by him under Section 3 or 6 of the said Act shall, after deducting the amount which might have been paid or be payable by the State Government to his landholder under Sections 7 and 8 of the said Act, be refunded to the person entitled in such manner as may be prescribed."*

* * *

***21. Non-occupancy tenants, sub-tenants of grovelands and tenant's mortgagees to be asamis.—***

*(1) Notwithstanding anything contained in this Act, every person who, on the date immediately preceding the date of vesting, occupied or held land as—*

*(a) a non-occupancy tenant of an intermediary's groveland,*

*(b) a sub-tenant of a groveland,*

*(c) a sub-tenant referred to in the proviso to sub-section (3) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 (U.P. Act X of 1947),*

*(d) a mortgagee in actual possession from a person belonging to any of the classes mentioned in clauses (b) to*

*(e) of sub-section (1) of Section 18 or clauses (i) to (vii) and (ix) of Section 19,*

*(e) a non-occupancy tenant of pasture land or of land covered by water and used for the purpose of growing singhara or other produce or of land in the bed of a river and used for casual or occasional cultivation,*

*(f) a non-occupancy tenant of land declared by the State Government by notification in the Gazette, to be intended or set apart for taungya plantation, or*

*(g) a tenant of land, which the State Government has, by a notification in the Gazette declared to be part of tract of shifting or unstable cultivation,*

*(h) a tenant of sir of land referred to in sub-clause (a) of clause (i) of the Explanation under Section 16, a sub-tenant referred to in sub-clause (ii) of clause (a) of Section 20 or an occupant referred to in sub-clause (i) of clause (b) of the said section where the landholder or if there are more than one landholders, all of them were person or persons belonging—*

*(a) if the land was let out or occupied prior to the ninth day of April, 1946, both on the date of letting a occupation, as the case may be, and on the ninth day of April, 1946, and*

*(b) if the land was let out or occupied on or after the ninth day of April, 1946, on the day of letting or occupation,*

*to any one or more of the classes mentioned in sub-section (1) of Section 157;*

*(i) a lessee holding under a lease from a court under sub-section (1) of Section 252 of the U.P. Tenancy Act, 1939,*

*shall be deemed to be an asami thereof.*

*Explanation.—The expression "taungya plantation" means the system of afforestation in which the plantation of trees is, in the earlier stages, done simultaneously with the cultivation of agricultural crops which ceases when the trees so planted begin to form a canopy rendering the cultivation of agricultural crops impossible.*

*(2) Occupants of groveland.—Every person, who, on the date immediately preceding the date of vesting was a person recorded, in the manner stated in clause (b) of Section 20, as occupant of any grove land, shall be called an asami of the land and shall, subject to the provisions of this Act, be entitled to take or retain possession thereof as an asami from year to year."*

19. The grove land in question could have vested in the petitioner only in accordance with the provisions of Section 18 of the U.P.Z.A.L.R.Act if the land was held by him as a grove holder on the date immediately preceding the date of vesting. The solitary evidence of possession relied upon by the petitioner is the CH-Form 2-A, which was prepared after commencement of consolidation operations in the year 1963. The entry made in CH Form 2-A does not establish that the petitioner was in possession of the land in dispute 'on the date immediately preceding the date of vesting'. Therefore, the material placed by the petitioner does not establish fulfillment of the conditions of Section 18 of the U.P.Z.A.L.R. Act.

20. So far as the submission based on Section 21 of the U.P.Z.A.L.R. Act. is concerned, the petitioner merely claims that he had planted trees with the permission of the proprietor of the land and he does not claim himself to be any kind of tenant referred to in Section 21 or a mortgagee and, therefore, the petitioner cannot claim any right on the basis of the provisions contained in Section 21 of the U.P.Z.A.L.R. Act also.

21. Even in the Khasra prepared on C.H. Form 2-A after commencement of the consolidation operations in the year 1963, the name of the tenure holder of the land in dispute was mentioned as Rana Syambar Singh. In spite of having been found in possession of the land in question, the petitioner was not mentioned as the tenure holder of the land in the Khasra. The petitioner did not feel aggrieved by this entry and it is the petitioner's own case that as he was recorded as the person in possession of the land, he did not file any objections. Subsequently in the new revenue record of rights prepared on CH Form-45, Rana Syambar Singh was recorded as the tenure holder and the petitioner's name did not find any mention and the petitioner did not challenge this entry also.

22. When the land in question continued to be recorded in the name of Rana Swayambar Singh without any protest by the petitioner, the Ceiling authorities did not commit any illegality in passing the order dated 29.03.1979 whereby the land in question was declared to be surplus land of the tenure holder Rana Swayambar Singh.

23. After declaration of the land as surplus land of Rana Swyambar Singh, its possession was taken and the land was allotted to the opposite party no. 8. In the year 1986, the petitioner filed a suit for cancellation of the lease deed executed in favour of the opposite party no. 8, but he allowed it to be dismissed for want of prosecution on 26.05.1986. '

24. Although the commission report submitted in proceedings under Section 198(4) of U.P.Z.A.L.R.Act mentioned that 10 Mango trees aged between 50-75 years, a Mahua tree aged about 50 years, a Ber tree aged about 5 years and 3 Neem trees aged about 5 to 25 years were standing on the land in question, no crop had been sown on the land and the petitioner's payaal ki khahi was found there, this status was of the date of commission and not of the date of vesting. Moreover, the proceedings under Section 198(4) were dismissed for want of prosecution and this report was not accepted. Therefore, the petitioner would not get any benefit from the observations recorded in the commission report.

25. Thereafter the petitioner had filed his objections/application under Section 11 (2) of the U. P. Imposition of Ceiling on Land Holdings Act,1960, claiming that he had been found in possession of the land and his name had been recorded as 'Baghdar Qabiz' in CH Form 2-A. However, the land continued to be recorded in the name of Rana Uma Nath Bux Singh, who had died about 50 years' ago and thereafter the name of his heir Rana Swayambar Singh was recorded in the Khatauni prepared on C.H. Form 45.

26. Section 27 (2) of the U. P. Consolidation of Holdings Act provides that all entries in the records of rights prepared in accordance with the provisions

of sub-section (1) shall be presumed to be true until the contrary is proved.

27. Section 49 of the U. P. Consolidation of Holdings Act provides that: -

"***49. Bar to Civil Court jurisdiction.—****Notwithstanding anything contained in any other law Courts for the time being in force, the declaration and adjudication of rights of tenure-holder in respect of land, lying in an area, for which a notification has been issued under sub-section (2) of Section 4, or adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act, shall be done in accordance with the provisions of this Act and no Civil or Revenue Court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act:*

*Provided that nothing in this section shall preclude the Assistant Collector from initiating proceedings under Section 122-B of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act 1 of 1951) in respect of any land, possession over which has been delivered or deemed to be delivered to a Gram Sabha under or in accordance with the provisions of this Act.*

28. In spite of the aforesaid statutory provision barring the jurisdiction of civil and revenue Courts, the petitioner had filed the application under Section 11(2) of the Ceiling Act, which has rightly been dismissed on the ground that the land continued to be recorded in the name of Rana Uma Nath Bux Singh, who had died about 50 years' ago and thereafter the name of his heir Rana Swayambar Singh was recorded in the Khatauni, which is the new revenue record of rights prepared under Section 27(1) of the U. P. Consolidation of Holdings Act on C.H. Form 45 and the petitioner had not challenged this entry..

29. In view of the aforesaid discussion, there is no illegality in the order 28.10.1987 passed by the Additional District Magistrate (Finance and Revenue), Raebareli rejecting the petitioner's application under Section 11(2) of the Ceiling Act, or in the order dated 15.03.1989 passed by the Additional Commissioner (Judicial), Lucknow Division, Lucknow, dismissing the Appeal filed by the petitioner against the aforesaid order dated 28.10.1987.

30. The Writ Petition lacks merit and the same is **dismissed**. Costs made easy.

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**(2024) 7 ILRA 421**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 05.07.2024**

**BEFORE**

**THE HON'BLE NALIN KUMAR SRIVASTAVA, J.**

Matters U/A 227 No. 6929 of 2024

**Pramit ...Petitioner**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Petitioner:**
Mohd. Naushad, Rajiv Sisodia

**Counsel for the Respondents:**
G.A.

**A. Criminal Law – Uttar Pradesh Excise Act, 1910- Section 72- confiscation proceedings pending before the District Magistrate- Vehicle confiscated- release application filed before judicial Magistrate- Section 457 of CrPC- dismissed on the ground of pendency of confiscation proceedings before District Magistrate- criminal revision preferred against it- dismissed- both the orders under challenge in the instant petition.**

**B. Judicial Magistrate- denuded of his power under Section 457 CrPC- during pendency of confiscation proceedings under Section 72 of the Act, 1910- Dictum in *Virendra Gupta* followed and reiterated- Vehicle seized under provisions of Excise Act-confiscation proceedings pending before the Collector- Judicial Magistrate has no jurisdiction to release the vehicle - Impugned orders not suffering from any legal lacuna- upheld-Petition dismissed. (Paras 17 to 22)**

**HELD:**

Hence, in view of the decision of the Division Bench of this Court in Virendra Gupta (supra) wherein the reference made in Virendra Gupta (referred by learned Single Judge of this Court) (supra) was answered as mentioned here-in-above. The controversy sets at rest and it can safely be held that if a vehicle is seized under the provisions of the Excise Act and confiscation proceedings in respect thereof are going on before the Collector, a Judicial Magistrate has got no jurisdiction to release the aforesaid vehicle. Needless to say that even if the petitioner before the Court is the registered owner of the vehicle, this fact does not offer any certificate regarding his entitlement to move an application for release of such vehicle before the Court of a Judicial Magistrate who is denuded of his jurisdiction in such matters as the jurisdiction is an ornament of the Court which cannot be imposed or created and it is inherited in a particular Court. (Para 21)

**Appeal allowed.** (E-14)

**List of Cases cited:**

1. Chandra Pal Vs St. ofU.P. & anr.(Application u/s 482 No. - 1325 of 2021) decided on 12.2.2021

2. Vikas Kumar Vs St. ofU.P & anr.(Application u/s 482 No. - 33012 of 2019) decided on 22.1.2020

3. Virendra Gupta Vs St. ofU.P., 2019 (6) ADJ 432 (D.B.)

4. Jaikawar Vs St. ofU.P. & anr.(Application u/s 482 No. - 9961 of 2021) decided on 4.10.2021

5. Akhilesh Kumar Vs St. ofU.P. & anr.(Application u/s 482 No. - 20096 of 2021) decided on 4.3.2022

6. Sunderbhai Ambalal Desai, AIR 2003 SC 638, Nand Vs St. ofU.P., 1996 Law Suit (All) 423

7. Jai Prakash Vs St. ofU.P., 1992 AWC 1744

8. Kamaljeet Singh Vs St. ofU.P. 1986 U.P. Cri. Ruling 50 (Alld)

9. Mustafa Vs St. ofUttar Pradesh & Ors. decided by the Hon'ble Supreme Court in Civil Appeal No.6438 of 2019 (arising out of SLP (Civil) No.11110 of 2018) on 20.8.2019

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

1. Heard Sri Rajiv Sisodia, learned counsel for the petitioner, learned A.G.A. for the State and perused the record.

2. Criminal Misc. Exemption Application is allowed.

3. The factual matrix of the matter may be summarized in the manner that two persons Pramit and Surendra were intercepted by the police while engaged in transporting 12 bottles of illegal liquor having a wrapper with remark of *'Royal Stag Whisky for sale in Haryana and Delhi'* endorsed upon it in a Ford Ecosport Car

bearing registration No. HR 06AH - 2718 on 25.10.2023 at 18:30 P.M. Both the accused persons were arrested and the liquor was seized and sample was taken by the police on spot and memo of recovery and arrest was also prepared and F.I.R. was lodged under Sections 60, 63, 72 of the Uttar Pradesh Excise Act, 1910 (hereinafter referred to as the 'Act').

4. Subsequently an application for release of Car No. HR 06AH - 2718 claiming himself to be the registered owner of the said vehicle was moved by one of the accused Pramit, but the said application was rejected by the Chief Judicial Magistrate, Shamli vide order dated 19.12.2023 in case crime no.591 of 2023 simply on the ground that since the confiscation proceedings are reported to be pending before the District Magistrate, the Judicial Magistrate has got no jurisdiction to entertain the application for release of the vehicle seized under the provisions of the Excise Act in respect thereof confiscation proceedings are pending before the District Magistrate. The said order was challenged by way of criminal revision no.1 of 2024 before the District Judge, Shamli which on the same analogy was rejected by the revisional court as well vide judgment and order dated 6.4.2024, feeling aggrieved to which the present petition under article 227 of the Constitution of India has been preferred.

5. It is submitted by learned counsel for the petitioner that the impugned orders passed by the learned Chief Judicial Magistrate as well as by the District Judge are bad in law and have been passed without taking into account the correct legal position into the matter.

Another point of argument is that the release application was rejected by the Chief Judicial Magistrate, Shamli solely on the ground that since confiscation proceedings are going on before the District Magistrate, the case property could not be released under Section 72 of the Act and the said view was legally not sustainable.

It has been further urged by the learned counsel for the petitioner that the aforesaid wrong legal notion was affirmed by the District & Sessions Judge in criminal revision no.1 of 2024 and the impugned order passed by the learned Magistrate was upheld and the revision was dismissed.

Another limb of argument is that the legal position in this regard is very explicit according to which even if the confiscation proceedings are going on before the District Magistrate in a case under the Act, the release of property cannot be refused on this ground alone. The petitioner before the Court is the registered owner of the vehicle in question and the Magistrate was fully empowered to pass an order for release of the said vehicle under Section 457 of the Code of Criminal Procedure.

Reliance has been placed by the learned counsel for the petitioner upon the decisions of the Single Bench of this Court rendered in **Chandra Pal Vs. State of U.P. and Another (Application u/s 482 No. - 1325 of 2021) decided on 12.2.2021 and Vikas Kumar Vs. State of U.P and Another (Application u/s 482 No. - 33012 of 2019) decided on 22.1.2020** by a learned Single Judge of this Court.

6. Per contra, learned A.G.A. vehemently opposed the prayer made in the petition. It has been urged that in the facts and circumstances of the present case, the Magistrate was seized of his power to release the vehicle in question under

Section 457 Cr.P.C. In support of his contention, he has placed reliance on the following decisions rendered by the coordinate Benches of this Court –

**(i) Virendra Gupta Vs. State of U.P., 2019 (6) ADJ 432 (D.B.)**
**(ii) Jaikawar Vs. State of U.P. and Another (Application u/s 482 No. - 9961 of 2021) decided on 4.10.2021**
**(iii) Akhilesh Kumar Vs. State of U.P. and Another (Application u/s 482 No. - 20096 of 2021) decided on 4.3.2022**

7. The provisions of Article 227 of the Constitution of India under which the present petition has been filed, are extracted below –

**"227. Power of superintendence over all courts by the High Court --**(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provisions, the High Court may--

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision or any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

8. In order to adjudge the validity of the impugned orders, to cast a fleeting glance over the provisions of Section 72 of the Act would be appropriate which are extracted as below.

**"72. What things are liable to confiscation** -(1) Whenever an offence punishable under this Act has been committed-

(a)every [intoxicant]2 in respect of which such offence has been committed ;

(b)every still, utensil, implement or apparatus and all materials by means of which such offence has been committed ;

(c)every [intoxicant]2 lawfully imported, transported, manufactured, held in possession or sold along with or in addition to any [ intoxicant]2 liable to confiscation under clause (a) ;

(d)every receptacle, package and covering in which any [intoxicant]2 as aforesaid or any materials, still, utensil, implement or apparatus is or are found, together with the other contents (if any ) of such receptacle or package ; and

(e)every animal, cart, vessel or other conveyance used in carrying such receptacle or package; shall be liable to confiscation.

(2) Where anything or animal is seized under any provision of this Act and the Collector is satisfied for reasons to be recorded that an offence has been

committed due to which such thing or animal has become liable to confiscation under sub-section (1), he may order confiscation of such thing or animal whether or not a prosecution for such offence has been instituted :

Provided that in the case of anything (except an intoxicant)or animal referred to in sub-section (1), the owner thereof shall be given an option to pay in lieu of its confiscation such fine as the Collector thinks adequate not exceeding its market value on the date of its seizure.

(3) Where the Collector on receiving report of seizure or on inspection of the seized thing, including any animal, cart, vessel or other conveyance, is of the opinion that any such thing or animal is subject to speedy wear and tear or natural decay or it is otherwise expedient in the public interest so to do, he may order such thing (except an intoxicant) or animal to be sold at the market price by auction or otherwise.

(4) Where any such thing or animal is sold as aforesaid, and -

(a) no order of confiscation is ultimately passed or maintained by the Collector under sub-section (2) or on review under sub-section (6); or (b) an order passed on appeal under sub-section (7) so requires; or (c) in the case of a prosecution being instituted for the offence in respect of which the thing or the animal seized, the order of the Court so requires; the sale proceeds after deducting the expenses of the sale shall be paid to the person found entitled thereto;

(5) (a) No order of confiscation under this section shall be made unless the owner thereof or the person from whom it is seized is given -

I. a notice in writing informing him of the grounds on which such confiscation is proposed ;

II. an opportunity of making a representation in writing within such reasonable time as may be specified in the notice ; and

III. a reasonable opportunity of being heard in the matter.

(b) Without prejudice to the provisions of clause (a), no order confiscating any animal, cart, vessel, or other conveyance shall be made if the owner therof proves to the satisfaction of the Collector that it was used in caring the contraband goods without the knowledge or connivance of the owner, his agent, if any, and the person-in-charge of the animal, cart, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use.

(6) Where on an application in that behalf being made to Collector within one month from any order of confiscation made under sub-section (2), or as the case may be, after issuing notice on his own motion within one month from the order under that sub-section refusing confiscation to the owner of the thing or animal seized or to the person from whose possession it was seized, to show cause why the order should not be reviewed, and after giving him a reasonable opportunity of being heard, the Collector is satisfied that the order suffers from a mistake apparent on the face of the record including any mistake of law, he may pass such order on review as he thinks fit.

(7) Any person aggrieved by an order of confiscation under sub-section(2) or sub-section (6) may, within one month from the date of the communication to him of such order, appeal to judicial authority as the State Government may appoint in this behalf and the judicial authority shall, after giving an opportunity to the appellant

to be heard, pass such order as it may think fit, confirming, modifying or annulling the order appealed against.

(8) Where a prosecution is instituted for the offence in relation to which such confiscation was ordered the thing or animal shall, subject to the provisions of sub-section (4), be disposed of in accordance with the order of the Court.

(9) No order of confiscation made by the Collector under this section shall prevent the infliction of any punishment to which the person affected thereby may be liable under this Act."

9. Section 72 of the Act stipulates that whenever an offence punishable under the Act has been committed then every thing or article seized in respect of which such offence has been committed, Section 72 of the Act empowers the Collector to confiscate the articles enumerated therein which are in any manner connected with any offence punishable under the Act.

10. The sole question involved in this matter is whether the Judicial Magistrate has got any jurisdiction to deal with the matter in respect of the release of a vehicle seized under the provisions of the Act while in connection thereof, confiscation proceedings are pending before the District Magistrate.

11. The issue involved in this matter has been a debatable point in the legal circle for long, but the controversy has now been set at rest by the Division Bench judgment of this Court passed in Virendra Gupta (supra).

12. Before referring to the judgment of the Division Bench in Virendra Gupta (supra) it would be appropriate to discuss the law promulgated in Chandra Pal (supra) and Vikas Kumar (supra) decided on 12.2.2021 and 22.1.2020 respectively, relied upon by the learned counsel for the petitioner.

13. In Chandra Pal (supra) it was found that on challenge of the order of the Magistrate refusing to release the vehicle seized under the provisions of the Excise Act, the revisional court in a criminal revision filed against the said order of the Magistrate concluded that since proceedings under section 72 of the Act are pending, no directions can be issued for the release of the vehicle in question. The learned Single Judge observed that albeit the release application was rejected by the Magistrate and the criminal revision filed against the said rejection order was also dismissed by the revisional court but both the courts declined to decide the issue regarding their own jurisdiction for releasing the vehicle in exercise of powers under the Code in respect of the vehicle which has been seized and confiscation proceedings in respect of which are pending consideration before the District Magistrate under section 72 of the Act and since the said issue remains unanswered by both the subordinate courts and their orders were silent on the point of their own jurisdiction, the application under section 482 Cr.P.C. was allowed and the matter was remitted to the Magistrate to decide the release application afresh in the light of the observations made in the judgment aforesaid.

14. In Vikas Kumar (supra), the learned Single Judge of this Court while referring to **Sunderbhai Ambalal Desai, AIR 2003 SC 638, Nand Vs. State of U.P., 1996 Law Suit (All) 423, Jai Prakash Vs. State of U.P., 1992 AWC**

**1744 and Kamaljeet Singh Vs. State of U.P. 1986 U.P. Cri. Ruling 50 (Alld)** opined that in the matter of release of a vehicle, the Magistrate Court should follow the procedure as contemplated under section 457 Cr.P.C. promptly. In the said case also, the application for release of the vehicle seized under the provisions of the Act in respect of which confiscation proceedings were pending before the District Magistrate under section 72 of the Act was rejected. The application u/s 482 Cr.P.C. was allowed and the Magistrate concerned was directed to decide the release application afresh in the light of the observations made in the body of the said judgment.

15. Since the Chandra Pal (supra) case deals with another aspect of the matter which is not a subject matter of the instant petition, it offers no assistance to the case of the petitioner.

16. In Jaikawar (supra) and Akhilesh Kumar (supra), the issue involved was identical and the same and it was explicitly held in both the judgments that during confiscation proceedings pending in respect of a vehicle involved under the provisions of the Excise Act, the Magistrate has no power under Sections 451 and 457 Cr.P.C. to release the said vehicle and a Division Bench judgment of this Court in **Virendra Gupta Vs. State of U.P., 2019 (6) ADJ 432** was relied upon in both the judgments in support of the conclusion arrived at therein.

17. In **Virendra Gupta Vs. State of U.P., 2018 105 AllCriC 518**, learned Single Judge of this Court while referring to the discordant views expressed by the learned Single Judges of this Court in several decisions over the subject, found it appropriate to refer the matter to the larger Bench to set the controversy at rest and the following question was found to be arisen for consideration by the Court which was as hereunder:

"Whether pending confiscation proceedings under Section 72 of the U.P. Excise Act before the Collector, the Magistrate/ Court has jurisdiction to release any property subject matter of confiscation proceedings, in the exercise of powers under Sections 451, 452 or 457 of the Code of Criminal Procedure?"

18. On reference, the matter was dealt with by the Division Bench of this Court in Virendra Gupta (supra) wherein various laws on the subject were taken into consideration such as **Sunderbhai Ambalal Desai vs. State of Gujarat, 2002 (10) SCC 283, Nand vs. State of U.P., 1997 (1) AWC 41, Rajiv Kumar Singh vs. State of U.P. and others, 2017 (5) ADJ 351, Ved Prakash vs. State of U.P., 1982 AWC 167 All, (G.N.C.T. of Delhi) vs. Narender, (2014) 13 SCC 100, General Insurance Counsel and others Vs. State of Andhra Pradesh and others, Muntazir Vs. State of U.P. and Another, Dilip Sinh Ram Sinh Solanki Vs. State of Gujarat and Mustafa and Another Vs. State of U.P. and Another** and the Division Bench expatiated upon the correct legal position to be kept in mind by the Magistrate at the time of dealing with the issue of release of any thing seized under the provisions of the Act and in connection of which confiscation proceedings are going on before the Collector under section 72 of the Act and it was concluded by the Division Bench of this Court as follows :

"Section 72 of the 'Act' which is admittedly a local act does not contain any

provision for release of anything seized or detained in connection with an offence committed under the Act in respect of which confiscation proceedings are pending. In fact the sub-section (1) to sub-section (4) of Section 72 of the 'Act' prescribe the manner in which anything seized in connection with an offence committed under the 'Act' and in respect of which confiscation proceedings u/s 72 of the 'Act' are pending, shall be dealt with. Section 72 of the 'Act' does not contain any provision indicating that such seized property may be released by the Magistrate in the exercise of his power u/s 457 Cr.P.C. The provisions contained in sub-sections (1) to (4) of Section 72 of the 'Act', clearly denudes the Magistrate of his power to pass any order u/s 457 Cr.P.C. for release of anything seized in connection with an offence purporting to have been committed under the 'Act'.

In view of the foregoing discussion, we find that the case of Ved Prakash (supra) lays down the correct law on the subject matter of this reference and neither Nand vs. State of U.P., 1997 (1) AWC 41 or Rajiv Kumar Singh vs. State of U.P. and others, 2017 (5) ADJ 351 nor Sunderbhai Ambalal Desai vs. State of Gujarat, 2002 (10) SCC 283 can be said to be authorities on the power of the Magistrate to release anything seized or detained in connection with an offence committed under the 'Act' in respect of which confiscation proceedings u/s 72 of the U.P. Excise Act are pending before the Collector."

19. The Division Bench got an opportunity to examine the various aspects of the matter pertaining to the release of a vehicle to which provisions of Sections 451 and 457 Cr.P.C. were applicable and Sunderbhai Ambalal Desai (supra) case was distinguished on the point that the Hon'ble Supreme Court in the said case had neither any occasion to examine the effect of section 72 of the Act on the power of a Magistrate to release seized properties in view of the section 5 of the Code of Criminal Procedure nor any direction in respect of the vehicle seized under any special enactment was specifically given by the Hon'ble Supreme Court. Further, the law laid down by the Single Bench of this Court in Ved Prakash (supra) explaining the power of the Magistrate to release the vehicle seized under the provisions of the Excise Act in respect of which confiscation proceedings are going on was held as a good and correct law on the subject by the Division Bench.

20. To refer the view taken in Ved Prakash (supra) which was marked as a correct law on the subject shall be advantageous and relevant at this juncture. The legal principle which was enumerated in Ved Prakash (supra) is that the Magistrate is denuded of his jurisdiction to release anything under section 457 Cr.P.C. seized in connection with a criminal case in respect of which confiscation proceedings under section 72 of the Act are pending.

21. Hence, in view of the decision of the Division Bench of this Court in Virendra Gupta (supra) wherein the reference made in Virendra Gupta (referred by learned Single Judge of this Court) (supra) was answered as mentioned here-in-above. The controversy sets at rest and it can safely be held that if a vehicle is seized under the provisions of the Excise Act and confiscation proceedings in respect thereof are going on before the Collector, a Judicial Magistrate has got no jurisdiction to release the aforesaid vehicle. Needless to say that even if the petitioner before the Court is the

registered owner of the vehicle, this fact does not offer any certificate regarding his entitlement to move an application for release of such vehicle before the Court of a Judicial Magistrate who is denuded of his jurisdiction in such matters as the jurisdiction is an ornament of the Court which cannot be imposed or created and it is inherited in a particular Court.

22. **Mustafa Vs. State of Uttar Pradesh & Ors. decided by the Hon'ble Supreme Court in Civil Appeal No.6438 of 2019 (arising out of SLP (Civil) No.11110 of 2018) on 20.8.2019** is another authority on the subject of this petition wherein legal position as enumerated by the Division Bench of this Court in Virendra Gupta (supra) has been reiterated and it was so concluded:

"30) After examining the provisions of the Act, we hold that the Collector has exclusive jurisdiction to confiscate the vehicles and in case the seized things are subject to speedy wear and tear or natural decay, he may order to sell the same in the manner prescribed under sub-section (3) of Section 72 of the Act. Sub- section (4) deals with distribution of sale proceeds when the seized thing is sold which is subject to wear and tear and natural decay or when it is expedient in public interest to do so. Sub- section (8) of Section 72 of the Act deals with a situation where a prosecution of an offence is instituted in relation to which confiscation was ordered, the thing or animal shall be disposed of subject to the provisions of sub-section (4) of Section 72 of the Act in accordance with the order of the Court. The order of the Court in sub-section (8) of Section 72 of the Act is after conclusion of the prosecution which is different from the seized things which are subject to speedy wear and tear or natural decay as contemplated by sub-section (3) of Section 72 of the Act.

31) In view of the above, we do not find any error in the order passed by the High Court which may warrant interference in the present appeal. Since the High Court has decided the matter only on the question of jurisdiction of the Collector to order confiscation, the matter is remitted back to the High Court to exercise power of judicial review over the order of confiscation passed by the Collector and as affirmed by the District Judge. The appeal is disposed of accordingly."

23. In view of the above settled legal position, the decision made in Vikas Kumar (supra) and relied upon by the learned counsel for the petitioner is also not helpful to him in any manner in the issue involved in the case in hand.

24. In the impugned order dated 19.12.2023 passed by the Chief Judicial Magistrate, Shamli, reliance has been placed over the decision of this Court in Virendra Gupta Vs. State of U.P. (D.B.) (Criminal Revision No.2177 of 2018, order dated 26.4.2019) and on the basis thereof it was held that if the confiscation proceedings under Section 72 of the Excise Act are pending, the seized property under the said Act cannot be released by the Magistrate in exercise of its power under Section 457 Cr.P.C. and the power to release such property to be exercised by the Magistrate is barred under the provisions of Sub-section (1) of Section 72 of the Excise Act.

25. In the impugned order dated 6.4.2024 passed by the learned District Judge, Shamli, reliance has been placed upon Mustafa (supra) passed by the

Hon'ble Supreme Court and the judgment passed by Division Bench of this Court in Virendra Gupta (supra) and relying upon the aforesaid decisions, the criminal revision was dismissed by the leaned District Judge, Shamli by the impugned order dated 6.4.2024.

26. The aforesaid discussion brings the Court to the conclusion that if confiscation proceedings are going on before the Collector in respect of release of a vehicle seized under the provisions of U.P. Excise Act, 1910, the Judicial Magistrate has got no jurisdiction to release the same and this conclusion is drawn on the basis of the law promulgated by Hon'ble Supreme Court in Mustafa (supra) and this Court in Virendra Gupta (Alld.) (D.B.) (supra) which is authoritative law on the subject.

27. Hence, both orders dated 19.12.2023 passed by the Chief Judicial Magistrate, Shamli and dated 6.4.2024 passed by the District Judge, Shamli, in my considered opinion are having no perversity or legal lacuna and need no interference or direction to be issued by this Court in the instant Petition. The Petition under article 227 of the Constitution of India has no force and is liable to be dismissed and is accordingly dismissed.

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**(2024) 7 ILRA 430**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 24.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Application U/S 482. No. 617 of 2020
And
Other Connected Cases

**M/s Kitply Industries & Ors. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Sri Amit Saxena, Sr. Advocate, Sri Anupam Laloriya

**Counsel for the Opposite Parties:**
Sri Mithilesh Kumar, A.G.A., Sri Sushil Shukla

**A. Criminal Law –** bunch of cases- commercial transaction between parties- number of cheques allegedly issued in favour of complainant by applicant company dishonoured- complaint proceedings under Section 138, 141 and 142 NI Act- summons issued against applicants n excluding the applicant company as it was not arrayed as accused- summoning order challenged under criminal revision-matter remanded- applicant company impleaded to fill legal lacuna-fresh summoning order passed- again challenged in criminal revision-revision dismissed- both the summoning order and order dismissing revision under challenge.

**B.** Applicants have no right to challenge the order of revisional court remanding the matter- no legal requirement of the accused to be heard at the stage of summoning-complaint-opposite party has specifically stated opposite party (Company) has issued cheques-trial court committed no error in considering impleadment application-however, trial court committed two errors-impleadment application not decided finally- reason assigned to summon applicants suffered with a legal error-complainant could not be penalised- summoning orders in all cases set aside- matter remitted back to trial court to be decided afresh-Application disposed of. **(Paras 9 and 10)**

**HELD:**
The impugned order has two errors, first impleadmentapplication was not finally decided and secondly, reason assigned tosummon applicants suffered with a legal error, however, for botherrors, the complainant could not be

penalized since he has doneeverything to summon applicants including the Company by way offiling an impleadment application. [Para 9 (ix)]

In view of above, impugned summoning orders in all theseapplications are set aside and matter is remitted back to Trial Courtconcerned to decide the impleadment applications in accordance with law after hearing complainant only as well as taking note of above referred judgments. Applicants are not required to be heard at this stage. The proceedings shall be concluded within two months from today, if there is no legal impediment. (Para 10)

**Application disposed of.** (E-14)

**List of Cases cited:**

1. Aneeta Hada Vs M/S Godfather Travels and Tours Pvt. Ltd. 2012(5) SCC 661

2. N. Harihara Krishnan Vs J Thomas, 2018 (13) SCC 663

3.Himanshu Vs B. Shivamurthy & anr., 2019 (3) SCC 797

4.Sunita Palita Vs M/S. Panchami Stone Quarry:(2022)10 SCC 152

5.Siby Thomas Vs M/s. Somany Ceramics Ltd:(2024)1 SCC 348

6.Dilip Hiraramani Vs Bank Of Baroda: (2019)3SCC 797

7.Ajay Kumar Radheshyam Goenka Vs Tourism Finance Corpn. of India Ltd, (2023) 10 SCC 545

8.M/s Narender Kumar @Brothers Vs St. of UP & ors., 2022: AHC:211261

9.Sunita Palita Vs Panchami Stone Quarry, (2022) 10SCC 152

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Present bunch of applications filed under Section 482 Cr.P.C. are arising out of commercial transaction between parties, wherein number of cheques allegedly issued in favour of Complainant by applicant Company were got dishonoured and the Complainant has initiated separate proceedings under the provisions of Section 138 of Negotiation Instruments Act, 1881 *(hereinafter referred to as "NI Act").*

2. Legal and factual issue involved in all cases are common, therefore, all the applications are being decided by this common judgment.

**Factual Matrix**

3. In order to appreciate factual and legal issue involved in present cases, it would be relevant to reproduce relevant documents annexed in leading matter being Application under Section 482 No. 617 of 2020 as under:

A. Complainant has filed a complaint under Sections 138, 141 and 142 of NI Act and the same in its entirety is reproduced hereinafter:

*"श्रीमान जी,*

*निवेदन है कि* ***प्रार्थी पार्श्वनाथ वुड प्रोडक्टस का मालिक है।*** *और उसके समस्त कारोबार की देखभाल करता है।* ***परिवादी की फर्म विनियर कौर जो प्लाई वुड व प्लाई बोर्ड बनाने के काम आती है, का निर्माण करती है परिवादी की फर्म द्वारा किट प्लाई इन्ड्रस्ट्रीज शाहबाद रोड थाना सिविल लाइन्स रामपुर को विनियर कौर सप्लाई किया गया था। जिसके भुगतान में किट प्लाई इन्ड० द्वारा एक चैक सं०- 084178 दिनांक- 05.05.2012 मुबलिग 5,00,000/- रू०***

***का पंजाब नेशनल बैंक सिविल लाइन्स रामपुर का दिया गया था। परिवादी द्वारा उक्त चैक नियमानुसार भुगतान हेतु अपने बैंक, बैंक ऑफ बडौदा रामपुर में नियमानुसार प्रस्तुत किया। किन्तु विपक्षीगण का उक्त चेक बिना भुगतान के इस टिप्पणी के साथ कि खाते में धन अपर्याप्त है।"*** *वापस कर दिया गया। जिसकी सूचना प्रार्थी को पंजाब नेशनल बैंक के मेमो दिनांक- 16.05.2012 के द्वारा हुयी।*

***यह कि प्रार्थी ने दिनांक - 22.05.2015 को अपने अधिवक्ता द्वारा उक्त चैक के भुगतान हेतु उपरोक्त व्यक्तियों को नोटिस दिया। नोटिस प्राप्ति के उपरांत भी प्रार्थी को उक्त रकम का भुगतान नहीं किया गया। जिसका भुगतान करने के अभियुक्तगण वैधानिक रूप से जिम्मेदार है। भुगतान न होने के कारण वाद कारण उत्पन्न हुआ है। अभियुक्तगण उपरोक्त के किट प्लाई इन्डस्ट्रीज के पदाधिकारी है और समान रूप से फैक्ट्री के कार्य एवं भुगतान के लिये जिम्मेदार है।***

*अतः श्रीमान जी से प्रार्थना है कि अभियुक्तगण को तलब फरमाकर धारा- 138, 141, 142 एन०आई० एक्ट के अन्तर्गत सजा दी जावे एवं परिवादी को उपरोक्त चेक की रकम का भुगतान मय हर्जा खर्चा दिलवाया जाये। प्रार्थी के गवाह एकाउन्टेन्ट रोहन सिंह व बैंक कर्मचारी एवं डाक विभाग के कर्मचारी है।"*

B. Chief Judicial Magistrate, Rampur vide impugned order dated 13.08.2012 summoned applicants No. 2 to 5, (the Company, i.e., Applicant No. 1 was not summoned since it was not arrayed as an accused) to face trial and said order is reproduced hereinafter:

*"पत्रावली आदेश हेतु नियत है। प्रार्थी के विद्वान अधिवक्ता की बहस तलबी पर सुना जा चुका है। पत्रावली का अवलोकन किया।*

*परिवादी के विद्वान अधिवक्ता ने परिवाद प्रस्तुत कर निवेदन किया है कि विपक्षी द्वारा मु० 5,00,000/- का चैक संख्या 084178 दिनांकित- 05.05.2012 प्रार्थी को दिया गया जिसे प्रार्थी द्वारा अपने बैंक पंजाब नेशनल बैंक, सिविल लाइन्स, रामपुर में लगाया गया लेकिन धनराशि अपर्याप्त होने के कारण भुगतान नही हो सका। विपक्षी को रजिस्टर्ड नोटिस भेजा गया फिर भी उनके द्वारा भुगतान नही किया गया। इन और अन्य आधारों का भुगतान मय हर्जा खर्चा दिलाये जाने के लिये निवेदन किया गया है।*

*पत्रावली के अवलोकन से विदित होता है कि विपक्षी द्वारा मु० पाँच लाख रूपये की धनराशि का चैक संख्या 084178 दिनांकित- 05.05.2012 प्रार्थी को दिया गया लेकिन यह चैक पंजाब नेशनल बैंक के पत्र दिनांकित- 16.05.2012 द्वारा बगैर भुगतान के वापस कर दिया गया। चैक विपक्षी सं0- 4 व 5 द्वारा जारी किये गये बताये गये है।*

*दिनांक- 22.05.2012 को विपक्षी को पंजीकृत नोटिस भुगतान हेतु प्रेषित किया गया लेकिन विपक्षी द्वारा आज तक भुगतान नही किया गया। यह परिवाद दिनांक- 21.06.2012 को संस्थित किया गया।*

*विपक्षी को रजिस्टर्ड नोटिस प्रेषित किये जाने से 30 दिन की समयावधि पर नोटिस की तामीला पर्याप्त मानी जाती है। परिवादी ने अपने बयान धारा- 200 द०प्र०सं० के माध्यम से परिवाद कथानक का समर्थन किया है तथा धारा- 202 द०प्र०सं० के अन्तर्गत चैक भुगतान न होने का प्रपत्र मेमोरेडम प्रेषित नोटिस की रजिस्ट्री रसीद मूल रूप से दाखिल की गयी है। परिवाद धारा 138 के अपेक्षाओं को पूरा करता है। उपरोक्त विवेचना के प्रकाश में विपक्षीगण देवेन्द्र सिंह, सुरेन्द्र चन्द्र बरनावत धारा 138 एन०आई० एक्ट के अन्तर्गत तलब किये जाने योग्य है।*

*अतः विपक्षीगण देवेन्द्र सिंह मैनेजर कार्मिक, सुरेश चन्द्र बरनावत, जी०एम०प्लान्ट शाहबाद रोड सिविल लाईन्स, रामपुर को अन्तर्गत धारा- 138 एन०आई० एक्ट के अन्तर्गत तलब किया जाता है। परिवादी आवश्यक पैरवी अन्दर सप्ताह करे तथा सूची गवाहान दाखिल करें। पत्रावली वास्ते हाजिरी अभियुक्त दिनांक 09.09.2012 को पेश हो।"*

C. Applicants No. 4 and 5 being aggrieved by above order, have filed a criminal revision, which was allowed by order dated 18.06.2013 and matter was remitted back to Trial Court to pass a fresh order taking note of Aneeta Hada Vs. M/S Godfather Travels and Tours Pvt. Ltd. 2012(5) SCC 661. Relevant part of order is mentioned hereinafter:

***"अनीता होडा बनाम मै० गोण फादर्स टेवलर्स एवं टूरल्स लि० 2012 (77) ए०सी०सी० 924 में माननीय सर्वोच्च न्यायालय की व्यवस्था है। उक्त व्यवस्था में माननीय सर्वोच्च न्यायालय द्वारा यह स्पष्ट किया गया है कि कम्पनी आदि जो व्यक्ति कम्पनी के कार्य की देखरेख करने वाले है वह भी धारा 141 परकाम्य विलेख अधिनियम के अन्तर्गत अभियुक्त है। क्योंकि उनका दायित्व उक्त कहां है कि अन्तर्गत समझा गया है।*** *माननीय सर्वोच्च न्यायालय द्वारा यह स्पष्ट किया गया है कि कम्पनी के पदाधिकारी समय समय पर बदल सकते है और कम्पनी छोड कर जा सकते है जब कि कम्पनी एक न्यायिक व्यक्ति और कम्पनी एक आवश्यक लोगो तथा प्रारम्भिक अपराधिक दायित्व कम्पनी का होगा। तथा मुख्य दायित्व कथनो का ही होगा* ***और यदि कम्पनी के विरूद्ध अभियोजन नही चलाया गया है तो दूसरी व तीसरी श्रेणी में आने वाले व्यक्तियों को कम्पनी की ओर से उत्तरदायी नही माना जा सकता है। क्योंकि दूसरी व तीसरी श्रेणी में आने वाले व्यक्तियों का उत्तरदायित्व को निर्धारित करने से पहले कम्पनी के उत्तरदायित्व का निर्धारित किया जाना पराकाम्य लिखित अधिनियम की धारा 141 के अन्तर्गत आवश्यक है।*** *माननीय सर्वोच्च न्यायालय की उक्त व्यवस्था3 माननीय न्यायमूर्तिगण की एक वृहद पीठ की व्यवस्था है जिसमें बिना कम्पनी को अभियुक्त बनाये उसके पदाधिकारियों के विरूद्ध अपराधिक मामला योजित किया जा सकता है या नही उक्त बिन्दु पर माननीय सर्वोच्च न्यायालय के पूर्व में दिये गये भिन्न भिन्न मतो की विवेचना माननीय वृहद पीठ द्वारा की गई है।* ***उल्लेखनीय है कि प्रस्तुत प्रकरण मे परिवादपत्र न्यायालय में माह जून 2012 में प्रस्तुत किया गया है और उससे कुछ ही दिन पहले दिनांक- 27.04.2012 को माननीय सर्वोच्च न्यायालय की वृहद पीठ की उक्त व्यवस्था आयी है और ऐसा समय है कि परिवादी के विद्वान अधिवक्ता भी अपर***

***न्यायालय के संज्ञान में उक्त विधि व्यवस्था न आ पायी हो। अतः उक्त व्यवस्था जो माननीय सर्वोच्च न्यायालय की नवीनतम व्यवस्था है उसके अनुसरण में समस्त बिन्दु पर अवर न्यायालय द्वारा अपने प्रश्नगत आदेश में मे कोई निष्कर्ष नही किया जा सका है अतः ऐसी स्थिति में यह आवश्यक हो जाता है कि माननीय सर्वोच्च न्यायालय की उक्त व्यवस्था 2012 (77) ए०सी०सी० 924 में प्रतिपादित सिद्धान्त के आधार पर अवर न्यायालय पुनः विपक्षी/परिवादी के परिवाद पत्र का निर्धारण किया और विधि के अनुसार आदेश पारित करें।***

*आदेश*

*निगरानीकर्ता की उक्त दाण्डिक निगरानी स्वीकार की जाती है तथा अवर न्यायालय का प्रश्नगत आदेश दिनांकित-13.08.2012 निरस्त करते हुये पत्रावली इस निगरानी मे दिये गये निष्कर्षों के आधार पर पुनः सुनवाई हेतु अवर न्यायालय को प्रतिप्रेषित की जाती है। अवर न्यायालय वर्तमान विधिक स्थिति को देखते हुए पुनः परिवाद पत्र का विचारण करे और अपना आदेश पारित करें। परिवादी अवर न्यायालय के समक्ष दिनांक-18.07.2012 को उपस्थित हो।"*

D. The Complainant in order to fill up a legal lacuna, filed an impleadment application to implead applicant No. 1 i.e. M/S Kitply Industries, to which objections were also filed, though after remand the applicants have no lis before Trial Court. On remand, Trial Court passed a fresh impugned summoning order dated 03.09.2015 and for reference relevant part of order is mentioned hereinafter:

***"उल्लेखनीय है कि सम्बन्धित कम्पनी को परिवादी ने पक्षकार नहीं बनाया गया है, जिसके संदर्भ में परिवादी ने प्रार्थना पत्र दिनांकित 16-01-2015 मैसर्स किट प्लाई इण्डस्ट्रीज लि० को पक्षकार बनाये जाने हेतु प्रस्तुत किया तथा उसमें कथन किया गया कि उसने मैसर्स किट प्लाई इण्डस्ट्रीज लि० को विधिवत रूप से नोटिस भी दे दिया है। विपक्षी पी० के० गोयनका द्वारा दाखिल आपत्ति दिनांकित 30-03-2015 के द्वारा यह कहा कि प्रस्तुत प्रकरण में अब मैसर्स किट प्लाई इण्डस्ट्रीज लि० को पक्षकार बनाये जाने हेतु प्रार्थना पत्र स्वीकार नहीं किया जा सकता, क्योंकि वह संशोधन की प्रकृति का है।***

*एन०आई०एक्ट की धारा 141 कम्पनी द्वारा अपराधं किये जाने के संदर्भ में प्राविधान करती है, जिसके अनुसार यदि धारा 138 एन०आई०एक्ट के अन्तर्गत कम्पनी द्वारा अपराध किया जाता है तो ऐसी परिस्थितियों में कम्पनी सहित उन सभी व्यक्तियों जो कि अपराध किये जाते समय कम्पनी के क्रिया कलापों के लिये उत्तरदायी थे, उक्त अपराध के लिये विचारण किया जायेगा व उन्हे दंडित किया जायेगा।* ***प्रस्तुत प्रकरण में प्रश्नगत चैक' किट प्लाई इण्डस्ट्रीज लि० के द्वारा जारी किया गया है। अतः ऐसी परिस्थिति में धारा 141 एन० आई०एक्ट के प्राविधान के अनुसार कम्पनी मैसर्स किट प्लाई इण्डस्ट्रीज लि0 सहित उसे जारी करने वाले व्यक्ति व कम्पनी के क्रिया कलापों के उत्तरदायी व्यक्तियों का वेिचारण प्रस्तुत प्रकरण के द्वारा होना चाहिये, परन्तु प्रस्तुत प्रकरण में मैसर्स किट प्लाई इण्डस्ट्रीज लि० को परिवादी ने अभियुक्त नहीं बनाया। इस स्तर पर यह स्पष्ट करना उचित होगा कि न्यायालय में किसी भी अपराध का विचारण पुलिस द्वारा विवेचना उपरांत***

***दाखिल आरोप पत्र के आधार पर न्यायालय द्वारा संज्ञान लेकर या स्वयं न्यायालय द्वारा परिवाद में संज्ञान लेने के उपरांत जांच के पश्चात किया जाता है तथा दोनो ही परिस्थितियों में न्यायालय या पुलिस/विवेचनाधिकारी के ऊपर यह दायित्व है कि वह जांच/विवेचना के दौरान प्रथम दृष्टया सभी दोषी व्यक्तियों को चिन्हित कर उनके विरूद्ध विचारण प्रारंभ करें। इसके लिये यह जरूरी नहीं है, जिन व्यक्तियों के विरूद्ध विचारण किया जाना है उन सभी का नाम परिवाद या प्रथम सूचना रिपोर्ट में अंकित हो।***

*अतः उपरोक्त समस्त व्याख्या, माननीय उच्चतम न्यायालय की उपरोक्त विधि व्यवस्था, माननीय रिवीजन न्यायालय द्वारा पारित उपरोक्त वर्णित निर्णय तथा धारा 141 पराक्राम्य लिखित अधिनियम के प्राविधान को दृष्टिगत रखते हुये* ***इस स्तर पर प्रस्तुत प्रकरण में मैसर्स किट प्लाई इण्डस्ट्रीज लि० द्वारा चेयरमैन, पी० के० गोयनका, एम०डी० गौरव गोयनका, सचिव शबनम जमाल, मैनेजर कार्मिक देवेन्द्र सिंह व जी०एम प्लांट सुरेश चन्द्र बरनावत को धारा 138 पराक्रम्य विलेख अधिनियन में विचारण हेतु तलब किये जाने का आधार पर्याप्त है।***

*आदेश*

*अभियुक्तगण मैसर्स किट प्लाई इण्डस्ट्रीज लि० द्वारा चेयरमैन, पी०के०गोयनका, गौरव गोयनका, शबनम जमाल, देवेन्द्र सिंह व सुरेश चन्द्र बरनावत को धारा- 138 पराक्रम्य विलेख अधिनियम के अन्तर्गत विचारण हेतु बजरिये सम्मन दिनांक 03.10.2015 को तलब किया जाये। परिवादी आवश्यक पैरवी नियमानुसार करें।"*

E. Aforesaid order was again challenged before Revisional Court at the behest of all applicants, however, the same was dismissed vide impugned order dated 15.05.2019 and relevant part thereof is mentioned hereinafter:

*"उक्त निगरानी सं०-२३०/१२ में दिये गये दिशा निर्देश का अनुपालन करते हुये अवर न्यायालय द्वारा दिनांक ०३.०९.२०१५ को नवीन आदेश करते हुये मैसर्स किटप्लाई इण्डस्ट्रीज लि० द्वारा चेयरमेन पी०के० गोयनका, गौरव गोयनका, शबनम जमाल, देवेन्द्र सिहं व सुरेश चन्द्र बरनावत को धारा १३८ पराक्रम्य विलेख अधिनियम के तहत विचारण हेतु तलब किया, जिससे क्षुब्ध होकर निगरानीकर्तागण द्वारा वर्तमान निगरानी प्रस्तुत की गयी।* ***मुख्यतः इस कथन के साथ कि निगरानी न्यायालय द्वारा ऐसा कोई आदेश पारित नहीं किया गया, जिसके आधार पर मैसर्स किटप्लाई इण्डस्ट्रीज लि० को अभियुक्त बनाया जाये। माननीय उच्चतम न्यायालय की विधि व्यवस्था अनीता हाडा आदि बनाम गौड फादर्स ट्रेवल्र्स एण्ड टूरल्स प्रा०लि० २०१२ (७७) ए०सी०सी०पृष्ठ १२४ का विवरण रिवीजन न्यायालय के निर्णय में किया गया है। परन्तु रिवीजन न्यायालय ने इस विधि व्यवस्था के आधार पर परिवादी को यह अधिकार नहीं दिया कि वह मैसर्स किटप्लाई इण्डस्ट्रीज लि० को परिवाद में अभियुक्त बनायें। परिवादी का प्रार्थना पत्र दिनांकित १६.०१.२०१५ पूर्णतयां गैरकानूनी है। उनके विरूद्ध कोई मामला धारः १३८ पराक्रम्य विलेख अधिनियम के अन्तर्गत नहीं बनता है। मैसर्स किटप्लाई निगरानीकर्ता सं०१ को कोई विधिक नोटिस आदि भी प्रेषित***

***नहीं किया गया और न ही प्राविधानित समयावधि के अन्दर परिवाद उनके विरूद्ध प्रस्तुत किया गया।***

*इस सन्दर्भ में यदि दाण्डिक निगरानी सं०-२३०/२०१२ में पारित निर्णय दिनांकित १८.०६.२०१३ को देखें तो* ***उपरोक्त निगरानी में यही मुख्य तकनीकी आपत्ति उठायी गयी थी कि किटप्लाई इण्डस्ट्रीज लि० को परिवाद पत्र में पक्षकार नहीं बनाया गया, जो कि आवश्यक है और न उसे नोटिस भेजा गया, न दिया गया। निगरानी न्यायालय द्वारा अपने आदेश दिनांकित १८.०६.२०१३ मे विधि व्यवस्था अनीता हाडा आदि बनाम गौड फादर्स ट्रैवलर्स एण्ड टूरल्स प्रा० लि० २०१२(७७) ए०सी०सी० पृष्ठ ९२४ में माननीय सर्वोच्च न्यायालय द्वारा यह स्पष्ट किया गया है कि कम्पनी और जो व्यक्ति कम्पनी के कार्य की देखरेख करने वाले है, वह भी धारा १४१ पराक्राम्य विलेख अधिनियम के अन्तर्गत अभियुक्त है, क्योंकि उनका दायित्व उक्त धारा के अन्तर्गत समझा गया है। माननीय सर्वोच्च न्यायालय द्वारा यह स्पष्ट किया गया है कि कम्पनी के पदाधिकारी समय समय पर बदल सकते है और कम्पनी छोड़ कर जा सकते है, जबकि कम्पनी एक न्यायिक व्यक्ति है और कम्पनी एक आवश्यक पक्षकार होगी तथा प्रारम्भिक अपराधिक दायित्व कम्पनी का होगा तथा मुख्य दायित्व कम्पनी का ही होगा और यदि कम्पनी के विरूद्ध अभियोजन नहीं चलाया गया है तो दूसरी व तीसरी श्रेणी में आने वाले व्यक्तियों को कम्पनी की ओर से उत्तरदायी होना नहीं कहा जा सकता है।*** *क्योंकि दूसरी व तीसरी श्रेणी में आने वाले व्यक्तितयों का उत्तरदायित्व का निर्धारण करने से पहले कम्पनी के उत्तरदायित्व का निर्धारित किया जाना पराक्रम्य विलेख अधिनियम की धारा १४१ के अन्तर्गत आवश्यक है। सम्मानीय विधि व्यवस्था में यह प्राविधानित किया गया कि दूसरी व तीसरी श्रेणी में आने वाले व्यक्तियों के उत्तरदायित्व का निर्धारण करने से पहले कम्पनी के उत्तरदायित्व का निर्धारण आवश्यक है। पराक्रम्य विलेख अधिनियम की धारा १४१ के अन्तर्गत साथ ही निगरानी न्यायालय द्वारा यह भी निष्कर्ष दिया गया कि माह जून २०१२ में परिवाद पत्र प्रस्तुत किया गया है और उससे कुछ ही समय पहले दिनांक २७.०४.१२ को माननीय सर्वोच्च न्यायालय की वृहद पीठ की उक्त विधि व्यवस्था आयी है। ऐसा सम्भव है कि परिवादी के विद्वान अधिवक्ता या न्यायालय के संज्ञान में उक्त विधि व्यवस्था न आ पायी हो। अतः उक्त व्यवस्था जो माननीय सर्वोच्च न्यायालय की नवीनतम व्यवस्था है, उसके अनुसरण में उक्त बिन्दु पर अवर न्यायालय द्वारा अपने प्रश्नगत आदेश में कोई निष्कर्ष नहीं दिया जा सका है। अतः अवर न्यायालय माननीय सर्वोच्च न्यायालय की विधि व्यवस्था अनीता हाडा आदि बनाम गौड फादर्स ट्रेवलर्स एण्ड टूरल्स प्रा० लि० २०१२(७७)ए०सी०सी० १२४ में प्रतिपादित सिद्धान्तों के आधार पर पुनः विपक्षी/परिवादी के परिवाद पत्र का विचारण करे और आदेश पारित करें। अतः निगरानी न्यायालय द्वारा उक्त के निगरानीकर्तागण की तलबी को विधि विरूद्ध नहीं बताया था।* ***बल्कि माननीय सर्वोच्च न्यायालय द्वारा विधि व्यवस्था अनीता हाडा आदि बनाम गौड फादर्स ट्रैवल्स एण्ड टूरल्स प्रा० लि० २०१२ (७७) ए०सी०सी० पृष्ठ १२४ में प्रतिपादित सम्मानीय सिद्धान्त को दृष्टिगत रखते हुये कम्पनी के सन्दर्भ में चूंकि***

***कोई निष्कर्ष निर्णय में नहीं दिया गया था। निगरानी स्वीकार की गयी थी। निगरानीकर्तागण को गलत विधि विरुद्ध तरीके से तलब किया गया, ऐसा कोई निष्कर्ष नहीं दिया गया तथा आदेश मात्र निगरानी में दिये गये निष्कर्षों के आधार पर पुनः सुनवाई हेतु दिया गया। उक्त निगरानी में दिये गये निष्कर्ष व निर्णय के विरूद्ध निगरानीकर्तागण द्वारा कहीं कोई कार्यवाही की गयी, ऐसा न साक्ष्य है, न कथन। अतः निगरानी में दिये गये निष्कर्ष पक्षों के मध्य अन्तिम हुये और उपरोक्त निष्कर्ष व निर्देश के अनुपालन में अवर न्यायालय द्वारा दिनांक ०३.०९.१५ को प्रश्नगत आदेश पारित किया गया है। विद्वान अवर न्यायालय द्वारा प्रश्नगत आदेश में निष्कर्ष दिया गया*** *कि- " एन० आई०एक्ट की धारा १४१ कम्पनी द्वारा अपराध किये जाने के सन्दर्भ में प्राविधान करती है, जिसके अनुसार यदि धारा १३८ एन०आई०एक्ट के अन्तर्गत कम्पनी द्वारा अपराध किया जाता है तो ऐसो परिस्थितियों में कम्पनी सहित उन सभी व्यक्तियों जो कि अपराध किये जाते समय कम्पनी के क्रिया कलापों के लिये उत्तरदायी थे, उक्त अपराध के लिये विचारण किया जायेगा व उन्हें दण्डित किया जायेगा। प्रस्तुत प्रकरण में प्रश्नगत चैक किटप्लाई इण्डस्ट्रीज लि० के द्वारा जारी किया गया है। अतः ऐसी परिस्थिति में धारा १४१ एन०आई०एक्ट के प्राविधान के अनुसार कम्पनी मैसर्स किटप्लाई इण्डस्ट्रीज लि० सहित उसे जारी करने वाले व्यक्ति व कम्पनी के क्रिया कलापों के उत्तरदायी व्यक्तियों का विचारण प्रस्तुत प्रकरण के द्वारा होना चाहिये, परन्तु प्रस्तुत प्रकरण में मैसर्स किटप्लाई इण्डस्ट्रीज लि० को परिवादी ने अभियुक्त नहीं बनाया। इस स्तर पर यह स्पष्ट करना उचित होगा कि न्यायालय में किसी भी अपराध का विचारण पुलिस द्वारा विवेचना उपरान्त दाखिल आरोप पत्र के आधार पर न्यायालय द्वारा संज्ञान लेकर या स्वयं न्यायालय द्वारा परिवाद में संज्ञान लेने के उपरान्त जांच के पश्चात किया जाता है तथा दोनो ही परिस्थितियों में न्यायालय या पुलिस/विवेचनाधिकारी के ऊपर यह दायित्व है कि वह जांच/विवेचना के दौरान प्रथम दृष्टया सभी दोषी व्यक्तियों को चिन्हित कर उनके विरूद्ध विचारण प्रारम्भ करें। इसके लिये यह जरूरी नहीं है, जिन व्यक्तियों के विरूद्ध विचारण किया जाना है, उन सभी का नाम परिवाद या प्रथम सूचना रिपोर्ट में अंकित हो।" जो कि विधिसंगत व न्यायोचित है।* ***चूंकि यदि तहरीर या परिवाद में किसी अभियुक्त का नाम लिखे जाने से रह जाये तो विधि इतनी प्रभावहीन नहीं कि उक्त अभियुक्त को उसके क्रिया कलापों के लिये तलब/जांच कर विचारण न कर सके। आवश्यक यह है कि मुख्य दोषियों को चिन्हित किया जाये तथा वर्तमान मामले में माननीय सर्वोच्च न्यायालय द्वारा अनीता हाडा आदि बनाम गौड फादर्स ट्रैवलर्स एण्ड टूरल्स प्रा० लि० २०१२(७७)ए०सी०सी० पृष्ठ १२४ में प्रतिपादित सम्मानीय विधि व्यवस्था के प्रकाश में कम्पनी के उत्तरदायित्व का निर्धारण किया जाना पराक्रम्य लिखित अधिनियम की धारा १४४ के तहत आवश्यक है। ऐसे में विद्वान अवर न्यायालय के प्रश्नगत आदेश में किसी भी प्रकार की कोई विधिक, तात्विक व क्षेत्राधिकार सम्बन्धी त्रुटि प्रतीत नहीं होती है तथा प्रश्नगत आदेश में किसी प्रकार के हस्तक्षेप की आवश्यकता नहीं है।*** *अतः यह फौजदारी निगरानी निरस्त होने योग्य है।*

आदेश

प्रस्तुत फैजदारी निगरानी निरस्त की जाती है। निर्णय की प्रति सहित अधीनस्थ न्यायालय की पत्रावली सम्बन्धित न्यायालय को अविलम्ब भेजी जाये।"

4. Above referred both orders are impugned in first application and similar impugned orders are challenged in respective applications.

5. **Undisputed facts**

(i) All cheques in question were issued by authorised signatories of applicant-company, M/s Kitply Industries Ltd. in favour of complainant towards commercial transactions between parties.

(ii) All cheques in question were got dishonoured on ground of "insufficient balance".

(iii) Statuary notice was issued to applicants No. 2 to 5 but not to the Company, the principal offender. A complaint was filed only against applicants No. 2 to 5 under Sections 138, 141, 142 of NI Act disclosing that all proposed accused worked for the Company.

(iv) The applicants No. 2 to 5 were summoned but it was challenged and Revisional Court remanded the matter for fresh consideration in view of judgment passed by Supreme Court in **Aneeta Hada (supra).** This order was not challenged at behest of either party.

(v) At this stage an application for impleadment of Company was filed to which objections were also filed. Though there was no specific order passed on it, however, it was taken note in impugned summoning order as well as objection to it was also taken note of.

(vi) On remand for fresh order all applicants including the Company were also summoned and challenge to it before the Revisional Court remained unsuccessful.

6. **Submission on behalf of Applicants**

(i) The complaint as filed by complainant under N.I. Act was not maintainable for non-joinder of necessary party i.e. the Company, being principal offender as contemplated in **Aneeta Hada (supra).**

(ii) The application filed at this stage of remand to implead the Company was not maintainable as well as the application was neither considered nor allowed nor rejected.

(iii) On remand, the summoning order was passed taking an analogy of State case, whereas present is a proceedings arising out of complaint case. The Trial Court has committed a legal error by summoning the Company as well as other applicants. The said legal error was not cured by the Revisional Court as such it was perpetuated further.

(iv) The Revisional Court vide it's order dated 18.06.2013 has remanded the matter which was patently illegal and should have quashed the proceedings in view of fact that Supreme Court only declares the law and the maxim ignorantia juris non excusat, a settled principle of law and therefore it could not be said that Trial Court was not aware of law pronounced by Supreme Court.

(v) Drawing analogy from provisions of Cr.P.C. for summoning accused is patently illegal in view of fact that NI Act is a complete code in itself and therefore provisions of Cr.P.C. are not applicable as has been held by Supreme

Court, in **N. Harihara Krishnan Vs. J Thomas, 2018 (13) SCC 663.**

(vi) The impleadment application was not accompanied by any delay condonation application and since the complaint was filed on 20.06.2012, while impleadment application was filed on 16.01.2015, i.e. after a delay of approximately 2 ½ years, the same could not have been allowed since the same was much beyond mandatory timelines given under Section 138 of N.I Act. Reference was made to a judgement of Supreme Court in **Himanshu vs B. Shivamurthy and another, 2019 (3) SCC 797.**

(vii) A bare perusal of complaint would also demonstrate that no specific role was assigned to accused and therefore in view of law declared by Supreme Court, the applicants could not have been summoned. Reference was made to the judgements passed by Supreme Court in **Sunita Palita vs M/S. Panchami Stone Quarry:(2022)10 SCC 152, Siby Thomas Vs. M/s. Somany Ceramics Ltd:(2024)1 SCC 348 and Dilip Hiraramani vs Bank Of Baroda: (2019)3 SCC 797.**

(viii) It was further submitted that without arraying Company as an accused on whose behalf cheques were issued, complaint would not be maintainable, reference was made to a three Judges judgement of Supreme Court in **Aneeta Hada (supra),** which has consistently been followed till date. Reference was also made to **Dilip Hiraramani (supra)** and **Himanshu (supra).**

7. **Submissions on behalf of Opposite Party No. 2/Complainant**

(i) It is a specific case of Complainant that all applicants even worked at accused Company at relevant time and were equally responsible for dishonoured cheques.

(ii) A Legal lacuna for not impleading Company was cured as admittedly an application for impleadment was filed after matter was remanded for fresh order subsequent to **Aneeta Hada (supra).** Objection to it was also filed.

(iii) The Trial Court as well as Revisional Court has considered factum of impleadment application as such formal order on application was not required (application was neither allowed nor rejected).

(iv) The proposition of law that unless the company is made accused, its Directors/Officers cannot be prosecuted is premised on the concept of law that unless the finding of guilt is recorded against the company its Directors/Officers cannot be punished vicariously but this proposition of law has an exception that where there is a legal bar for proceeding against the company due to operation of certain other laws, or that the company is legally disable from being prosecuted then in such case the director or the officers of the company can be prosecuted independently without the company being impleaded as accused (ref: **Ajay Kumar Radheshyam Goenka Vs Tourism Finance Corpn. of India Ltd, (2023) 10 SCC 545**). So where from their own pleadings in the instant application, the applicants had stated about the company being under the process of IBC, no prejudice is likely to be caused to Directors/Officers especially those who have signed the cheques (Applicant Nos. 3 & 4) if they are prosecuted because they can independently establish their defense in trial in terms of Section141 (2) NI Act.

(v) The accused-applicants were first summoned vide order dated 21.9.2012 passed by the Magistrate. They had challenged it on all these grounds before

Lower Revisional Court, which vide its order dated 18.06.2013 had then remanded the case to Magistrate for passing fresh order of summoning and no further challenge was made by them to such revisional order before this Court. It is thereafter that during proceedings before the Magistrate that Complainant had sought amendment in complaint seeking impleadment of Company as accused, which stands allowed impliedly when Magistrate vide his fresh order of summoning had summoned Company also on premise that cognizance is taken of offence and there is no legal bar in then summoning those who appears to be the offenders even if they were not arrayed in the title of complaint by complainant. Recourse to such amendments in complaint, which causes no prejudice to accused is legally permissible and which position of law has been exhaustively dealt with by this Court in the case of **M/s Narender Kumar @ Brothers vs State of UP & others, 2022:AHC:211261,** which is relied upon by complainant in toto.

(vi) The Director or officer of the Company who had signed the cheque can be prosecuted without making any averment in the complaint to effect that they were in charge of, or responsible to Company for conduct of its business hence impugned complaint qua Applicant Nos. 3 & 4 survives since they were the joint signatories of the cheque. (Ref. **Sunita Palita vs Panchami Stone Quarry, (2022) 10 SCC 152**)

8. Heard learned counsel for rival parties, perused the record as well as written submissions filed by both parties.

9. **Discussion and Conclusion**

(i) In above referred undisputed facts, now the applicants have no legal right to challenge the order whereby Revisional Court has remanded the case for fresh consideration in view of **Aneeta Hada (supra).** There was no legal requirement that applicants (proposed accused) be heard at the stage of summoning even though matter was remanded to Trial Court for this purpose. The objections filed by applicants to impleadment application was not required to be taken note of.

(ii) The first issue for consideration is whether on remand the Trial Court has to pass an order only in view of **Aneeta Hada (supra)** without consideration of impleadment application or not. If the answer would be affirmative then in strict view of **Aneeta Hada (supra),** since principal offender i.e. Company was not arrayed as an accused therefore, no criminal proceeding could be initiated under NI Act against applicants No. 2 to 5. However, if the answer would be negative then, the Court will consider whether application for impleadment was considered and allowed or contents of impugned order do indicate that it was allowed as well as whether pleadings are to the effect that Company and applicants have committed prima-facie offence under NI Act.

(iii) The Revisonal Court while remitting the case has neither put any caveat nor restricted the Trial Court to consider impleadment application in accordance with law, if so filed. It is important to note here that none of applicants have challenged the order passed by Revisional Court whereby matter was remitted for fresh consideration.

(iv) In regard to amendment in a complaint, few paragraphs of M/s **Narender Kumar @ Brothers (supra),** a

judgement passed by this Court and relied upon by complainant would be relevant where this issue was considered in detail:-

*"9. The first issue before this Court is whether amendment in a complaint was legally permissible?*

*10. In this regard rival parties have placed reliance on S.R.Sukumar (Supra).*

*11. Learned counsel for the applicants has submitted that amendment which could cause prejudice to accused, such cannot be allowed. Contrary, according to counsel for complainant no prejudice was caused.*

*12. Before considering rival submissions, relevant paragraphs no.18 and 19 of S.R.Sukumar (supra) would be relevant to mention hereinafter:*

*"18. Insofar as merits of the contention regarding allowing of amendment application, it is true that there is no specific provision in the Code to amend either a complaint or a petition filed under the provisions of the Code, but the Courts have held that the petitions seeking such amendment to correct curable infirmities can be allowed even in respect of complaints. In U.P. Pollution Control Board vs. Modi Distillery And Ors., (1987) 3 SCC 684, wherein the name of the company was wrongly mentioned in the complaint that is, instead of Modi Industries Ltd. the name of the company was mentioned as Modi Distillery and the name was sought to be amended. In such factual background, this Court has held as follows:-*

*"...The learned Single Judge has focussed his attention only on the technical flaw in the complaint and has failed to comprehend that the flaw had occurred due to the recalcitrant attitude of Modi Distillery and furthermore the infirmity is one which could be easily removed by having the matter remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make the formal amendments to the averments contained in para 2 of the complaint so as to make the controlling company of the industrial unit figure as the concerned accused in the complaint. All that has to be done is the making of a formal application for amendment by the appellant for leave to amend by substituting the name of Modi Industries Limited, the company owning the industrial unit, in place of Modi Distillery.... Furthermore, the legal infirmity is of such a nature which could be easily cured…"*

*19. What is discernible from the U.P. Pollution Control Board's case is that easily curable legal infirmity could be cured by means of a formal application for amendment. If the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for entertaining such amendment, the Court may permit such an amendment to be made. On the contrary, if the amendment sought to be made in the complaint does not relate either to a curable infirmity or the same cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the Court shall not allow such amendment in the complaint."*

*13. xxxxx*

*14. xxxxx*

*15. xxxxx*

*16. In S.R. Sukumar (supra), Supreme Court has reproduced part of U.P. Pollution Control, Board (supra) wherein amendment of details of the company was allowed and it was held that*

*Court may permit an amendment which are formal in nature though a caveat was put that in event of likelihood of prejudice to the other side, such amendment may not be allowed."*

(v) To further consider the rival submissions on issue, I have carefully perused the complaint where it was specifically stated that opposite party (the Company) has issued cheques in pursuance of commercial transactions, which got dishonoured and named accused were employees of the Company and were equally responsible for dishonour, as such prima-facie allegations against the Company, being principal offender, was part of proceeding since inception and are sufficient to summon the Company also being principal offender as well as other applicants including signatories to the cheques. The Trial Court has not committed any legal error by considering an application for impleadment.

(vi) Now the Court has to consider effect of a fact that application for impleadment was neither allowed nor rejected, though from the contents of impugned order, Trial Court was apparently considering the said application only as it would be evident from first Para of impugned order and for reference said paragraph is again reproduced hereinafter:-

*"उल्लेखनीय है कि सम्बन्धित कम्पनी को परिवादी ने पक्षकार नहीं बनाया गया है, जिसके संदर्भ में परिवादी ने प्रार्थना पत्र दिनांकित 16-01-2015 मैसर्स किट प्लाई इण्डस्ट्रीज लि० को पक्षकार बनाये जाने हेतु प्रस्तुत किया तथा उसमें कथन किया गया कि उसने मैसर्स किट प्लाई इण्डस्ट्रीज लि० को विधिवत रूप से नोटिस भी दे दिया है। विपक्षी पी० के० गोयनका द्वारा दाखिल आपत्ति दिनांकित 30-03-2015 के द्वारा यह कहा कि प्रस्तुत प्रकरण में अब मैसर्स किट प्लाई इण्डस्ट्रीज लि० को पक्षकार बनाये जाने हेतु प्रार्थना पत्र स्वीकार नहीं किया जा सकता, क्योंकि वह संशोधन की प्रकृति का है।"*

(viii) As referred above, the Trial Court was in fact considered the application for impleadment only but while considering the issue, it lost track and dealt the issue on different analogy i.e. power of Magistrate to summon even an accused not named in charge-sheet if so warrant, however, a fact that present case was arising out of a complaint case under a Special Act was completely ignored. Therefore, reason and analogy for allowing impugned order has a legal error and impugned order in its present form could not legally survive.

(ix) The impugned order has two errors, first impleadment application was not finally decided and secondly, reason assigned to summon applicants suffered with a legal error, however, for both errors, the complainant could not be penalized since he has done everything to summon applicants including the Company by way of filing an impleadment application.

(x) The judgments relied upon by applicants i.e. **N. Harihara Krishnan (supra); Himanshu (supra); Sinuta Palita (supra); Siby Thomas (supra)** and **Dilip Hiraramani (supra)** are on the point that if Company was not convicted, their Director would also not be convicted either, or vicarious liability would also not fall on non-executive Directors or on summon under Section 319 Cr.P.C. No judgment on issue whether amendment could not be allowed is being placed on record. Proceedings still have not reached upto a

stage, where other cited judgements would have application.

(xi) The law in regard to amendment in a complaint is being referred in **Narender Kumar @ Brothers (supra).** The Trial Court has adopted a wrong approach to consider the case and in interest of justice such approach could not prejudice the complainant's case. In first round Revisional Court has remitted the case for fresh consideration, where impleadment application was filed in view of **Aneeta Hada (supra)** therefore, it was maintainable, however, as discussed above said application was not decided on merit.

(xii) Therefore, this Court is of considered opinion that impugned order in its present form does not survive.

10. In view of above, impugned summoning orders in all these applications are set aside and matter is remitted back to Trial Court concerned to decide the impleadment applications in accordance with law after hearing complainant only as well as taking note of above referred judgments. Applicants are not required to be heard at this stage. The proceedings shall be concluded within two months from today, if there is no legal impediment.

11. The applications are accordingly disposed of.

12. Registrar (Compliance) to take steps.

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**(2024) 7 ILRA 443**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 08.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Application U/S 482 No. 1077 of 2020

**Vinesh Kumar Yadav ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Shishir Tandon

**Counsel for the Opposite Parties:**
G.A.

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Section 161,164 - Statement of victim, Indian Penal Code, 1860 - Section 406, The Dowry prohibition Act, 1961 - Section - Section 3/4 - A Magistrate cannot add or subtract charges at the cognizance stage in cases based on police reports - power lies with the Trial Court - Exercise of this power is permitted only at the framing of charge stage. (Para -13,14)**

Victim filed an application under Section 156(3) CrPC. - Charge sheet filed against some accused, but not O.P. No. 2. - Victim's statement recorded under Section 164 CrPC. - application filed at cognizance stage - seeking re-examination of victim's statement - Applicant sought to add rape charge (Section 376 IPC) against O.P. No. 2. - Trial Court's power to summon additional accused at the stage of cognizance disputed. (Para -1 to 13)

**HELD: -** No addition or subtraction of offences at cognizance stage. No sufficient evidence to summon O.P. No. 2 for offences under Section 406 IPC and 3/4 of Dowry Prohibition Act. Trial Court can consider summoning O.P. No. 2 under Section 319 CrPC & can proceed under Section 217 CrPC if evidence emerges during trial.**(Para -18)**

**Application u/s 482 Cr.P.C. disposed of.** (E-7)

**List of Cases cited:**

1. St. of Guj. Vs Girish Radhakrishnan Varde, (2014) 3 SCC 659

2. Dharampal & ors. Vs St. of Har.. & anr., (2014) 3 SCC 306

3. Kishun Singh & ors. Vs St. of Bihar, (1993) 2 SCC 16

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Sri Shishir Tandon, learned counsel for applicant, Mrs. Mamta Singh, Advocate on behalf of O.P. No.2 and Sri B.P.Singh, learned A.G.A.

2. Applicant before this Court has approached for quashing the impugned order dated 29.11.2019 passed by Special Chief Judicial Magistrate, Kanpur Nagar in Case No. 1049 of 2019, (State of U.P. Vs. Narendra Yadav and others) arising out of Case Crime No.885 of 2018 under Section 406 of I.P.C. and Section ¾ of Dowry Prohibition Act, Police Station-Barra, District-Kanpur Nagar.

3. Applicant before this Court is father of the victim, whose marriage was fixed with O.P. No.2 i.e. complainant.

4. Complainant lodged an F.I.R. under Sections 376, 406 I.P.C. and 3/4 of Dowry Prohibition Act 1961 against present applicant and 12 co-accused being his close family members including women. Contents of F.I.R. is reproduced hereinafter :

"सेवा में श्रीमान थानाध्यक्ष, थाना बर्रा, कानपुर नगर महोदय सविनय निवेदन है कि प्रार्थी की पुत्री कु० रोली यादव का विवाह योगेन्द्र सिंह पुत्र श्री शिवराम दास निवासी ग्राम पुरवा बक्शा, थाना साहल, जिला औरैया के साथ तय हुयी थी, जिसकी बरीक्षा दिनांक 10.10.2016 को व गोद भराई का कार्यक्रम दिनांक 20.11.2016 को मंदाकिनी गेस्ट हाउस, गोविन्द नगर से हुआ था। यह शादी योगेन्द्र सिंह व उसके परिवार के समस्त सदस्यों द्वारा प्रार्थी की पुत्री को कई बार देखने के बाद तय की गयी थी। प्रार्थी ने योगेन्द्र सिंह व उसके बड़े भाई नरेन्द्र सिंह, चरन सिंह, प्रेम सिंह, नरेन्द्र सिंह का पुत्र संदीप व कुलदीप, योगेन्द्र की मां श्रीमती कान्ती देवी, पिता शवराम दास व योगेन्द्र तीनों भाभीयां राधा कुन्ती व भावना। इन लोगों की मांग के अनुसार प्रार्थी ने उपरोक्त सभी लोगों को बरीक्षा से गोद भराई तक 2-3 बार में रूपया 22,50,000/-नकद व रूपया 1,50,000/-चेक के माध्यम से बड़े भाई विष्णु कुमार यादव के द्वारा व हमारे द्वारा रूपया 1,00,000/-की चेक संख्या 551166 व 551167 अर्थात कुल धनराशि रूपया 25,00,000/-उक्त सभी लोगों को प्रार्थी द्वारा दिया गया था। इसके अलावा करीब 3,00,000/-का सामान भी दिया गया था बरीक्षा व गोद भराई के बाद अक्सर योगेन्द्र सिंह प्रार्थी के घर आता जाता था तथा रोली को घुमाने के बहाने अपने साथ बाहर ले जाता था और उसकी इच्छा के बिना बहला फुसला कर रोली के साथ शारीरिक सम्बन्ध भी बनाता था कई बार तो योगेन्द्र सिंह प्रार्थी के घर पर भी रूका और घर में भी रोली को बहला फुसला कर रोली की स्वतन्त्र सहमति के बिना यह

कहकर कि तुमसे ही तो मेरी शादी होनी है रोली के साथ दुष्कर्म किया। उपरोक्त लोग प्रार्थी के बार-2 कहने के बाद शादी की तारीख टालते रहे प्रार्थी यह सोच समझ कर विश्वास करता रहा कि यह लोग सच कह रहे हैं परन्तु पिछले कुछ दिनों से उपरोक्त लोगों ने अचानक शादी की बातचीत करना बन्द कर दिया तब मजबूर होकर प्रार्थी ने दिनांक 24.09.2018 को द्वारा अधिवक्ता एक लीगल नोटिस के जरिये उक्त नरेन्द्र सिंह, योगेन्द्र सिंह तथा नरेन्द्र के लड़के कुलदीप, सन्दीप व उसके अन्य बाकी भाई लोग व पिता एवं नरेन्द्र के चाचा प्रहलाद व सिद्ध गोपाल आदि लोगों ने प्रार्थी से कहा कि अब लालच बढ़ता जा रहा है तुम्हें शादी में एक स्कार्पियों गाड़ी व 200 गज का के०डी०ए० का प्लाट और देना पड़ेगा तब जाकर यह शादी होगी वरना शादी नहीं करेंगे। यह सुनकर प्रार्थी के पैरों के नीचे से जमीन निकल गयी। प्रार्थी ने उक्त लोगों से प्रार्थना की व अनुनय विनय किया परन्तु वह लोग उक्त अतिरिक्त दहेज के बिना शादी करने को तैयार नहीं है। प्रार्थी को जानकारी हुयी कि किसी और के यहां योगेन्द्र की शादी तय करने जा रहे हैं। उपरोक्त लोग पिछले 2 वर्षों से शादी का झूंठा झांसा देकर प्रार्थी से रूपया 25,00,000/-हड़प लिया तथा लगातर 2 सालों तक प्रार्थी को धोखा देकर प्रार्थी के साथ विश्वासघात करते रहे तथा योगेन्द्र शादी का झूंठा झांसा देकर प्रार्थी की पुत्री रोली के साथ रोली की स्वतन्त्र सहमति के बिना शारीरिक सम्बन्ध भी बनाता रहा। अब अतिरिक्त दहेज की मांग न मानने पर शादी करने से मना कर दिया तथा प्रार्थी द्वारा दिया गया रूपया 25,00,000/-वापस करने से स्पष्ट रूप से मना कर दिया है। उक्त लोगों के धोखा देने से प्रार्थी की पुत्री अवसादग्रस्त रहने लगी है तथा उसे गहरा सदमा पहुंचा है। जिसके लिए योगेन्द्र व उसके घर वाले पूरी तरह से जिम्मेदार है। अतः श्रीमान जी आपसे विनम्र निवेदन है कि उक्त लोगों के विरूद्ध विश्वासघात, धोखाधड़ी वसूली, दहेज मांगने व लेने तथा योगेन्द्र द्वारा प्रार्थी की पुत्री रोली से दुष्कर्म करने की रिपोर्ट दर्ज कर कठोर से कठोर दण्डात्मक कानूनी कार्यवाही किये जाने की कृपा करें। आपकी महान दया होगी।"

5. Investigation was conducted in aforesaid F.I.R. wherein statement of victim was recorded under Section 161 and 164 Cr.P.C. For reference same are reproduced hereinafter:

"<u>नकल बयान 161 Cr.P.C.</u>

बयान पीड़िता रोली यादव पुत्री श्री विनेश कुमार यादव नि० 155, बर्रा गांव, थाना-बर्रा, जनपद कानपुर नगर सं० मु०अ०सं० 885/18, धारा-376, 406 आईपीसी व ¾ डी०पी० एक्ट अन्तर्गत धारा 161 Cr.P.C. पूछने पर बयान किया कि मेरा नाम रोली यादव पुत्री श्री विनेश कुमार

यादव नि० 155, बर्रा गांव की रहने वाली हूं मेरी उम्र 24 वर्ष है। मेरी सगाई योगेन्द्र सिंह यादव पुत्र श्री शिवराम दास है। वह बक्शा पूरवा, जिला औरैया के रहने वाले हैं। मेरी सगाई दि० 20.11.16 को योगेन्द्र के साथ मंदाकिनी गेस्ट हाउस, गोविन्द नगर में हुआ था। सगाई के दिन से ही वह मेरे पास फोन करने लगे। इसके बाद इनके कहने पर हमने जिम ज्वाइन किया। जिम के बाहर ये मुझसे मिलने आने लगे। धीरे-2 मेरे घर पर भी आने लगे मेरे डैडी दूध डेरी का काम करते हैं। जिसके सिलसिले में ओ अक्सर पंजाब जाते थे। वहां से करीब 10 दिन बाद ही घर पर आते थे। योगेन्द्र यादव जो कि कानपुर में ही सरकारी टीचर थे। गोविन्द नगर व बर्रा-2 में कोचिंग पढ़ाते थे। जब वे घर पर आते थे तो मेरे यहां रात में भी रूकते थे। मेरी छोटी बहन को जो मेरे साथ ही रहती थी। उसको दूसरे रूम में भेज दिये और मुझसे बोले कि अब तो हम लोगों की शादी होने वाली है। मुझे बहला फुसला कर मेरे साथ शारीरिक संबंध बनाये। डैडी ज्यादातर बाहर रहते थे उनके गैर मौजूदगी में योगेन्द्र मेरे घर आते थे। और मेरे साथ लगातार शारीरिक सम्बन्ध बनाने लगे। इसी बीच योगेन्द्र का PCS में ज्वाइनिंग हो गया फिर इसके बाद इनके बड़े भाई नरेन्द्र का फोन डैडी के पास आया और बोले की योगेन्द्र का PCS में सिलेक्शन हो गया। तो मुझे दहेज में 25 लाख रू० और एक स्कार्पियो न्यू माडल और 2 प्लाट चाहिए तभी हम शादी करेंगे। तो मेरे डैडी ने योगेन्द्र के भाई चरन सिंह को एक-एक लाख की दो चेक दे दिये एक मेरे डेडी ने दिया तथा दूसरा मेरे ताऊ विष्णु कुमार यादव ने दिया। तथा 2-3 बार में 22,50,000रू० नकद दिया इसके अलावा 3,00,000 का सामान भी दिया फिर बोले कि ट्रेनिंग के बाद शादी करेंगे। ट्रेनिंग के बाद अब वे लोग और दहेज की मांग करने लगे। दहेज की रकम न देने पर शादी करने से मना कर दिये। तथा योगेन्द्र व उनके घर वालों ने फिर योगेन्द्र की किसी और जगह शादी कर दिये। यही मेरा बयान है।

प्रश्न-1 आप की उम्र क्या है। और आप की शिक्षा क्या है।

उत्तर-1 मेरी शैक्षिक योग्यता M.A. है। तथा मेरी जन्मतिथि 31.1.1994 है। मैं अपने साथ हाईस्कूल व इण्टर के अंक पत्रों की फोटो काफी लायी हूं। जो आपको दे रही हूं।

नोट- मैं म०आ० 2032 रानी यादव प्रमाणित करती हूं कि पीड़िता रोली यादव ने जो बोला है। वही शब्द व शब्द अंकित किया है। तथा पढ़ाकर हस्ताक्षर बनवाये गये।

हस्ता, म०आ० रानी यादव, थाना बर्रा दि० 4.11.18

"जो मैं बोली हूं। वही लिखा गया है पढ़कर हस्ताक्षर बनाई" रोली यादव।

xxx

बयान धारा 164 CrPC पीड़िता रोली यादव D/O श्री विनेश कुमार यादव निवासी 155 बर्रा गांव थाना बर्रा, जनपद कानपुरनगर सम्बन्धित मु०अ०सं०885/18 धारा 376, 406 IPC व ¾ DP Act थाना बर्रा कानपुरनगर

मेरे द्वारा पीड़िता को समझाया गया कि वो यह बयान बिना किसी भय के दे, उसने इस बात को समझा तत्पश्चात सःशपथ यह बयान दिया कि-

मेरी शादी योगेन्द्र यादव से 2016 में हुई थी। तब वो एक स्कूल अध्यापक थे। हमारी बरीक्षा 10.10.16 को हुई थी, जिसमें हमने 10 लाख नकद दिया था और 3 लाख का सामान दिया था।

वरीक्षी के बाद योगेन्द्र का चयन PCS में हो गया। उसके बाद से योगेन्द्र, नरेन्द्र, चरन, प्रेम सिंह, संदीप, कुलदीप, कान्ती देवी, शिवरामदास, राधा, कुन्ती देवी, भावना, प्रहलाद, सिद्ध गोपाल मुझसे और मेरे घरवालों से पैसे मांगने लगे। घर का हर इन्सान मुझसे काल करके की 2 लाख कभी 1 लाख रूपये बहाने से मांगता था। और बोलता था कि बस इतने पैसे दे दो, तो हम शादी की तारीख बता देंगे। ऐसा करते करते पूरे 25 लाख ले चुके है और अब शादी से इन्कार कर रहे है। योगेन्द्र की शादी कही और तय कर दी है।

मैं और योगेन्द्र के साथ दो साल तक थे। उसने मेरे साथ जबरदस्ती शारीरिक संबंध स्थापित करे। वो अक्सर मेरे घर रूकने आते थे और चुपके से मेरे कमरे में आ जाते थे। मेरी इच्छा के विरूद्ध वो मेरे साथ संबंध स्थापित करते थे।

अंत में योगेन्द्र, नरेन्द्र ने एक स्कारपिओ कार और एक 2 गज का प्लाट मांगा। और शादी की तारीख को टालते रहे। और अब मना कर दिया।"

6. After investigation, a charge-sheet was filed only under Section 406 I.P.C. and 3/4 of Dowry Prohibition Act against Narenda Singh and ShivRam Das i.e. brother of O.P. 2 and his father. No charge-sheet was filed against any other accused persons named in the F.I.R., including opposite party no.2 herein i.e. complainant's husband as well as no offence was found under Section 376 of I.P.C.

7. At the stage of cognizance, victim filed an application dated 2.1.2019 with a prayer that during investigation, statement of victim recorded under Section 164 Cr.P.C. was not considered, therefore, it may be sent to the Investigation Officer for further investigation.

8. Learned Trial Court considered the above referred application and rejected the same and thereafter took cognizance of the offence and summoned two accused persons against whom charge-sheet was filed. Relevant part of said order is mentioned hereinafter:

"प्रस्तुत मामले में वादी मुकदमा पीड़िता का पिता है, जिसके द्वारा प्रथम सूचना रिपोर्ट दर्ज कराई गई है। शादी न हो

पाने पर उभयपक्षों के मध्य समझौता हुआ है, जिसे वादी मुकदमा द्वारा फाड़े जाने का कथन किया गया है। उक्त फटे हुए समझौतानामें की फोटो प्रति विवेचक द्वारा केस डायरी के साथ प्रस्तुत की गई। प्रस्तुत मामले में विवेचक द्वारा वादी मुकदमा के सगे भाई सुरेश यादव पुत्र जगजीवन लाल, विष्णु कुमार यादव पुत्र जगजीवन लाल तथा राजेश कुमार जो कि सुरेश का साला है, राम प्रताप यादव पुत्र जगजीवन लाल तथा राजेश कुमार जो कि सुरेश का साला है, राम प्रताप यादव पुत्र स्व० अतर सिंह यादव उक्त साक्षियों में राजेश के अलावा शेष सभी साक्षी वादी मुकदमा के मकान नं० 155, बर्रा में ही निवास करते हैं, जिनके द्वारा घटना का समर्थन नहीं किया गया है, साथ ही यह भी कथन किया गया है कि अभियुक्त योगेन्द्र सिंह द्वारा वादी मुकदमा द्वारा कथित घटना कारित नहीं की गई है। उपरोक्त के अलावा विवेचक द्वारा वादी मुकदमा, पीड़िता, उसकी मां व अन्य साक्षियों के बयान दर्ज कर नियमानुसार विवेचना की गई है। विवेचक द्वारा धारा-376 का अपराध नहीं पाते हुए न्यायालय में धारा-406 भा०दं०सं० व धारा-3/4 दहेज प्रतिषेध अधिनियम में आरोप पत्र प्रस्तुत किया गया है। सम्पूर्ण केस डायरी के अवलोकन से पीडिता की ओर से प्रस्तुत प्रार्थना पत्र का समर्थन नहीं होता है। विवेचक द्वारा नियमानुसार विवेचना कर आरोप पत्र न्यायालय प्रेषित किया गया है। आरोप पत्र न्यायालय प्रेषित किए जाने के उपरान्त पुनः धारा-164 दं०प्र०सं० के बयान विवेचक के पास भेजे जाने का आधार पर्याप्त नहीं है। तदनुसार पीड़िता की ओर से प्रस्तुत प्रार्थना पत्र दिनांकित 02.01.19 निरस्त किया जाता है।

न्यायालय में प्रेषित आरोप पत्र सं० 550/2018, अंतर्गत धारा-406 भा०दं०सं० व धारा-3/4 दहेज प्रतिषेध अधिनियम अंतर्गत थाना बर्रा, कानपुर नगर विरूद्ध कथित अभियुक्तगण पर प्रसंज्ञान लिया जाता है।

अभियुक्तगण जरिए सम्मन दिनांक 31.01.19 को तलब हों।"

9. It appears that a report was filed by Investigation Officer after further investigation, whereby the charge-sheet submitted earlier was again approved.

10. Learned counsel for applicant has submitted that aforesaid order is impugned in present case. It was urged on behalf of complainant that O.P. No.2 be summoned under Section 376 I.P.C. as on basis of material available, said offence was made out.

11. Aforesaid argument was considered by learned Trial Court and by impugned order dated 29.11.2019, it was rejected and relevant part thereof is mentioned hereinafter:

"प्रस्तुत मामले में दिनांक-11.02.2019 को विद्वान पूर्वाधिकारी द्वारा पूर्व में प्रेषित आरोप पत्र के आधार पर

संज्ञान लिया जा चुका है, अग्रिम विवेचना के उपरान्त विवेचक द्वारा पूर्व में विवेचना के निष्कर्षों से अपनी सहमति जताई है, किसी नये तथ्य का उल्लेख नहीं किया गया है। ऐसी स्थिति में न्यायालय के मत में किसी अन्य अभियुक्त के विरूद्ध किसी अन्य धाराओं में संज्ञान लिये जाने का कोई औचित्य प्रतीत नहीं हो रहा है।

न्यायालय का यह मत है कि न्यायालय आदेश दिनांकित-11.01.2019 को न तो अपास्त कर सकता है और न ही उसका पुनर्विलोकन कर सकता है। आपराधिक क्षेत्राधिकार वाले विचारण न्यायालय को अपने आदेश के पुनर्विलोकन का क्षेत्राधिकार प्राप्त नहीं है। इस संबंध में अदालत प्रसाद बनाम रूप लाल जिंदल व अन्य, 2004(50) ए०सी०सी० 924 में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधि व्यवस्था अनुकरणीय है।"

12. Learned counsel for applicant has not been able to deny that that at the stage of cognizance in view of judgment passed by Supreme Court in ***State of Gujarat Vs. Girish Radhakrishnan Varde (2014) 3 SCC 659,*** learned Trial Court has no option, to add or subtract any offence other than offence under which a charge-sheet has been filed, therefore, at this stage, offence under Section 376 I.P.C. could not be added.

13. Learned counsel for applicant has referred judgments passed by Supreme Court in case of ***Dharampal & Ors Vs. State of Haryana & Anr (2014) 3 SCC 306 and Kishun Singh & Ors. Vs. State of Bihar (1993) 2 SCC 16*** to emphasize that Court of Sessions has complete and unfettered jurisdiction to take cognizance of offence which would include summoning of a person or persons whose complicity in commission of crime was prima-facie evident gathered from material available on record, even though no charge sheet was filed against them and for that learned Trial Court does not need to wait till the stage of Section 319 Cr.P.C. is reached in trial. For reference relevant paragraphs of aforesaid judgments Dharampal and Kishun Singh (Supra) are reproduced hereinafter :

*"40. **Dharampal (supra)** In that view of the matter, we have no hesitation in agreeing with the views expressed in Kishun Singh case [Kishun Singh v. State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470] that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Sessions Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.*

*16. **Kishun Singh (supra)** . We have already indicated earlier from the ratio of this Court's decisions in the cases of Raghubans Dubey [(1967) 2 SCR 423 : AIR 1967 SC 1167 : 1967 Cri LJ 1081] and Hareram [(1978) 4 SCC 58 : 1978 SCC (Cri) 496 : (1979) 1 SCR 349 : AIR 1978 SC 1568] that once the court takes cognizance of the offence (not the offender) it becomes the court's duty to find out the real offenders and if it comes to the*

*conclusion that besides the persons put up for trial by the police some others are also involved in the commission of the crime, it is the court's duty to summon them to stand trial along with those already named, since summoning them would only be a part of the process of taking cognizance. We have also pointed out the difference in the language of Section 193 of the two Codes; under the old Code the Court of Session was precluded from taking cognizance of any offence as a court of original jurisdiction unless the accused was committed to it whereas under the present Code the embargo is diluted by the replacement of the words the accused by the words the case. Thus, on a plain reading of Section 193, as it presently stands once the case is committed to the Court of Session by a Magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. On the Magistrate committing the case under Section 209 to the Court of Session the bar of Section 193 is lifted thereby investing the Court of Session complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can prima facie be gathered from the material available on record. The Full Bench of the High Court of Patna rightly appreciated the shift in Section 193 of the Code from that under the old Code in the case of Sk. Lutfur Rahman [1985 PLJR 640 : 1985 Cri LJ 1238 (Pat HC) (FB)] as under:*

*"Therefore, what the law under Section 193 seeks to visualise and provide for now is that the whole of the incident constituting the offence is to be taken cognizance of by the Court of Session on commitment and not that every individual offender must be so committed or that in case it is not so done then the Court of Session would be powerless to proceed against persons regarding whom it may be fully convinced at the very threshold of the trial that they are prima facie guilty of the crime as well .... Once the case has been committed, the bar of Section 193 is removed or, to put it in other words, the condition therefore stands satisfied vesting the Court of Session with the fullest jurisdiction to summon any individual accused of the crime."*

*We are in respectful agreement with the distinction brought out between the old Section 193 and the provision as it now stands."*

14. Learned counsel for applicant has referred two arguments. Firstly on basis of material available and statement of victim recorded under Section 164 Cr.P.C., offence of rape is made out against O.P.No.2. However, as referred above, in **Varde (supra),** it has been held that no addition or subtraction in offences under which charge-sheet was filed could be done at the stage of cognizance or summoning the accused and relevant part of said judgment is mentioned hereinafter:

*"The question, therefore, emerges as to whether the complainant/informant/prosecution would be precluded from seeking a remedy if the investigating authorities have failed in their duty by not including all the sections of IPC on which offence can be held to have been made out in spite of the facts disclosed in the FIR. The answer obviously has to be in the negative as the prosecution cannot be allowed to suffer prejudice by ignoring exclusion of the sections which*

*constitute the offence if the investigating authorities for any reason whatsoever have failed to include all the offences into the charge-sheet based on the FIR on which investigation had been conducted. But then a further question arises as to whether this lacunae can be allowed to be filled in by the Magistrate before whom the matter comes up for taking cognizance after submission of the charge-sheet and as already stated, the Magistrate in a case which is based on a police report cannot add or subtract sections at the time of taking cognizance as the same would be permissible by the trial court only at the time of framing of charge under Sections 216, 218 or under Section 228 CrPC as the case may be which means that after submission of the charge-sheet it will be open for the prosecution to contend before the appropriate trial court at the stage of framing of charge to establish that on the given state of facts the appropriate sections which according to the prosecution should be framed can be allowed to be framed. Simultaneously, the accused also has the liberty at this stage to submit whether the charge under a particular provision should be framed or not and this is the appropriate forum in a case based on police report to determine whether the charge can be framed and a particular section can be added or removed depending upon the material collected during investigation as also the facts disclosed in the FIR and the charge-sheet."*

(Emphasis Supplied)

15. Accordingly, first argument is rejected. Second limb of argument of learned counsel for applicant is that on basis of material available, O.P. No.2 may be summoned to face trial at least for the offence under which charge-sheet has been filed i.e. for Section 406 I.P.C. and 3/4 of Dowry Prohibition Act and for that counsel for applicant has referred judgments passed in **Dharampal and Kishun Singh (supra).**

16. Per contra, learned counsel for O.P.No.2 and learned A.G.A. have opposed the above submissions and they submittted that on basis of material available, no case is made out against O.P. No.2 to summon him for offence under which charge-sheet was filed.

17. I have carefully perused the above referred part of judgments of **Dharampal and Kishun Singh (supra)** and law in regard to summoning is clear that since cognizance is taken of an offence, therefore, in case there is a complicity of accused against whom charge-sheet has not been filed still, they could be summoned.

18. In order to appreciate as to whether there are sufficient evidence to summon O.P. No.2 for the offence under Section 406 I.P.C. and 3/4 of D.P. Act, I have carefully perused statements of complainant and victim also. However, there is no specific allegation against O.P. No.2 that he has demanded dowry or he was a party in the allegations that the amount paid towards marriage was not returned, therefore, on basis of material available, Court is of the view that even no offence is made out against O.P. No.2 to summon him for offence under Section 406 I.P.C. and 3/4 of D.P. Act at the stage of cognizance and summoning. However, this order will not come in the way, if Trial Court at the stage of Section 319 Cr.P.C., on basis of evidence available during trial found material to summon O.P. No.2 before trial under Section 406 of I.P.C. and 3/4 of D.P. Act. It is also observed that if there is evidence during trial, against applicant or co-accused for the offence

under which charge-sheet has not been filed in such event, complainant as well as Court is at liberty to proceed under Section 217 Cr.P.C. at appropriate stage.

19. Prayers made in this application are accordingly rejected.

20. With the aforesaid observation/direction, this application is disposed of.

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**(2024) 7 ILRA 452**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 09.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Application U/S 482. No. 1820 of 2024

**Santosh Kumar Sharma & Ors. ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Anita Singh, Kumari Poonam Rajpoot, Nirmla Kumari, Prem Babu Verma

**Counsel for the Opposite Parties:**
Arvind Agrawal, G.A.

**Criminal Law – Criminal Procedure Code, 1973 – Sections 156(3), 200, 202, 204 & 482 - The Indian Penal Code, 1860- Sections 304, 420, 467, 468 & 302 -** Application u/s 482 – for quashing the summoning order – deceased executed a Will in favour of applicants – Civil suit for cancellation of Will filed by complainant – in order to give a criminal colour to a civil dispute complainant lodged an FIR – final report was submitted – direction for further investigation – again a final report was submitted stating that there was no reason to take a contrary view to earlier final report – A protest petition – treated as complaint – Trial court, only on the basis that, deceased father who was an 80 years old person and suffering from old age ailments was died after a day of execution of Will, issued summoning order u/s 204 of Cr.P.C. – court finds that, already a civil suit for cancellation of will is pending and there is no material before the trial court as well as no reason has been assigned that there are sufficient ground to proceed against applicants – further, the ingredients of section 420 & 304 IPC are not made out – process hence, impugned summoning order as well as entire proceedings are hereby quashed. (Para – 9, 14, 15, 16)

**Application Allowed.** (E-11)

**List of Cases cited:**

1. A. M. Mohan Vs State Represented by SHO & anr. (2024 SCC Online SC 339),

2. Lalankumar Singh & ors. Vs St. of Mah. (2022 SCC OnLine SC 1383),
3. Sachin Gang Vs St.of U.P. & anr.(2024 INSC 72).

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Applicants are aggrieved by impugned order dated 02.12.2023 passed by Chief Judicial Magistrate, Firozabad in Complaint Case No. 22712 of 2022 (Dev Kumar vs. Santosh Kumar Sharma and others), under Sections 304, 420 IPC, Police Station Shikohabad, District Firozabad, whereby they have been summoned to face trial.

2. Complainant has initially lodged a FIR for offence under Sections 467, 468, 420, 302 IPC that applicants who are his brother and Bhabhi have committed offence of cheating and forgery whereby they have forcefully took signatures and thumb impressions of his father and executed a Will on 27.01.2017 in their favour in exclusion of Complainant and

under unnatural circumstances on very next day, his father died on 28.01.2017.

3. After investigation in aforesaid FIR, a final report was submitted. At that stage further investigation was directed by Police Officials, however, again a final report was submitted that there was no reason to take a contrary view to earlier final report.

4. A protest petition thereafter was filed by Complainant, which was treated as a complaint and thereafter statements of Complainant and other witnesses were recorded under Sections 200 and 202 Cr.P.C. and applicants were summoned by means of impugned order dated 02.12.2023 passed under Section 204 Cr.P.C.

5. Mrs. Anita Singh, learned counsel for applicants submitted that Complainant has also filed a civil suit for cancellation of Will. Complainant was mainly aggrieved that Will was prepared only in favour of applicants and he was not included and in order to give a criminal colour to a civil dispute, criminal proceedings were initiated. Learned counsel further submits that only on basis that their father died after a day of execution of Will, it could not be a case for offence under Section 304 IPC without any evidence. It is on record that applicants' father was an 80 year old person and was suffering from old age ailments. He got admitted in hospital on 27.01.2024 and discharged on 28.01.2024, however, he died on same day. No objection was made when cremation was conducted. He refers some statements recorded during investigation specifically the statement of Doctor. There are no ground to proceed against the applicants and summoning order is liable to be quashed.

6. Per contra, Sri Mithilesh Kumar, learned AGA for State and Sri Arvind Agarwal, learned counsel for Opposite Party No. 2, has submitted that applicants have taken advantage of old age of his father and forced him to execute a Will in favour of applicants. He was not in best of his mental condition. Complainant's father died in suspicious circumstances. It was not normal that on the very next date of execution of Will his father got admitted and was forcefully discharged and later on same day he died. Factum of filing a suit for cancellation of Will was not denied.

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

8. Before adverting to rival submissions it would be relevant to refer few paragraph of a recent judgement passed by Supreme Court in **A.M. Mohan Vs. State Represented by SHO and another, 2024 SCC OnLine SC 339:-**

*"9. The law with regard to exercise of jurisdiction under Section 482 of Cr. P.C. to quash complaints and criminal proceedings has been succinctly summarized by this Court in the case of Indian Oil Corporation v. NEPC India Limited1 after considering the earlier precedents. It will be apposite to refer to the following observations of this Court in the said case, which read thus:*

*"12. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few—Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [(1988) 1 SCC 692 : 1988 SCC (Cri) 234], State of*

*Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426], Rupan Deol Bajaj v. Kanwar Pal Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059], Central Bureau of Investigation v. Duncans Agro Industries Ltd. [(1996) 5 SCC 591 : 1996 SCC (Cri) 1045], State of Bihar v. Rajendra Agrawalla [(1996) 8 SCC 164 : 1996 SCC (Cri) 628], Rajesh Bajaj v. State NCT of Delhi [(1999) 3 SCC 259 : 1999 SCC (Cri) 401], Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [(2000) 3 SCC 269 : 2000 SCC (Cri) 615], Hridaya Ranjan Prasad Verma v. State of Bihar [(2000) 4 SCC 168 : 2000 SCC (Cri) 786], M. Krishnan v. Vijay Singh [(2001) 8 SCC 645 : 2002 SCC (Cri) 19] and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque [(2005) 1 SCC 122 : 2005 SCC (Cri) 283]. The principles, relevant to our purpose are:*

*(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused. For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.*

*(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.*

*(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.*

*(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.*

*(v)* ***A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."***

*(Emphasis supplied)*

9. It is well settled that process of summoning is a serious matter. It became more serious when order of summoning is for offence under Section 304 IPC, i.e., culpable homicide not amounting to murder. It is on record that on investigation of FIR, a final report was prepared and despite further investigation again a final report was submitted that no case is made

out. It is also on record that a suit for cancellation of Will is filed at the behest of Complainant against present applicants.

10. In above background, the Court proceed to consider statements recorded under Sections 200 and 202 Cr.P.C. as well as impugned order passed under Section 204 Cr.P.C. and relevant part thereof are mentioned hereinafter:

**Statement of Complainant under Section 200 Cr.P.C.**

*"नाम गवाह :- देव कुमार शर्मा पुत्र स्व० श्री बृज किशोर शर्मा निवासी 462 शम्भू नगर शिकोहाबाद जिला फिरोजाबाद उम्र 60 वर्ष ने सशपथ पूर्वक बयान किया कि मेरे पिता जी का स्वास्थ्य 2017 में जनवरी के प्रथम सप्ताह से खराब चल रहा था। दिनांक 05. 01.2017 को जांच रिपोर्ट मे मेरे पिता जी की किडनी में स्टि पाया गया था।* ***मेरे पिताजी का बीमारी के कारण मानसिक सन्तुलन ठीक नही था। मेरे पिता अपना अच्छा बुरा समझने में भी असमर्थ थे। मेरे बडे भाई सन्तोष शर्मा उनका पुत्र मोनू उर्फ अभिमन्य व उनकी पत्नी इन्द्रा साजिश करके मेरे पिता की वद्धा वस्था ... व बीमारी का फायदा उठाते हुये जाल साजी से कूटरचित फर्जी वसीयत अपने नाम करा ली। जब कि पूर्व में ही सन् 2000 में मेरे पिता जी व माता जी ने अपनी स्वास्थ्य चेतना से हम दोनो भाईयों के नाम रजिस्ट्री वसीयत की थी। वसीयत में लिये गये पिता जी के हस्ताक्षर फर्जी है। उनके अंगूठे के निशान भी जबरदस्ती लगवाये हैं दिनांक 27.01.2017 को समय 02: 53 बजे दोपहर में मेरे भाई ने पिता जी से धोखे से जब जबरन वसीयत करवाई उसी दिन शाम 5: 15 बजे पिताजी को रश्मि मेडिकेयर सेन्टर आगरा में भर्ती कराया। डाक्टर के मना करने के बावजूद व बिना डाक्टर की सलाह के दिनांक 28.01.2017 को मेरे भाई सन्तोष शर्मा पिताजी को घर सिरसागंज ले आये समय करीब 6 बजे मै सूचना मिलने पर थाने आई सन्तोष के घर अपने पिताजी से मिलने घर पर पहुंचा जहां मैने देखा कि मेरे पिता जी का शरीर नीला पडा है व उनके हाथों के अंगूठे पर नीली स्याही जगी थी। पूछने पर पिताजी ने बताया है कि सन्तोष ने मुझे जबरन धोखे से गुमराह करके वसीयत अपने नाम करा ली है मुझे यहां से से चलों मेरी जान को खतरा है। मेरी कभी भी हत्या हो सकती है। जब मैने पिताजी को अपने साथ थाने व डाक्टर को दिखाने की बात कही तो सन्तोश उसके पुत्र व उसकी पत्नी ने मुझे मारा पीटा और घर से भगा दिया। इसकी सूचना मैने अपने रिस्तेदारों को दी थी। उन्होने अगले दिन आने का वायदा किया। किन्तु दिनांक 28.01. 2017 को रात्रि 12- 1 बजे के मध्य पिताजी की मृत्यु हो गयी।*** *जिसकी सूचना मुझे रिस्तेदारी द्वारा दिनांक 29.01.2017 की सुबह मिली। मैं अपने भाई के घर पहुंचा। मैने पुलिस को मौके पर सूचना दी थी। किन्तु कोई कार्यवाही नही हुई। तब मैने नयायालय से धारा- 156(3)*

*सी०आर०पी०सी० में मुकदमा पंजीकृत कराया था। जिसमें पुलिस ने मेरे भाई से मिलकर अन्तिम आख्या प्रस्तुत कर दी। न्यायालय में मैने अन्तिम आख्या के विरूद्ध प्रेषित पिटीशन प्रस्तुत किया। जिसे न्यायालय में परिवाद के रूप में दर्ज किया है।"*

**<u>Statement of PW-1 under Section 202 Cr.P.C.</u>**

*"नाम गवाह : शिवम्भर दयाल शर्मा पुत्र दादू दयाल शर्मानिवासी शान्ति नगर स्टेशन रोड मेजा ... के सामने शिकोहाबाद जिला फिरोजाबाद उम्र 64 वर्ष ने शपथ पूर्वक बयान किया कि देव कुमार व सनतोश कुमार को मैं जनता हूँ ये हमारे रिस्तेदार है। देव कुमार के पिता का स्वास्थ्य वर्ष 2017 से खराब चल रहा था। उनकी किडनी में शिष्ट था।* ***देव कुमार के पिता अपने बड़े बेटे सन्तोष कुमार के साथ सिरसागंज में रहते थे उनका स्वास्थ्य खराब होने पर सन्तोष ने उन्हें आगरा में भर्ती कराया था। किन्तु अगले दिन वह उनकों अस्पताल से घर लेकर आ गये। देव कुमार को जब इसकी जानकारी हुई तो वह अपने पिता को देखने सिरसागंज सन्तोष के घर पर गये। वहां पर देव कुमार के पिता ने देव कुमार से कहा कि तुम मुझे यहां से ले चलो। इन लोगों ने फर्जी वसीयत मुझसे करा ली है। मेरी जान को खतरा है। जब देव कुमार ने पिताजी को लाने की बात कही तो सनतोष उसके बेटे व पत्नी ने देव कुमार को मारपीट कर भगा दिया। इस की सूचना देव कुमार ने मुझे फोन पर यह उसीदिन दी। औरअगले दिन सिरसागंज पहुंचने को कहा। दिनांक 29.01.2017 को मुझे सूचना किसी कि देव कुमार के पिताजी की मृत्यु हो गई है।*** *हम लोग सिरसागंज । तो देखा कि उनके पिता हाथों की अंगूठे व अंगुठियों पर नीली स्याही लगी है। देव कुमार कह रहे थे कि पिता जी कल ठीक थे। उनकी हत्या कर दी है। पुलिस सूचना पर आयी थी। किन्तु पुलिस ने कोई कार्यवाही नहीं की। न ही पोस्ट मार्टम कराया।"*

**<u>Statement of PW-2 under Section 202 Cr.P.C.</u>**

*"नाम गवाह श्रीमती शीतल देवी पत्नी स्व० बृज किशोर शर्मा उम्र 85 वर्ष निवासी हाल शम्भू नगर थाना शिकाहोबाद जिला फिरोजाबाद ने शपथ्ज्ञ पूर्वक बयान किया कि मेरे 2 पुत्र व 4 पत्रिया हैं सभी शादी शुदा हैं वर्ष 2017 में मैं अपने पति स्व० बृज किशोर के साथ अपने बडे बेटे सन्तोश के साथ अपने मकान स्थित सिरसागंज में रहती थी।* ***मेरे पति की किडनी में सिष्ट था। और उनकी मानसिक स्थिति भी ठीक नहीथी। मेरे पति की तबीयत खराब रहती थी। जब उनकी तबीयत ज्यादा खराब हई थी तो मेरा बडाबेटा सन्तोष कुमार उनकी ईलाज हेतु आगरा ले गया किन्तु दूसरे दिन ही वापिस घर छुटटी करा घर ले आया। मेरे पति ने***

***वर्ष 2000 में एक रजिस्टर्ड वसीयत दोनो बेटों के नाम की थी। मेरे पति की तबियत खराब होने का फायदा उठाकर सन्तोष ने धोखे से जबरदस्ती वीसयत अपने नामकरा ली। यह बात मुझे मेरे स्व० पति ने मृत्यु से 2-3 दिन पहले बताई थी। तथा यह भी कहा था कि ये लोग मेरी हत्या भी कर सकते है। तब बीमारी की सूचना मेरे छोटे बेटे देव कुमार को मिली तो वह हमारे पास आया। तब फर्जी वसीयत वाली बात मेरे पित ने देव कुमार को बताई थी। देव कुमार ने कहा कि मैं तुम लोगों को ल अपने साथ लेकर चलूंगा। किन्तु दिनांक 28.01.2017 को रात्रि में सन्तोष अपनी पत्नी और उसके लडके ने मिलकर मेरे पति की हत्या कर दी।*** *कयोंकि शाम को वह पूरी तरह से बात चीत कर रहे थे। खा थी रहे। मृत्यु के बाद उनका शरीर नीला पडा था। सन्तोष व उसकी पत्नी ने मुझे चुप रहने को कहा था।"*

**Relevant part of impugned order:**

*"सुना तथा पत्रावली का अवलोकन किया। अवलोकन से स्पष्ट है कि परिवादी ने अपने बयान अन्तर्गत धारा-200 द०प्र०स० में परिवाद कथानक का समर्थन किया है तथा यह कहा है कि उसके पिता का स्वास्थ्य 2017 में जनवरी के प्रथम सप्ताह से खराब चल रहा था। दिनांक 05.01.17 को जांच रिपोर्ट मे पिता जी की किडनी मे सिफ्ट पाया गया था। उनका बीमारी के कारण मानसिक सन्तुलन ठीक नही था वह अपना अच्छा बुरा समझने मे भी अस्मर्थ थे। प्रार्थी के बड़े भाई सन्तोष शर्मा, उनका पुत्र मोनू उर्फ अभिमन्यु पत्नी इन्द्र साजिश करके प्रार्थी के पिता की बृद्धावस्था, दुर्बलता व बीमारी का फायदा उठाते हुए जालसाजी से कूटरचित फर्जी वसीयत अपने नाम करालो। जबकि पूर्व मे सन 2000 मे पिता जी व माता जी ने अपनी स्वस्थ चेतना से दोनो भाइयों के नाम रजिस्टर्ड वसीयत की थी। वसीयत मे किये गये पिता के हस्ताक्षर फर्जी है उनके निशानी अंगूठा के के निशान भी जबरदस्ती लगवाये है। दिनांक 27.01.17 को समय 02.53 बजे दोपहर मे भाई ने पिता से धोखे से जबरन वसीयत करवाई। उनी दिन सायं 05.15 बजे पिता को रश्मी डेकेयर सेन्टर आगरा मे भर्ती कराया। डाक्टर ने मना करने के बाबजूद व बिना डॉक्टर की सलाह के दिनांक 28-01-17 को भाई संतोष पिता को घर सिरसागंज ले आये समय करीव 6 बजे सूचना मिलने पर अपने भाई संतोष के घर पिता से मिलने गया वहां देखा कि पिता का पूरा शरीर नीला पडा था उनके हाथों के अंगूठे पर नीली स्याही लगी थी पिता ने बताया था कि संतोष ने जबरन वसीयत अपने नाम करा ली है। मुझे यहां से ले चलो, जान का खतरा बताया। प्रार्थी पिता को अपने साथ लाना चाहता था किन्तु इन लोगो ने रोक दिया मारपीट की घर से भगा दिया दिनांक 28.01.17 को रात*

*मे पिता की मृत्यु हो गयी। परिवादी के कथनो का समर्थन उसके साक्षीगण द्वारा किया गया है।* ***पत्रावली पर उपलब्ध मौखिक एवं अभिलेखीय साक्ष्य से प्रकट होता है कि दिनांक 28-01-17 को बृजकिशोर शर्मा को इलाज हेतु भर्ती किया गया है। शिनर्जी प्लस हॉस्पीटल आगरा के पैथोलोजी रिपोर्ट पत्रावली पर संलग्न जिसमे टॉक्सिक ग्रेनुअल्स मौजूद पाया गया है। डा० तरूण सिंघल के बयान में आया है कि बृजकिशोर शर्मा को बीपी हार्ट, डायबिटीज, पेशाव में रूकावट व उल्टी के कारण दिनांक 27-01-17 को अस्पताल में भर्ती कराया गया था। पत्रावली पर संलग्न प्रश्नगत वसीयत के अवलोकन से प्रकट होता है कि उक्त वसीयत दिनांक 27-01-17 को ही निष्पादित की गयी थी त यह भी उल्लेखनीय है कि दिनांक 27-01-17 को ही वसीयतकर्ता बृजकिशोर शर्मा बीपी हार्ट, डायबिटीज, पेशाव में रूकावट व उल्टी के कारण अस्पताल में भर्ती करा गया था। बीमारी की इस अवस्था में किसी व्यक्ति का स्वस्थ चित्त में किसी विलेख का निष्पादित किया जाना संदेहास्पद है तथा यह भी उल्लेखनीय है कि कथित वसीयत के दूसरे दिन दिनांक 28-01-17 को वसीयतकर्ता की मृत्यु हो गयी। वादी, वादी की मां व पत्नी के अनुसार बीमारी के कारण मृतक बृजकिशोर शर्मा का मानसिक सन्तुलन ठीक नही था वह अपना अच्छा बुरा समझने मे भी अस्मर्थ थे। ऐसी स्थिति मे मामला संदिग प्रतीत होता है। इस मामले में विचारण आवश्यक है और मामले के तथ्य एवं परिस्थितियों मे अभियुक्तगण के विरूद्ध मामला बनता प्रतीत होता है।*** *अभियुक्तगण सन्तोष कुमार शर्मा, श्रीमती इन्द्रा देवी एवं मोनू उर्फ अभिमन्यू को धारा 304,420 भा०द०स० के अन्तर्गत प्रथम दृष्टया मामला बनता न्यायोचित प्रतीत होता है, अतः अभियुक्तगण उपरोक्त विचारण हेतु आहूत किये जाने योग्य है।*

*आदेश*

*अभियुक्तगण सन्तोष कुमार शर्मा, श्रीमती इन्द्रा देवी एवं मोनू उर्फ अभिमन्यू उपरोक्त के विरूद्ध धारा 304,420 भा०द०सं० के अन्तर्गत विचारण हेतु आहूत किया जाता है। अभियुक्तगण उपरोक्त के विरूद्ध सम्मन दिनांक 02-01-24 के लिए जारी हो। परिवादी पैरवी करे।"*

*(Emphasis supplied)*

11. Complainant in his statement recorded under Section 200 Cr.P.C. has narrated the version made in protest petition which appears to be corroborated to some extent by statements of witnesses. However, Court has to examine, whether on basis of above referred statements there are sufficient ground to proceed against applicants as well as whether Complainant has given cloak of criminality to a case which is essentially of civil nature.

12. In this regard the reason assigned by Trial Court in impugned order could become relevant that on basis of material available there was a suspicion that father

of Complainant died under unnatural circumstances and essentially on basis of such reason it was considered to be a case of 'cheating', i.e., under Section 420 IPC as well as Section 304 IPC.

13. At this stage, it would be relevant to mention few paragraphs of judgments passed by Supreme Court in **Lalankumar Singh and others vs. State of Maharashtra, 2022 SCC OnLine SC 1383 and Sachin Gang vs. State of U.P. and another, 2024 INSC 72**, as under:

**Lalankumar Singh (supra)**

*"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, (2015) 4 SCC 609 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."***

**Sachin Garg (supra)**

***"18. While it is true that at the stage of issuing summons a magistrate only needs to be satisfied with a prima facie case for taking cognizance, the duty of the magistrate is also to be satisfied whether there is sufficient ground for proceeding, as has been held in the case of Jagdish Ram (supra). The same proposition of law has been laid down in the case of Pepsi Foods Ltd. and Anr. -vs Special Judicial Magistrate and Ors. [(1998) 5 SCC 749]. The learned Magistrate's order issuing summons records the background of the case in rather longish detail but reflects his***

***satisfaction in a cryptic manner...."***
*(Emphasis supplied)*

14. In above background and taking note that Complainant has already filed a civil suit for cancellation of Will, at this stage there is no material before Trial Court as well as no reason has been assigned that there are sufficient ground to proceed against applicants to summon under Section 420 IPC. The ingredients of Section 420 IPC that applicants have cheated and thereby dishonestly induces the person deceived to deliver any property, are not made out as at this stage it could not be concluded that deceased has signed Will under force. In this regard I have also perused photocopy of Will wherein not only thumb impression of deceased was marked but he has also put his signatures.

15. With regard to summon under Section 304 IPC, Trial Court has noted that Will was executed on 27.01.2017 and executor was admitted in Hospital on same day and he expired on next date. Trial Court considered the said circumstances suspicious and sufficient to summon applicants. In this regard Trial Court has taken note of statement of Complainant and his mother. However, without any post mortem report or without any statement of Doctor before Trial Court only on basis that executor of Will, a person aged about 80 years, died on very next day as well as without any medical report that he was a person of unsound mind, I do not find that there are sufficient ground to proceed against applicants to summon them under Section 304 IPC also. Accordingly, ingredients of Section 304 IPC are also not made out. Court has taken note of **Lalankumar Singh (supra)** and **Sachin Garg (supra).**

16. In in view of above and taking note of **A.M. Mohan (supra),** application is allowed. Impugned summoning order dated 02.12.2023 passed by Chief Judicial Magistrate, Firozabad as well as entire proceedings of Complaint Case No. 22712 of 2022 (Dev Kumar vs. Santosh Kumar Sharma and others), under Section 304, 420 IPC, Police Station Shikohabad, District Firozabad, are hereby quashed.

17. Registrar (Compliance) to take steps.

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**(2024) 7 ILRA 460**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 19.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Application U/S 482. No. 1861 of 2024

**Ms. Kritika Kaushik @ Hanu & Anr. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opp. Parties**

**Counsel for the Applicants:**
Ravi Anand Agarwal, Shreya Gupta

**Counsel for the Opposite Parties:**
Aravind Kumar Tripathi, Deepak Kumar Yadav, G.A., Laxmi Narayan Mishra, Rajrshi Gupta, Rizwan Ahamad

**Criminal Law – Indian Penal Code, 1860 - Sections 34, 108, 328, 344, 347, 384, 406, 500, 506 & 511 - Code of Criminal Procedure, 1973 – Sections 200 & 202 – Quashing of entire criminal proceedings, summoning order – Challenged – Held, in order to prove offence of extortion there must be delivery of amount demanded - As clearly reflected from statements of Complainant and witnesses the alleged**

**demand of Rs. 1 crore was never materialized as it was never handed over by Complaint to applicants - As such, offence u/s 383 IPC punishable u/s 384 IPC is not made out - In the statements of Complainant and witnesses the nature of threat is not specified that whether it will fall within the parameters that person to whom insult was made was likely to commit an act which would provoke breach of peace - As such, ingredients of Section 504 IPC are also not made out - Applicant-1 has already initiated criminal proceedings against her husband and in-laws, therefore, it is a case wherein opposite parties have initiated present proceedings for wreaking vengeance. (Para 2, 4, 8, 10, 13)**

**Application Allowed.** (E-13)

**List of Cases cited:**

1. Sanjeev Rawat @ Teetu & anr. Vs State of U.P. & anr., Neutral Citation No. 2023:AHC:179057

2. M/s Eicher Tractor Ltd. & ors. Vs Harihar Singh & anr., 2008(16) SCC 763

3. Sanjay Gupta alias Sanju Mohan Vs St. of U.P. & anr., Neutral Citation No. 2024:AHC:105492

4. Dhananjay @ Dhandnjay Kumar Singh Vs St. of Bihar & ors., (2007)14 SCC 768

5. Salib @ Shalu @ Salim Vs St. of U.P. & ors., 2023 INSC 687

6. Mohammad Wajid & anr. Vs St. of U.P. & ors., 2023 INSC 683

7. Vijay Kumar Ghai & ors. Vs St. of W. B. & ors., (2022) 7 SCC 124

8. St. of Har. v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Ms. Shreya Gupta, learned counsel for applicants, Sri Mithilesh Kumar, learned AGA for State and Sri Rizwan Ahamad, Advocate for Complainant.

2. The present application under Section 482 Cr.P.C. has been filed for quashing of entire proceedings of Complaint Case No. 3921 of 2023, under Sections 34, 108, 328, 344, 347, 384, 406, 500, 506, 511 IPC and summoning order dated 18.12.2023 passed by Additional Civil Judge (Senior Division)/ Additional Chief Judicial Magistrate, Court No. 4, Ghaziabad, whereby Applicant-1, Kritika Kaushik has been summoned under Section 406 IPC and Applicant-2, Naresh Kumar Kaushik has been summoned under Sections 504, 384 IPC.

3. In the present case Applicant-1 is daughter-in-law of Opposite Party No. 2 and Applicant-2 is father of Applicant-1.

4. Learned counsel for applicants submits that even contents of complaint and statements recorded under Sections 200 and 202 Cr.P.C. considered to be true, still ingredients of Sections 384, 504, 406 IPC are not made out and she refers relevant part of impugned order, which is reproduced hereinafter:

*"पत्रावली का अवलोकन किया।*

*पत्रावली के अवलोकन से विदित है कि परिवादी ने अपने बयान अंतर्गत धारा-200 दं०प्र०सं० में कथन किया है कि दिनांक 06-11-2021 को परिवादी की पुत्रवधू कृतिका परिवादी के परिवार के आभूषण अपने मायके दिखाने भैय्या दूज के त्योहार*

*पर ले गयी थी और जब वापस आयी तो जेवर मांगने पर उसके द्वारा कहा गया कि यह जेवरात मायके भूल आयी है। दिनांक 11-11-2021 को परिवादी की पुत्रवधू के पिता नरेश कौशिक आये और परिवादी की पुत्रवधू और उसके पोते को अपने साथ ले गये। उत्तके बाद दिनांक 24-11- 2021 को नरेश कौशिक परिवादी की पुत्रवधू कृतिका व उसके दोस्त विकास शर्मा परिवादी के घर आये और परिवादी की पुत्रवधू अपने और अपने बेटे का सामान साथ में ले गयी। जाते समय नरेश कौशिक ने एक भारी बैग से परिवादी की पत्नी रेखा शर्मा को धक्का दिया जिससे उसकी हड्डियों में चोट लग गयी। दिनांक 03-07- 2022 को नरेश कौशिक अपने दोस्त विकास शर्मा की पत्नी और राजू शर्मा के साथ परिवादी के घर आये और परिवादी से बातचीत की। उसके बाद अचानक मीटिंग छोड़कर उसके घर के पड़ोतियों के दरवाजे खटखटाने लगे और परिवादी व उसके घर वालों का नाम लेकर गंदी गंदी गालियां देने लगे। तब नरेश कौशिक से कहा कि आप बैठकर बातचीत से कोई समझौता क्यों नहीं कर लेते। इस पर नरेश कौशिक ने एक करोड़ रूपये समझौते में मांगे और तभी जेवरात वापस करने की बात की। परिवादी का यह भी कथन है कि माननीय उब न्यायालय दिल्ली का आदेश है कि परिवादी की बहू कृतिका कौशिक अपने बच्चे को अमेरिका में रखेगी व अपने पति से मिलने देगी। परिवादी ने अपने परिवाद के कथनों में माननीय उब न्यायालय दिल्ली के आदेश की प्रति दाखिल की है। उक्त के सम्बन्ध में जांच आख्या अंतर्गत धारा-202 दं०प्र०सं० न्यायालय द्वारा सम्बन्धित थाने से मांगी गयी है।*

*उक्त घटना के सम्बन्ध में जांच आख्या अंतर्गत धारा-202 दं०प्र०सं० में जांचकर्ता द्वारा आख्या दी गयी है कि विपक्षी नरेश कौशिक से बातचीत करने पर उन्होंने कोई भी सहयोग नहीं किया, जबकि परिवादी द्वारा अपने बयानों का जांच आख्या में कथन किया गया है। उक्त पुलिस जांच आख्या परिवादी व उसकी ओर से परीक्षित साक्षीगण के साक्ष्य के आधार पर प्रथम दृष्टया विपक्षी नरेश कुमार कौशिक को परिवादी व उसकी पत्नी को गाली-गलौच करने व 1 करोड़ रूपये समझौते में मांगने पर अंतर्गत धारा-504,384 भा०दं०सं० व कृतिका कौशिक को परिवादी की पत्नी के जेवर ले जाने व वापस न करने के सम्बन्ध में अंतर्गत धारा-406 भा०दं० सं० में तलब किये जाने योग्य है।*

*<u>आदेश</u>*

*अभियुक्तगण नरेश कुमार कौशिक को अंतर्गत धारा 504,384 भा०दं०सं० व कृतिका कौशिक को अंतर्गत धारा 406 भा०दं०सं० में तलब किया जाता है। परिवादी धारा 204 (2) दंड प्रक्रिया संहिता में वर्णित साक्षी सूची की पैरवी*

*अविलंब करें। तत्पश्चात अभियुक्तगण को सम्मन दिनांक-49.01.2024 को पेश हो।"*

5. Learned counsel further submits that date mentioned in complaint, statements recorded under Sections 200 and 202 Cr.P.C. as well as in Police investigation report is different as such even ingredients under Section 406 IPC is not made out. In support of her submissions she placed reliance on a Coordinate Bench judgment of this Court in **Sanjeev Rawat alias Teetu and another vs. State of U.P. and another, Neutral Citation No. 2023:AHC:179057** and a judgment passed by Supreme Court in **M/s Eicher Tractor Ltd. and others vs. Harihar Singh and another, 2008(16) SCC 763.**

6. Per contra, learned AGA as well as learned counsel appearing for Complainant have supported the impugned order and submit that all the allegations are supported by statements recorded during proceeding and there are reasons assigned by Trial Court concerned that there are sufficient ground to proceed.

7. In order to appreciate rival submissions the Court takes note of a recent judgment passed by this Court in **Sanjay Gupta alias Sanju Mohan vs. State of U.P. and another, Neutral Citation No. 2024:AHC:105492** wherein ingredients to commit offence under Section 384 IPC were discussed in detail and Court has also placed reliance on two judgments passed by Supreme Court in **Dhananjay @ Dhandnjay Kumar Singh Vs. State of Bihar and others, (2007)14 SCC 768 and Salib @ Shalu @ Salim vs. State of U.P. and others, 2023 INSC 687.** Relevant paragraphs of Sanjay Gupta alias Sanju Mohan (supra) are reproduced hereinafter:

*"10. In order to appreciate, whether contents of Section 387 IPC are made out or not, it would be appropriate to reproduce relevant part of judgments passed by Supreme Court in Dhananjay @ Dhandnjay Kumar Singh Vs. State of Bihar and others, (2007)14 SCC 768 and Salib @ Shalu @ Salim vs. State of U.P. and others, 2023 INSC 687:*

*Dhananjay @ Dhandnjay Kumar Singh (Supra)*

*"5.Section 384 provides for punishment for extortion. What would be an extortion is provided under Section 383 of the Penal Code in the following terms:*

*"383.Extortion.--Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits ''extortion'."*

*6.A bare perusal of the aforementioned provision would demonstrate that the following ingredients would constitute the offence:*

*1. The accused must put any person in fear of injury to that person or any other person.*

*2. The putting of a person in such fear must be intentional.*

*3. The accused must thereby induce the person so put in fear to deliver to any person any property, valuable security or anything signed or sealed which may be converted into a valuable security.*

*4. Such inducement must be done dishonestly.*

*7. A First Information Report as is well known, must be read in its entirety. It is not in dispute that the parties entered into transactions relating to supply of bags. The fact that some amount was due to the appellant from the First Informant, is not in dispute. The First Information Report itself disclosed that accounts were settled a year prior to the date of incident and the appellant owed a sum of about Rs.400-500 from (sic) Gautam Dubey (sic).*

*8. According to the said Gautam Dubey, however, a sum of Rs.1500/- only was due to him.*

*9. It is in the aforementioned premise the allegations that Gautam Dubey and the appellant slapped the first informant and took out Rs.1580/- from his upper pocket must be viewed.*

*10. No allegation was made that the money was paid by the informant having been put in fear of injury or putting him in such fear by the appellant was intentional.*

*11. The first informant, admittedly, has also not delivered any property or valuable security to the appellant.*

*12. A distinction between theft and extortion is well known. Whereas offence of extortion is carried out by overpowering the will of the owner; in commission of an offence of theft the offender's intention is always to take without that person's consent.*

*13. We, therefore, are of the opinion that having regard to the facts and circumstances of the case, no case under Section 384 of the Penal Code was made out in the first information report."*

<u>*Salib @ Shalu @ Salim (supra)*</u>

*"21. "Extortion" has been defined in Section 383 of the IPC as follows:—*

*"Section 383. Extortion.—Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits 'extortion.*

*Illustrations*

*(a) A threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.*

*(b) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain monies to A. Z sings and delivers the note. A has committed extortion.*

*(c) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.*

*(d) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z sings and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security. A has committed extortion."*

*22. So from the aforesaid, it is clear that one of the necessary ingredients of the offence of extortion is that the victim must be induced to deliver to any person any property or valuable security, etc. That is to say, the delivery of the property must be with consent which has been obtained by putting the person in fear of any injury. In contrast to theft, in extortion there is an element of consent, of course, obtained by putting the victim in fear of injury. In extortion, the will of the victim has to be*

*overpowered by putting him or her in fear of injury. Forcibly taking any property will not come under this definition. It has to be shown that the person was induced to part with the property by putting him in fear of injury. The illustrations to the Section given in the IPC make this perfectly clear.*

*23. In the aforesaid context, we may refer to the following observations made by a Division Bench of the High Court of Patna in Ramyad Singh v. Emperor Criminal Revision No. 125 of 1931 (Pat):-*

*"If the facts had been that the complainant's thumb had been forcibly seized by one of the petitioners and had been applied to the piece of paper notwithstanding his struggles and protests, then I would agree that there is good ground for saying that the offence committed whatever it may be, was not the offence of extortion because the complainant would not have been induced by the fear of injury but would have simply been the subject of actual physical compulsion."*

*It was held:-*

*"It is clear that this definition makes it necessary for the prosecution to prove that the victims Narain and Sheonandan were put in fear of injury to themselves or to others, and further, were thereby dishonestly induced to deliver papers containing their thumb impressions. The prosecution story in the present case goes no further than that thumb impressions were 'forcibly taken' from them. The details of the forcible taking were apparently not put in evidence. The trial Court speaks of the wrists of the victims being caught and of their thumb impressions being then 'taken' ……. The lower Courts only speak of the forcible taking of the victim's thumb impression; and as this does not necessarily involve inducing the victim to deliver papers with his thumb impressions (papers which could no doubt be converted into valuable securities), I must hold that the offence of extortion is not established."*

*24. Thus, it is relevant to note that nowhere the first informant has stated that out of fear, she paid Rs. 10 Lakh to the accused persons. To put it in other words, there is nothing to indicate that there was actual delivery of possession of property (money) by the person put in fear. In the absence of anything to even remotely suggest that the first informant parted with a particular amount after being put to fear of any injury, no offence under Section 386 of the IPC can be said to have been made out." (Emphasis supplied)*

*11. I have carefully perused the contents of complaint, statements recorded under Sections 200 and 202 Cr.P.C. as well as impugned order. As referred in Dhananjay @ Dhandnjay Kumar Singh (supra) and Salib @ Shalu @ Salim (supra), in order to make out a case of extortion, one of the essential ingredient is to deliver any property or valuable security being under threat by Complainant to accused, whereas in the present case such ingredient is absolutely missing as it was not a case of Complainant that he actually handed over Rs. 5 lacs to accused.*

*12. The nature of allegation is that Complainant was put under threat of fear of death that he has to pay Rs. 5 lacs to run the business of Gutkha but admittedly no amount was paid. A reference be taken of statement of Complainant and other witnesses being part of present order that, "बंदूक तान दी और बोले कि अगर अपना गुटखा चलाना हो तो मुझे 5,00,000 रूपये हर महीने दो".*

*13. The words used in Section 387 IPC, i.e., "in order to the committing*

*of extortion" is used for an act committed during act of extortion and for that act of extortion has to be concluded in terms of Section 383 IPC.*

*14. In aforesaid circumstances, since in the present case act of 'extortion' was not concluded as Rs. 5 lacs was not paid, therefore, offence under Section 383 IPC was not made out and consequently offence under Section 387 IPC was also not made out. [See, Dhananjay @ Dhandnjay Kumar Singh (supra) and Salib @ Shalu @ Salim (supra)]"*

8. As referred above, in order to prove the offence of extortion there must be delivery of amount demanded. However, as clearly reflected from statements of Complainant as well as witnesses the alleged demand of Rs. 1 crore was never materialized as it was never handed over by Complaint to applicants. As such, offence under Section 383 IPC punishable under Section 384 IPC is not made out.

9. In order to appreciate the submission with regard to offence under Section 504 IPC, the Court takes note of a judgment passed by Supreme Court in **Mohammad Wajid and another vs. State of U.P. and others, 2023 INSC 683** wherein the Court considered ingredients of Section 503 IPC and relevant paragraphs of judgment are mentioned hereinafter:

*"23. Chapter XXII of the IPC relates to Criminal Intimidation, Insult and Annoyance. Section 503 reads thus:-*

*"Section 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 threat, commits criminal intimidation.*

*Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.*

*Illustration*

*A, for the purpose of inducing B to resist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation."*

*Section 504 reads thus:-*

*"Section 504. Intentional insult with intent to provoke breach of the peace.—Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

*XXXXX*

*24. An offence under Section 503 has following essentials:-*

*1) Threatening a person with any injury;*

*(i) to his person, reputation or property; or*

*(ii) to the person, or reputation of any one in whom that person is interested.*

*2) The threat must be with intent;*

*(i) to cause alarm to that person; or*

*(ii) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat; or*

*(iii) to cause that person to omit to do any act which that person is legally*

*entitled to do as the means of avoiding the execution of such threat.*

*25. Section 504 of the IPC contemplates intentionally insulting a person and thereby provoking such person insulted to breach the peace or intentionally insulting a person knowing it to be likely that the person insulted may be provoked so as to cause a breach of the public peace or to commit any other offence. Mere abuse may not come within the purview of the section. But, the words of abuse in a particular case might amount to an intentional insult provoking the person insulted to commit a breach of the public peace or to commit any other offence. If abusive language is used intentionally and is of such a nature as would in the ordinary course of events lead the person insulted to break the peace or to commit an offence under the law, the case is not taken away from the purview of the Section merely because the insulted person did not actually break the peace or commit any offence having exercised self control or having been subjected to abject terror by the offender. In judging whether particular abusive language is attracted by Section 504, IPC, the court has to find out what, in the ordinary circumstances, would be the effect of the abusive language used and not what the complainant actually did as a result of his peculiar idiosyncrasy or cool temperament or sense of discipline. It is the ordinary general nature of the abusive language that is the test for considering whether the abusive language is an intentional insult likely to provoke the person insulted to commit a breach of the peace and not the particular conduct or temperament of the complainant.*

*26. Mere abuse, discourtesy, rudeness or insolence, may not amount to an intentional insult within the meaning of Section 504, IPC if it does not have the necessary element of being likely to incite the person insulted to commit a breach of the peace of an offence and the other element of the accused intending to provoke the person insulted to commit a breach of the peace or knowing that the person insulted is likely to commit a breach of the peace. Each case of abusive language shall have to be decided in the light of the facts and circumstances of that case and there cannot be a general proposition that no one commits an offence under Section 504, IPC if he merely uses abusive language against the complainant. In King Emperor v. Chunnibhai Dayabhai, (1902) 4 Bom LR 78, a Division Bench of the Bombay High Court pointed out that:-*

*"To constitute an offence under Section 504, I.P.C. it is sufficient if the insult is of a kind calculated to cause the other party to lose his temper and say or do something violent. Public peace can be broken by angry words as well as deeds." (Emphasis supplied)*

10. As discussed above, in the statements of Complainant as well as witnesses the nature of threat is not specified that whether it will fall within the parameters that person to whom insult was made was likely to commit an act which would provoke breach of peace. As such, ingredients of Section 504 IPC are also not made out.

11. Lastly, this Court proceed to consider the argument with regard to offence under Section 406 IPC, i.e., criminal breach of trust. There is merit in the argument of learned counsel for applicant that date of offence of criminal breach of trust are different, therefore, the very basis of offence does not survive. Still this Court further proceed that even the statements considered to be true, can it be a

case of criminal breach of trust since basis element of entrustment is missing. In this regard, it would be apposite to refer a judgement passed by Supreme Court in **Vijay Kumar Ghai and others vs. State of West Bengal and others, (2022) 7 SCC 124** wherein the ingredients for criminal breach of trust were discussed and relevant paragraphs thereof are mentioned hereinafter:

*"27. Section 405 of IPC defines "Criminal Breach of Trust" which reads as under: -*

***"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".*

*The essential ingredients of the offence of criminal breach of trust are:-*

*(1) The accused must be entrusted with the property or with dominion over it,*

*(2) The person so entrusted must use that property, or;*

*(3) The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation,*

*(a) of any direction of law prescribing the mode in which such trust is to be discharged, or;*

*(b) of any legal contract made touching the discharge of such trust.*

*28. "Entrustment" of property under Section 405 of the Indian Penal Code, 1860 is pivotal to constitute an offence under this. The words used are, "in any manner entrusted with property'. So, it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of "trust'. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code.*

*29. The definition in the section does not restrict the property to movables or immoveable alone. This Court in R K Dalmia vs Delhi Administration, (1963) 1 SCR 253 held that the word "property' is used in the Code in a much wider sense than the expression "moveable property'. There is no good reason to restrict the meaning of the word "property' to moveable property only when it is used without any qualification in Section 405.*

*30. In Sudhir Shantilal Mehta Vs. CBI, (2009) 8 SCC 1 it was observed that the act of criminal breach of trust would, Interalia mean using or disposing of the property by a person who is entrusted with or has otherwise dominion thereover. Such an act must not only be done dishonestly but also in violation of any direction of law or any contract express or implied relating to carrying out the trust."*

12. In view of above, since ingredients of above referred offences are not made out, therefore, it is a fit case wherein inherent power under Section 482 Cr.P.C. can be exercised in the light of para 102 of judgment passed by Supreme Court in **State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426.** For reference para 102(7) of **Bhajan Lal (supra)** is reproduced hereinafter:

*"(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."*

13. Since Applicant-1 has already initiated criminal proceedings against her husband and in-laws, therefore, it is a case wherein opposite parties have initiated present proceedings for wreaking vengeance.

14. The outcome of above discussion is that, the application is allowed. Entire proceedings of Complaint Case No. 3921 of 2023 as well as summoning order dated 18.12.2023 passed by Additional Civil Judge (Senior Division)/ Additional Chief Judicial Magistrate, Court No. 4, Ghaziabad, are hereby quashed.

15. Registrar (Compliance) to take steps.

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**(2024) 7 ILRA 469**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 24.07.2024**

**BEFORE**

**THE HON'BLE SAURABH LAVANIA, J.**

Application U/S 482. No. 2778 of 2018

**Sanehi @ Ram Sanehi ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Raj Kr. Singh Suryavanshi

**Counsel for the Opposite Parties:**
G.A., Nadeem Murtaza

**(A) Criminal Law - Maintainability of Application - The Code of criminal procedure, 1973 - Section 482 - Inherent power, Section 397 – revision, Indian Penal Code, 1860 - Sections 147, 148, 149, 302, 504 - mere availability of alternative remedy cannot be a ground to disentitle the relief under Section 482 CrPC - Section 482 CrPC powers can be exercised despite alternative remedies - High Courts should exercise self-restraint and consider each case on its merits, rather than mechanically dismissing applications due to alternative remedies.(Para - 8,9,10 )**

Summoning order passed by Magistrate - challenged before revisional court - revisional Court interfered in summoning order - whereby Magistrate summoned the persons impleaded as opposite parties in Complaint Case – impugned order (dated 13.04.2018) was passed by a revisional court under Section 397 Cr.P.C. - applicant has right to a revision remedy - preliminary objection raised by opposite party to the maintainability of an application under Section 482 Cr.P.C..(Para 1 to 5)

**HELD: -** Application under Section 482 CrPC held maintainable; matter listed for final disposal. (Para -11,12)

**Application pending.** (E-7)

**List of Cases cited:**

1. Vipin Sahni & anr. Vs C.B.I., 2024 SCC OnLine SC 511

2. Drigpal Singh & ors. Vs Sanehi @ Ram Sanehi & ors., SLP(Crl.) No. 8396 of 2018 (Criminal Appeal No. 366 of 2024)

3. Prabhu Chawla Vs St. of Raj. & anr., (2016) SCC OnLine SC 905

4. Vijay & anr. Vs St. of Maha., (2017) 13 SCC 317

5. Mohit Vs St. of U.P., (2013) 7 SCC 789

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard.

2. Shri Nadeem Murtaza, learned counsel for the opposite party has raised preliminary objection regarding the maintainability of the instant application under Section 482 Cr.P.C..

3. By means of the instant application under Section 482 Cr.P.C., the applicant has challenged the order dated 13.04.2018 which has been passed by Additional District Judge/ Special Judge (Essential Commodities Act), Room No. 2, Barabanki (in short "revisional Court") in Criminal revision No. 128 of 2017 (Drig Pal Singh Vs. State of U.P.).

4. The revisional Court vide order dated 13.04.2018 interfered in the summoning order dated 31.05.2017 passed by C.J.M., Barabanki (in short "Magistrate") whereby the Magistrate summoned the persons impleaded as opposite parties in Complaint Case no. 191/2016 (Ram Sanehi Vs. Drig Pal Singh) under sections 147, 148, 149, 302, 504 IPC, Police Station - Tikait Nagar, District - Barabanki.

5. On the issue of maintainability, it is stated by Shri Nadeem Murtaza, learned counsel for the opposite parties that the order dated 13.04.2018 under challenge was passed by revisional Court in exercise of powers under Section 397 Cr.P.C. and the remedy of revision is available under the said section to the presentapplicant which is permissible under the law, and as such in view of the statutory remedy available to the applicant, the present application is not maintainable.

6. In support of his submissions, reliance has been placed on the judgement passed by Hon'ble Apex Court in the case of **Vipin Sahni and Another Vs. Central Bureau of Investigation,** reported in **2024 SCC OnLine SC 511**. Relevant para of the judgment reads as under:

*"23. As regards the objection raised by the appellants as to the maintainability of the CBI's petition filed before the High Court under Section 482 Cr. P.C., we may note that, as per Article 131 in the Schedule to the Limitation Act, 1963, the limitation period for filing a criminal revision under Section 397 Cr. P.C., be it before the High Court or the Sessions Court, is 90 days. However, there is no limitation prescribed for invocation of the inherent powers of the High Court under Section 482 Cr. P.C. and it can be at any time. It is a matter of record that when the learned Special Magistrate, CBI Court, dismissed the appellants' discharge petition in the first instance, they had filed a revision before the Sessions Court under Section 397 Cr. P.C. and the matter was remanded for hearing afresh. However, the CBI did not choose to adopt this course when the appellants' discharge petition was allowed by the learned Special Magistrate in the second round. Long after the expiry of the limitation period of 90 days, the CBI filed a petition before the High Court at Allahabad under Section 482 Cr. P.C. This was obviously to get over the hurdle of the limitation for filing of a revision under Section 397 Cr. P.C. <u>In this regard, useful reference may be made to the decision of this Court in Mohit alias Sonu v. State of U.P.3, wherein it was observed thus:</u>*

*'28. So far as the inherent power of the High Court as contained in Section 482 CrPC is concerned, the law in this regard is set at rest by this Court in a catena of decisions. However, we would like to reiterate that when an order, not*

*interlocutory in nature, can be assailed in the High Court in revisional jurisdiction, then there should be a bar in invoking the inherent jurisdiction of the High Court. In other words, inherent power of the Court can be exercised when there is no remedy provided in the Code of Criminal Procedure for redressal of the grievance. It is well settled that the inherent power of the Court can ordinarily be exercised when there is no express provision in the Code under which order impugned can be challenged.*

*29. Courts possess inherent power in other statute also like the Code of Civil Procedure (CPC), Section 151 whereof deals with such power. Section 151 CPC reads:*

*"**151. Saving of inherent powers of court.**—Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."*

*30. This Court in Padam Sen v. State of U.P. [AIR 1961 SC 218 : (1961) 1 Cri LJ 322] regarding inherent power of the Court under Section 151 CPC observed : (AIR p. 219, para 8)*

*"8. ... The inherent powers of the court are in addition to the powers specifically conferred on the court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the legislature. It is also well recognised that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code."*

*31. In a Constitution Bench decision rendered in Manohar Lal Chopra v. Seth Hiralal [AIR 1962 SC 527], this Court held that : (AIR p. 537, para 43)*

*"43. ... The inherent jurisdiction of the court to make orders ex debito justitiae is undoubtedly affirmed by Section 151 of the Code, but [inherent] jurisdiction cannot be exercised so as to nullify the provisions of the Code of Civil Procedure. Where the Code of Civil Procedure deals expressly with a particular matter, the provision should normally be regarded as exhaustive."*

*32. The intention of the legislature enacting the Code of Criminal Procedure and the Code of Civil Procedure vis-à-vis the law laid down by this Court it can safely be concluded that when there is a specific remedy provided by way of appeal or revision the inherent power under Section 482 CrPC or Section 151 CPC cannot and should not be resorted to.'*

*24. In the light of the above edict, it was not open to the CBI to blithely ignore the statutory remedy available to it under Section 397 Cr. P.C. and thereafter resort to filing of an application under Section 482 Cr. P.C."*

7. In response, it is stated by learned counsel for the applicant that the present application was entertained by this Court challenging the order passed by the revisional Court in exercise of power under Section 397 Cr.P.C. read with Section 399 Cr.P.C. and thereafter, the final order was passed on 09.05.2018 whereby this Court allowed the present application and set aside the order dated 13.04.2018 and directed the Magistrate to proceed in accordance with law without any delay. Thereafter aggrieved, the parties

approached the Hon'ble Apex Court by filing **SLP(Crl.) No. 8396 of 2018 (Drigpal Singh and Ors. Vs. Sanehi @ Ram Sanehi and Ors.),** which was converted into **Criminal Appeal No. 366 of 2024** and the Hon'ble Apex Court after considering the fact that all the accused were not impleaded in the instant application interfered in the judgment dated 09.05.2018 passed by this Court and remanded the matter back and in terms of the said order, the instant application is listed before this Court for final disposal, after impleading all the accused.

8. It is thus stated that in the aforesaid background of the case as also the law laid down by the Hon'ble Apex Court in the case of **Prabhu Chawla Vs. State of Rajasthan & Anr.** reported in **(2016) SCC OnLine SC 905**, the application is liable to be entertained, heard and decided on merits. Reference has been made to following paragraphs:

*"5. Mr Goswami also placed strong reliance upon the judgment of Krishna Iyer, J. in a Division Bench in Raj Kapoor v. State [Raj Kapoor v. State, (1980) 1 SCC 43 : 1980 SCC (Cri) 72] . Relying upon the judgment of a Bench of three Judges in Madhu Limaye v. State of Maharashtra [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] and quoting therefrom, Krishna Iyer, J. in his inimitable style made the law crystal clear in para 10 which runs as follows : (Raj Kapoor case [Raj Kapoor v. State, (1980) 1 SCC 43 : 1980 SCC (Cri) 72] , SCC pp. 47-48)*

*"10. The first question is as to whether the inherent power of the High Court under Section 482 stands repelled when the revisional power under Section 397 overlaps. The opening words of Section 482 contradict this contention because nothing of the Code, not even Section 397, can affect the amplitude of the inherent power preserved in so many terms by the language of Section 482. Even so, a general principle pervades this branch of law when a specific provision is made : easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code. In Madhu Limaye v. State of Maharashtra [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] this Court has exhaustively and, if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that Section 482 is pervasive it should not subvert legal interdicts written into the same Code, such, for instance, in Section 397(2). Apparent conflict may arise in some situations between the two provisions and a happy solution 'would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the court or for the purpose of securing the ends of justice*

*interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction'. (SCC pp. 555-56, para 10)*

*In short, there is no total ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation excites the Court's jurisdiction. The limitation is self-restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face. In between is a tertium quid, as Untwalia, J. has pointed out as for example, where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the court's process. Can we state that in this third category the inherent power can be exercised? In the words of Untwalia, J. : (SCC p. 556, para 10)*

*'10. ... The answer is obvious that the bar will not operate to prevent the abuse of the process of the court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible.'*

*I am, therefore clear in my mind that the inherent power is not rebuffed in the case situation before us. Counsel on both sides, sensitively responding to our allergy for legalistics, rightly agreed that the fanatical insistence on the formal filing of a copy of the order under cessation need not take up this Court's time. Our conclusion concurs with the concession of counsel on both sides that merely because a copy of the order has not been produced, despite its presence in the records in the court, it is not possible for me to hold that the entire revisory power stands frustrated and the inherent power stultified."*

*6. In our considered view any attempt to explain the law further as regards the issue relating to inherent power of the High Court under Section 482 CrPC is unwarranted. We would simply reiterate that Section 482 begins with a non obstante clause to state:*

***"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."*

*A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J.*

*"abuse of the process of the court or other extraordinary situation excites the Court's jurisdiction. The limitation is self-restraint, nothing more". (Raj Kapoor case [Raj Kapoor v. State, (1980) 1 SCC 43 : 1980 SCC (Cri) 72] , SCC p. 48, para 10)*

*We venture to add a further reason in support. Since Section 397 CrPC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 CrPC only to petty interlocutory orders! A situation wholly unwarranted and undesirable.*

*7. As a sequel, we are constrained to hold that the Division Bench, particularly in para 28, in Mohit [Mohit v. State of U.P., (2013) 7 SCC 789 : (2013) 3 SCC (Cri) 727] in respect of inherent power of the High Court in Section 482 CrPC does not state the law correctly. We record our respectful disagreement.*

*8. In our considered opinion the learned Single Judge of the High Court should have followed the law laid down by this Court in Dhariwal Tobacco Products Ltd. [Dhariwal Tobacco Products Ltd. v. State of Maharashtra, (2009) 2 SCC 370 : (2009) 1 SCC (Cri) 806] and other earlier cases which were cited but wrongly ignored them in preference to a judgment of that Court in Sanjay Bhandari [Sanjay Bhandari v. State of Rajasthan, (2009) 1 Cri LR 282 : 2009 SCC OnLine Raj 456] passed by another learned Single Judge on 5-2-2009 in SB Criminal Miscellaneous Petition No. 289 of 2006 which is impugned in the connected criminal appeal arising out of Special Leave Petition No. 4744 of 2009. As a result, both the appeals, one preferred by Prabhu Chawla and the other by Jagdish Upasane and others are allowed. The impugned common order dated 2-4-2009 [Ashish Bagga v. State, 2009 SCC OnLine Raj 1552] passed by the High Court of Rajasthan is set aside and the matters are remitted back to the High Court for fresh hearing of the petitions under Section 482 CrPC in the light of law explained above and for disposal in accordance with law. Since the matters have remained pending for long, the High Court is requested to hear "5. A close scrutiny of the order of the High Court reveals that the whole basis for the High Court to pass the order impugned is that there is an alternative remedy available to the petitioner i.e. by way of revision under Section 156(3) CrPC. Hence, the jurisdiction under Section 482 CrPC cannot be exercised by indirect method when statutory remedy of revision is available. Hence, the High Court disposed of the application reserving liberty to the appellants to take appropriate steps as are available in law and further directed to complete the investigation within three months from the date of the order.*

*6. The learned counsel appearing for the appellants relied upon the judgment of this Court in Dhariwal Tobacco Products Ltd. v. State of Maharashtra [Dhariwal Tobacco Products Ltd. v. State of Maharashtra, (2009) 2 SCC 370 : (2009) 1 SCC (Cri) 806] : (SCC p. 372, para 6)*

*"6. ... Only because a revision petition is maintainable, the same by itself, in our considered opinion, would not constitute a bar for entertaining an application under Section 482 of the Code. Even where a revision application is barred, as for example the remedy by way of Section 115 of the Code of Civil Procedure, 1908, this Court has held that the remedies under Articles 226/227 of the Constitution of India would be available."*

*The learned counsel further relied upon the recent judgment of this Court in Prabhu Chawla v. State of Rajasthan [Prabhu Chawla v. State of Rajasthan, (2016) 16 SCC 30] .*

*7. After hearing the counsel and also after perusing the impugned order, we are of the considered opinion that the order of the High Court has no legs to stand in*

*view of the law laid down by this Court in Prabhu Chawla [Prabhu Chawla v. State of Rajasthan, (2016) 16 SCC 30] . In the above referred case, in view of the divergent opinions of this Court in Dhariwal Tobacco Products Ltd. [Dhariwal Tobacco Products Ltd. v. State of Maharashtra, (2009) 2 SCC 370 : (2009) 1 SCC (Cri) 806] and Mohit v. State of U.P. [Mohit v. State of U.P., (2013) 7 SCC 789 : (2013) 3 SCC (Cri) 727] , the matter was placed before the three-Judge Bench of this Court. The three-Judge Bench took the view that Section 482 CrPC begins with a non obstante clause to state:*

***"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."*

*As Section 397 CrPC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 CrPC only to petty interlocutory orders! A situation which is wholly unwarranted and undesirable. The three-Judge Bench has confirmed the law laid down by this Court in Dhariwal Tobacco Products Ltd. [Dhariwal Tobacco Products Ltd. v. State of Maharashtra, (2009) 2 SCC 370 : (2009) 1 SCC (Cri) 806]*

*8. In view of the above settled law, mere availability of alternative remedy cannot be a ground to disentitle the relief under Section 482 CrPC and, apart from this, we feel that the learned Judge without appreciating any of the factual and legal position, in a mechanical way, passed the impugned order, which warrants interference by this Court. Accordingly, the order of the High Court is set aside and the matter is remanded to the High Court for reconsideration in the light of the settled legal position."and decide the matters expeditiously, preferably within six months."*

9. Considered the aforesaid and perused the records.

10. Before proceeding further on the issue of maintainability of the present application, it would be fruitful to extract relevant paras of the judgment passed by the Hon'ble Apex Court in the case of **Vijay and Another Vs. State of Maharasthra, (2017) 13 SCC 317,** which read as under:

*"5. A close scrutiny of the order of the High Court reveals that the whole basis for the High Court to pass the order impugned is that there is an alternative remedy available to the petitioner i.e. by way of revision under Section 156(3) CrPC. Hence, the jurisdiction under Section 482 CrPC cannot be exercised by indirect method when statutory remedy of revision is available. Hence, the High Court disposed of the application reserving liberty to the appellants to take appropriate steps as are available in law and further directed to complete the investigation within three months from the date of the order.*

*6. The learned counsel appearing for the appellants relied upon the judgment of this Court in Dhariwal Tobacco Products Ltd. v. State of Maharashtra [Dhariwal Tobacco Products Ltd. v. State of Maharashtra, (2009) 2 SCC 370 : (2009) 1 SCC (Cri) 806] : (SCC p. 372, para 6)*

*"6. ... Only because a revision petition is maintainable, the same by itself, in our considered opinion, would not constitute a bar for entertaining an*

*application under Section 482 of the Code. Even where a revision application is barred, as for example the remedy by way of Section 115 of the Code of Civil Procedure, 1908, this Court has held that the remedies under Articles 226/227 of the Constitution of India would be available."*

*The learned counsel further relied upon the recent judgment of this Court in Prabhu Chawla v. State of Rajasthan [Prabhu Chawla v. State of Rajasthan, (2016) 16 SCC 30] .*

*7. After hearing the counsel and also after perusing the impugned order, we are of the considered opinion that the order of the High Court has no legs to stand in view of the law laid down by this Court in Prabhu Chawla [Prabhu Chawla v. State of Rajasthan, (2016) 16 SCC 30] . In the above referred case, in view of the divergent opinions of this Court in Dhariwal Tobacco Products Ltd. [Dhariwal Tobacco Products Ltd. v. State of Maharashtra, (2009) 2 SCC 370 : (2009) 1 SCC (Cri) 806] and Mohit v. State of U.P. [Mohit v. State of U.P., (2013) 7 SCC 789 : (2013) 3 SCC (Cri) 727] , the matter was placed before the three-Judge Bench of this Court. The three-Judge Bench took the view that Section 482 CrPC begins with a non obstante clause to state:*

***"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."*

*As Section 397 CrPC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 CrPC only to petty interlocutory orders! A situation which is wholly unwarranted and undesirable. The three-Judge Bench has confirmed the law laid down by this Court in Dhariwal Tobacco Products Ltd. [Dhariwal Tobacco Products Ltd. v. State of Maharashtra, (2009) 2 SCC 370 : (2009) 1 SCC (Cri) 806]*

*8. In view of the above settled law, mere availability of alternative remedy cannot be a ground to disentitle the relief under Section 482 CrPC and, apart from this, we feel that the learned Judge without appreciating any of the factual and legal position, in a mechanical way, passed the impugned order, which warrants interference by this Court. Accordingly, the order of the High Court is set aside and the matter is remanded to the High Court for reconsideration in the light of the settled legal position."*

11. Upon due consideration of the aforesaid particularly the fact that the present application was finally allowed vide order dated 09.05.2018 by this Court and this order was challenged before the Hon'ble Apex Court and the Hon'ble Apex Court interfered in the order of this Court and remanded the matter back to decide the case afresh vide final judgment/order dated 23.01.2024 as also the observation made by the Hon'ble Apex Court in the case of **Prabhu Chawla (supra),** wherein the Hon'ble Apex Court with regard to judgment passed in case of **Mohit Vs. State of U.P., (2013) 7 SCC 789,** relied upon in the judgment passed in the case of **Vipin Sahni (supra),** observed that "we are constrained to hold that the Division Bench, particularly in para 28, in **Mohit (supra)** in respect of inherent power of the High Court in Section 482 CrPC does not state the law correctly. We record our respectful disagreement", and Vijay (supra), this Court, at this stage of the proceedings, is not inclined to relegate the

applicant to avail the remedy under Section 397 Cr.P.C. and accordingly, the issue of maintainability is decided.

12. Accordingly, list this case on **29.07.2024** for final disposal.

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**(2024) 7 ILRA 477**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 03.07.2024**

**BEFORE**

**THE HON'BLE SAURABH LAVANIA, J.**

Application U/S 482. No. 5716 of 2024

**Bare Lal Pandey ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Surya Prakash Singh

**Counsel for the Opposite Parties:**
G.A.

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Section 156(3) - Complaint case, Indian Evidence Act, 1872 - Section 65B - Admissibility of electronic records - if investigation in the matter is not required then in that eventuality, the Magistrate/Court of competent of jurisdiction can treat the application under Section 156(3) Cr.P.C. as a 'complaint case' - Magistrate/Court of competent of jurisdiction is also empowered to reject the application under Section 156(3) Cr.P.C..(Para - 19,20,23)**

**(B) Evidence law - pleadings are not evidence - a party who wants to prove anything as made out in his/her pleading has to give evidence to prove his/her assertions - held -** reliance on averment made in regard to passing of order dated 26.02.2024 cannot be made.

Application preferred by applicant under Section 156(3) Cr.P.C. - trial Court entertained the application as a complaint case - hence present application - allegations of conspiracy against the private opposite parties - Applicant produced CCTV footage and certificate as evidence - CCTV footage and recordings are in applicant's possession - CCTV cameras are installed on applicant's premises - Incident occurred on applicant's premises. **(Para - 2, 24)**

**HELD: -** Trial and revisional court did not commit any illegality in passing the challenged orders, and the applicant's application under Section 156(3) Cr.P.C. was treated as a complaint case, requiring no interference and rejecting the applicant's force. **(Para -27)**

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

**List of Cases cited:**

1. XYZ Vs St. of M.P. & ors., 2023 (1) JIC 538 (SC)

2. Lalita Kumari Vs St. of U.P., (2014) 2 SCC 1

3. Ramdev Food Products Pvt. Ltd. Vs St. of Guj., (2015) 6 SCC 439

4. Vishwanath Vs St. of U.P. & ors, (2020) ILR 2 All 889

5. Sukhwasi Vs St. of U.P., 2007 (59) ACC 739 (All);

6. Lalita Kumari Vs St. of U.P., (2014) 2 SCC 1.

7. Priyanka Srivastava Vs St. of U.P., (2015) 6 SCC 287.

8. Vishwanath Vs St. of U.P. & ors, (2020) ILR 2 All 889.

9. Kailash Vijayvargiya Vs Rajlakshmi Chaudhuri, (2023) SCC OnLine SC 569

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the applicant and learned A.G.A. for the State as well as perused the records.

2. By means of the present application, the applicant has assailed the order dated 28.02.2023 passed by Chief Judicial Magistrate, Pratapgarh (in short "trial Court") in Criminal Misc. Case No. 349 of 2023 (Bade Lal Pandey Vs. Arpan alias Anil Pandey and Another) whereby the trial Court entertained the application preferred by the applicant under Section 156(3) Cr.P.C. as a complaint case. The order impugned, on reproduction, reads as under:

"पत्रावली वास्ते आदेशार्थ पेश हुई। प्रस्तुत प्रार्थना पत्र अन्तर्गत धारा 156 (3) दं०प्र०सं० प्रार्थी बड़े लाल पाण्डेय द्वारा इस आशय का प्रस्तुत किया गया है कि प्रार्थी एक भूतपूर्व वायुसेना अधिकारी है तथा सेवानिवृत्त होन पर अपने पैतृक ग्राम सहिली थाना मानिकपुर में अपनी पत्नी के साथ रह रहा है। प्रार्थी के सगे भाई, भाई लाल पाण्डेय के घर में अभियुक्तगण द्वारा प्रार्थी व उसकी पत्नी के उपर जानलेवा हमला करने, झूठे मुकदमें में फंसाने तथा घर लूट लेने आदि की योजना बना रहे थे। प्रार्थी के घर में सी०सी०टी०वी० जिसमें आवाज भी रिकार्ड होती है, लगा हुआ है। विपक्षीगण की उक्त षडयन्त्रकारी योजना काफी हद तक प्रार्थी के घर में लगे सी०सी०टी०वी० में रिकार्ड हुई है।

थाने की आख्या के अनुसार प्रकरण के सम्बन्ध में कोई अभियोग थाने पर दर्ज नहीं है। सुना तथा अवलोकन किया।

घटना के समस्त तथ्य प्रार्थी की जानकारी में हैं। विवेचना कराये जाने से कोई नया तथ्य उभरकर प्रकट होने की कोई सम्भावना प्रतीत नहीं होती है। प्रार्थना पत्र में वर्णित तथ्यों एवं माननीय उच्च न्यायालय इलाहाबाद द्वारा प्रतिपादित निर्णयज विधि सुखवासी बनाम राज्य उ०प्र०2007(59) एसीसी 739 व अन्जुम बनाम राज्य 2008 (61) ए०सी०सी० 181 के आलोक में प्रार्थी द्वारा प्रस्तुत पत्र धारा 156(3) दं०प्र०सं० परिवाद के रूप में दर्ज किया जाना न्यायसंगत है।

आदेश

प्रार्थना पत्र परिवाद के रूप में दर्ज किया जाये। पत्रावली वास्ते प्रस्तुत करने सूची गवाहान एवं बयान अन्तर्गत धारा 200 दं०प्र०स० दिनांक 03.04.2023 को पेश हो।"

3. The applicant has also assailed the order dated 06.03.2024 passed by Additional Sessions Judge/Fast Tract Court, Pratapgarh (in short "revisional Court") passed in Criminal Revision No. 180 of 2023 (Bade Lal Pandey Vs. Arpan alias Anil Pandey and Another) whereby the revisional Court dismissed the criminal revision filed by the applicant impeaching the order dated 28.02.2023. The relevant portion of the order, on reproduction, reads as under:

"3. पत्रावली प्रस्तुत हुई। निगरानीकर्ता के विद्वान अधिवक्ता तथा विद्वान ए०डी०जी०सी० फौजदारी अधिवक्ता

के तर्कों को सुना और पत्रावली का परिशीलन किया।

4. अवर न्यायालय द्वारा पारित आदेश दिनांकित 28.02.203 की प्रमाणित प्रति निगरानीकर्ता द्वारा पत्रावली पर दाखिल की गयी है जिसके अवलोकन से विदित होता है कि अवर न्यायालय ने पाया कि घटना के समस्त तथ्य प्रार्थी की जानकारी में है। विवेचना कराये जाने से कोई नया तथ्य प्रकट होने की संभावना नहीं है। अवर न्यायालय ने प्रार्थना पत्र में वर्णित तथ्यों एवं माननीय उच्च न्यायालय द्वारा प्रतिपादित निर्णयज विधि सुखवासी बनाम राज्य उ.प्र. 2007 (59) ए सी सी 739 व अंजुम बनाम राज्य 2008 (61) ए सी सी 181 के आलोक में प्रार्थी द्वारा प्रस्तुत प्रार्थना पत्र धारा 156 (3) दं.प्र.सं. को परिवाद के रूप में दर्ज किये जाने का आदेश पारित किया गया है। निगरानीकर्ता द्वारा निगरानी में कथन किया गया कि अवर न्यायालय पारित आदेश विधि विरुद्ध है। अवर न्यायालय द्वारा पारित आदेश दिनांकित 28.02.2023 पत्रावली पर उपलब्ध साक्ष्यों के अनुसार पारित किया गया है। जैसा कि माननीय उच्चतम न्यायालय द्वारा Krishna Kumar Tiwari vs. State of U.P., 2009 (5) ALU 1 (AII-LB.) मे अवधारित किया है कि *Where an application u/s. 156(3) CrPC was rejected on the ground that the alleged offence was not of heinous nature and the allegations levelled in the application were not of such a nature which could not be levelled falsely, it has been held that rejection of the application u/s. 156(3) CrPC was not erroneous. Magistrate will not work u/s. 156(3) CrPC like a postman but he has to examine whether from reading of application/complaint filed u/s. 156(3) CrPC prima facie commission of offence is disclosed or not. If the dispute is purely of civil nature, refusal to order registration of FIR is proper.* अतः उपरोक्त विधि व्यवस्थाओं को दृष्टिगत रखते हुए अधीनस्थ न्यायालय द्वारा पारित आदेश दिनांकित 28.02.2023, जिसमें हस्तक्षेप किये जाने का कोई विधिक आधार नहीं है। निगरानी निरस्त किये जाने योग्य है।

आदेश

निगरानीकर्ता की ओर से प्रस्तुत दाण्डिक निगरानी 180/23 बड़े लाल पाण्डेय बनाम अर्पण उर्फ अनिल निरस्त की जाती है। विद्वान न्यायालय मुख्य न्यायिक मजिस्ट्रेट प्रतापगढ़ द्वारा पारित आदेश दिनांकित 28.02.2023 पुष्ट किया जाता है। निगरानी की पत्रावली आवश्यक कार्यवाही हेतु नियमानुसार दाखिल दफ्तर हो एवं अवर न्यायालय की पत्रावली इस निर्णय की प्रति के साथ वापस भेजी जावे।"

4. Brief facts of the case are to the effect that the applicant preferred an application under Section 156(3) Cr.P.C. levelling allegations of conspiracy against the private opposite party nos. 2 to 6. According to this application, in nutshell, the opposite parties in the premises of the applicant hatched a conspiracy (i) to attack the applicant and his wife, (ii) to implicate

the applicant and his family in false criminal cases and (iii) to commit loot in the house of the applicant and this incident was recorded in the Closed Circuit Television (in short "CCTV") situated at the premises of the applicant. The relevant portion of the application, on reproduction, reads as under:

"(3) यह कि प्रस्तुत प्रार्थना-पत्र मुख्य रूप से दिनांक 25.04.2022 को शाम लगभग7:15 से 8बजे के मध्य पाण्डेय के घर में अभियुक्तगण द्वारा प्रार्थी व उसकी पत्नी के ऊपर जानलेवा हमला करने, और झूठे मुकदमें में फंसाने तथा घर लूट लेने आदि की योजना बनाने के संबंध में है।

(4) यह कि प्रार्थी व अभियुक्तगण /अभियुक्त 2 का घर प्रार्थी के घर से जुड़ा हुआ है तथा प्रार्थी के घर के सी०सी०टी०वी० जिसमें आवाज भी रेकॉर्ड होती है लगा हुआ है अतः विपक्षीगण की उक्त षड्यंत्रकारी योजना काफी हद तक प्रार्थी के घर में लगे सी०सी०टी०वी० में रेकॉर्ड हुई है- रेकॉर्डिंग में आवाज थोड़ी धीमी है किन्तु बात समझ आ रही है और आवश्यकता पड़ने पर पुलिस जांच के दौरान तकनीकी विभाग द्वारा आवाज को बढ़ा कर स्पष्ट सुना जा सकता है।"

5. It appears that the trial Court, taking note of the facts indicated above which includes the availability of the evidence i.e. CCTV footage with the applicant, observed that investigation in the matter is not required. Accordingly, treated the application under Section 156(3) Cr.P.C. filed by the applicant as a complaint case vide order dated 28.02.2023, quoted above.

6. The order dated 28.02.2023 was challenged by the applicant by preferring revision under Section 397 Cr.P.C., which was registered as Criminal Revision No. 180 of 2023. In the memo of revision, in nutshell, it has been stated that in the present matter, the investigation is required as such, the trial Court erred in entertaining the application under Section 156(3) Cr.P.C. as a complaint case. The revisional Court dismissed the revision vide order dated 06.03.2024, quoted above.

7. Learned counsel for the applicant, while impeaching the orders in issue, stated that the case of the appicant is squarely covered by the judgment passed by the Hon'ble Apex Court in the case of **XYZ Vs. State of M.P. and Ors.** reported in **2023 (1) JIC 538 (SC)** and **Lalita Kumari Vs. State of U.P.** reported in **(2014) 2 SCC 1.** In continuation, he stated that the evidence i.e. CCTV footage can only be retrieved/collected/recovered by the Investigating Officer during the investigation. As such, the orders are liable to be interfered and direction be issued to police to lodge an FIR.

8. Learned counsel for the applicant also submitted that an application was preferred before the trial Court in terms of order dated 26.02.2024 and along with same, the CCTV footage as also the certificate which is required under Section 65B of Indian Evidence Act, 1872 (in short "Act of 1872") were filed and this application was not considered by the revisional Court while passing the order dated 06.03.2024. Para 38 of the instant

application referred in this regard reads as under:

*"38. That the Ld. Additional Sessions Judge/Fast Track Court, Pratapgarh, on 26.02.2024, directed the Petitioner to file the CCTV footage available with him and the Petitioner along with a Miscellaneous Application Dated: 04.03.2024 narrating the part of the conversation of Opposite Party No. 2 to 6 filed the CCTV footage in a Pen Drive duly supported by a Certificate under Section 65B of the Indian Evidence Act, 1872. A certified true copy of the Miscellaneous Application narrating the conversation of Opposite Party No. 2 to 6 is being filed and marked as Annexure No. 6 to this affidavit. A certified true copy of the Certificate under Section 65B of the Indian Evidence Act, 1872 is being filed and marked as Annexure No. 7 to this affidavit."*

9. At this stage, on being asked as to whether the order dated 26.02.2024 is on record and as to whether in absence of the same, the facts related to the same mentioned in para 38 of the application can be considered.

10. In response, learned counsel for the applicant stated that the copy of the order dated 26.02.2024 has not been brought on record.

11. In view of the aforesaid, after taking note of the settled principle that pleadings are not evidence and that a party who wants to prove anything as made out in his/her pleading has to give evidence to prove his/her assertions, this Court finds that the reliance on averment made in regard to passing of order dated 26.02.2024 cannot be made.

12. Learned A.G.A. opposed the application. He stated that the order(s) passed by the trial Court as also by the revisional Court are just and proper in the facts and circumstances of the case and accordingly, no interference in the matter is required.

13. Learned counsel for the applicant in support of his contentions placed reliance on the following paras of the judgment passed in the case of **XYZ (supra):**

*"15. First, we find it appropriate to reiterate the duty of police to register an FIR whenever a cognizable offence is made out in a complaint. A Constitution Bench of this Court in Lalita Kumari v Government of Uttar Pradesh5 has laid out the position of law as summarized in the following extract of the decision:*

*"119. Therefore, in view of various counterclaims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is*

*merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR."*

*16. We cannot help but note that the police's inaction in this case is most unfortunate. It is every police officer's bounden duty to carry out his or her functions in a public-spirited manner. The police must be cognizant of the fact that they are usually the first point of contact for a victim of a crime or a complainant. They must abide by the law and enable the smooth registration of an FIR. Needless to say, they must treat all members of the public in a fair and impartial manner. This is all the more essential in cases of sexual harassment or violence, where victims (who are usually women) face great societal stigma when they attempt to file a complaint. It is no secret that women's families often do not approve of initiating criminal proceedings in cases of sexual harassment. Various quarters of society attempt to persuade the survivor not to register a complaint or initiate other formal proceedings, and they often succeed. Finally, visiting the police station and interacting with police officers can be an intimidating experience for many. This discomfort is often compounded if the reason for visiting the police station is to complain of a sexual offence.*

*X X X X X..*

*23. It is true that the use of the word "may" implies that the Magistrate has discretion in directing the police to investigate or proceeding with the case as a complaint case. But this discretion cannot be exercised arbitrarily and must be guided by judicial reasoning. An important fact to take note of, which ought to have been, but has not been considered by either the Trial Court or the High Court, is that the appellant had sought the production of DVRs containing the audio-video recording of the CCTV footage of the then Vice-Chancellor's (i.e., the second respondent) chamber. As a matter of fact, the Institute itself had addressed communications to the second respondent directing the production of the recordings, noting that these recordings had been handed over on his oral direction by the then Registrar of the Institute as he was the Vice-Chancellor. Due to the lack of response despite multiple attempts, the Institute had even filed a complaint with PS Gole Ka Mandir on 29 October 2021 for registering an FIR against the second respondent for theft of the DVRs.*

*24. Therefore, in such cases, where not only does the Magistrate find the commission of a cognizable offence alleged on a prima facie reading of the complaint but also such facts are brought to the Magistrate's notice which clearly indicate the need for police investigation, the discretion granted in Section 156(3) can only be read as it being the Magistrate's duty to order the police to investigate. In cases such as the present, wherein, there is alleged to be documentary or other evidence in the physical possession of the accused or other individuals which the police would be best placed to investigate and retrieve using its powers under the CrPC, the matter ought to be sent to the police for investigation."*

14. He also placed reliance on para 120 of the judgment passed in the case of **Lalita Kumari Vs. State of U.P.,** reported in (2014) 2 SCC 1, which reads as under:

*"120. In view of the aforesaid discussion, we hold:-*

*120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.*

*120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.*

*120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.*

*120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.*

*120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.*

*120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:*

*(a) Matrimonial disputes/family disputes*
*(b) Commercial offences*
*(c) Medical negligence cases*
*(d) Corruption cases*
*(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.*

*The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.*

*120.7 . While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks' time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry.*

*120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."*

15. Learned A.G.A. for the State indicated para 20 and 22 of the judgment passed in the case of **Ramdev Food Products Private Limited Vs. State of Gujarat,** reported in **(2015) 6 SCC 439:**

*"20. It has been held, for the same reasons, that direction by the Magistrate for investigation under Section 156(3) cannot be given mechanically. In Anil Kumar v. M.K. Aiyappa [(2013) 10 SCC 705 : (2014) 1 SCC (Cri) 35] , it was observed : (SCC p. 711, para 11)*

*11. "The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed case [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."*

*The above observations apply to category of cases mentioned in para 120.6 in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] .*

*22. Thus, we answer the first question by holding that:*

*22.1. The direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone the issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued.*

*22.2. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed". Category of cases falling under para 120.6 in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] may fall under Section 202.*

*22.3. Subject to these broad guidelines available from the scheme of the Code, exercise of discretion by the Magistrate is guided by interest of justice from case to case.*

16. Learned A.G.A. also placed reliance on the judgmetn passed in the case of **Vishwanath Vs. State of U.P. and 4 Ors,** reported in **(2020) ILR 2 All 889,** wherein this Court while dealing with similar issue, after considering the relevant previsions of Cr.P.C. and various pronouncements, concluded as under:

*55. Thus, in the whole scheme of the Code of Criminal Procedure as clarified in the pronouncements of the Apex Court ranging from 1951 to 2019, it is evident that if a person has a grievance that his F.I.R. has not been registered by the police, his first remedy is to approach the Superintendent of Police under Section 154(3), Cr.P.C. or other police officer referred to in Section 36, Cr.P.C. If his grievances still persist, then he can approach a Magistrate under Section*

*156(3), Cr.P.C. He has a further remedy of filing a criminal complaint under Section 200, Cr.P.C. On receipt of the complaint, however, several courses are open to the Magistrate:*

*(i) He may take cognizance of the offence at once and proceed to record statements of the complaints and the witnesses present under Section 200, and proceed under Chapter XV and Chapter XVI, accordingly.*

*(ii) If, he 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 process as he may 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 of proceeding; or dismiss the complaint if there is no sufficient ground for proceeding.*

*(iii) 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 investigation to be made by the police under Section 156(3).*

*(iv) 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 power 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 Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not.*

*56. Thus, the above discussion pertaining to the power of the Magistrate under Section 156(3) in Chapter XII read with Section 190 in Chapter XIV of the Code leaves no room for doubt that there is nothing in the Code of Criminal Procedure, which curtails or puts any embargo on the power of the Magistrate to make an "inquiry" as defined under Section 2(g) of the Code or to order for "investigation" defined under Section 2(h) of the Code, in dealing with the application under Section 156(3), Cr.P.C. i.e., in exercise of the power conferred upon it under Chapter XII or Chapter XIV of the Code to satisfy itself about the veracity of the allegations of commission of a criminal offence made therein.*

*57. In its discretionary power, it is open for the Magistrate to direct the police to register a criminal case under Section 154, Cr.P.C. and conduct investigation. At the same time, it is open for the Magistrate, where the facts of the case and the ends of justice so demand, to take cognizance of the matter by treating it as a complaint and proceed for the "inquiry" under Sections 200 and 202, Cr.P.C.*

*58. It cannot be said nor it could be demonstrated that in each case, without application of its independent mind, the Magistrate shall issue simply direction "to register and investigate" i.e., to lodge a first information report on an application filed under Section 156(3), Cr.P.C. The power to conduct a preliminary inquiry into the report of commission of criminal offence(s), conferred on the Magistrate within the scheme of the Code of Criminal Procedure has not been curtailed by any of the observations made by the Apex Court in the case of Lalita Kumari, MANU/SC/1166/2013MANU/SC/1166/2013 : 2014(2) SCC 1.*

*59. However, it is pertinent to note that while exercising its discretionary power under Section 156(3), Cr.P.C., the*

*Magistrate like any other court of discretionary jurisdiction is to act fairly and consciously and ensure that the discretion conferred upon it is exercised within the limits of judicial discretion. The entire emphasis is to act in an unbiased and just manner, strictly in accordance with law, to find but the truth of the case which shall come before it.*

*60. It is a Magistrate who is the competent authority to take cognizance of an offence and it is his duty to decide whether on the basis of the record and documents produced, an offence is made out or not and if made out, what course of law should be adopted. Emphasis is laid to the statement in Vinubhai (supra), wherein it is stated that "it is the judicial conscience of the Magistrate which has to be satisfied with reference to the record and the documents placed before him by the investigating agency, in coming to an appropriate conclusion in consonance with the principles of law." It would not be out of place to note para '17' of the report in Vinubhai, at this stage:*

*"17. It is clear that a fair trial must kick off only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not/are not arraigned to stand trial That this is the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India cannot be doubted. It is the hovering omnipresence of Article 21 over the Cr.P.C. that must needs inform the interpretation of all the provisions of the Cr.P.C., so as to ensure that Article 21 is followed both in letter and in spirit."*

*(Emphasis added)*

*61. Applying the above legal principles, in the facts of the present case, this Court finds that the application under Section 156(3), Cr.P.C. was filed after a period of two months of the alleged incident and it was noted by the court concerned that nothing could be traced in favour of the prosecution by medical examination etc. In the circumstances before it, the court deemed it fair, just and proper to search the evidence(s) which is/are well known to the applicant and in his possession so as to find out the truth of the allegations in the application.*

*62. Having perused the contents of the application and the order of the court below, it cannot be said that the court concerned has committed illegally in exercise of its discretionary jurisdiction under Section 156(3), Cr.P.C. or it has exceeded in its jurisdiction in any manner or has exercised jurisdiction not vested in it in law. It cannot be said also that any material injustice has been caused to the applicant on account of the decision of the court below to treat the application under Section 156(3), Cr.P.C. as a complaint for the purpose of deciding whether or not there is sufficient ground for proceeding, rather than directing the police to register an F.I.R. and investigate under Section 154 of the Code."*

17. Considered the aforesaid submissions and perused the records.

18. Law related to dealing with an application under Section 156(3) Cr.P.C. has already been settled in various pronouncements including the following judgments:

**(i) Sukhwasi Vs. State of U.P., reported in 2007 (59) ACC 739 (All);**

**(ii) Lalita Kumari Vs. State of U.P., reported in (2014) 2 SCC 1;**

**(iii) Priyanka Srivastava Vs. State of U.P., reported in (2015) 6 SCC 287;**

**(iv) Ramdev Food Products Private Limited (supra);**

**(v) Vishwanath Vs. State of U.P. and 4 Ors, reported in (2020) ILR 2 All 889;**

**(vi) Kailash Vijayvargiya vs Rajlakshmi Chaudhuri, reported in (2023) SCC OnLine SC 569**

19. As per settled view, the Magistrate/Court of competent of jurisdiction, after verifying the truth and veracity of the allegations made in the application under Section 156(3) Cr.P.C., can (i) pass an order contemplated by Section 156(3) Cr.P.C., (ii) direct examination of complaint and witnesses and proceed further in the manner provided by Section 202 Cr.P.C. and (iii) can also direct the preliminary inquiry by police in terms of law laid down in the judgment passed in the case of **Lalita Kumari (supra).** The Magistrate/Court of competent of jurisdiction is also empowered to reject the application under Section 156(3) Cr.P.C..

20. In other words, the Magistrate/Court of competent of jurisdiction while dealing with an application under Section 156(3) Cr.P.C. is empowered to pass an order for registration of FIR and investigate into he matter or to treat such application as a 'complaint case' and he is fully empowered to reject the application under Section 156(3) Cr.P.C.

21. Regarding expression 'investigation', it would be appropriate to refer the paras 53 to 55 of the judgment passed in the case of **Kailash Vijayvargiya (supra),** which reads as under:

***"Relevant legal provisions of Chapter XII of the Criminal Procedure Code, 1973.***

*53. The Code vide Chapter XII, ranging from Section 154 to Section 176, deals with information to the Police and their power to investigate. Section 154 deals with the information relating to the commission of a cognizable offence and fiats the procedure to be adopted when prima facie commission of a cognizable offence is made out. Section 156 authorises a police officer in-charge of a Police station to investigate any cognizable offence without the order of a Magistrate. Sub-section (3) of Section 156 provides for any Magistrate empowered under Section 190 to order an investigation as mentioned in Section 156(1). In cases where a cognizable offence is suspected to have been committed, the officer in-charge of the Police station, after sending a report to the Magistrate empowered to take cognizance of such offence, is entitled under Section 157 to investigate the facts and circumstances of the case and also to take steps for discovery and arrest of the offender. Clauses (a) and (b) of the proviso to sub-section (1) to Section 157 give discretion to the officer in-charge not to investigate a case, when information of such offence is given against any person by name and the case is not of serious nature; or when it appears to the officer in-charge of the Police station that there is no sufficient ground for entering the investigation. In each of the cases mentioned in clauses (a) and (b) to the proviso to sub-section (1) to Section 157, the officer in-charge of the Police station has to file a report giving reasons for not complying with the requirements of sub-*

*section (1) and in a case covered by clause (b) to the proviso, also notify the informant that he will not investigate the case or cause it to be investigated. Section 159 gives power to a Magistrate, on receiving such report of the officer in-charge, to either direct an investigation or if he thinks fit, proceed to hold a preliminary inquiry himself or through a Magistrate subordinate to him, or otherwise dispose of the case in the manner provided by the Code.*

*54. Sections 160 to 164 deal with the power of the Police to require attendance of witnesses, examination of witnesses, use of such statements in evidence, inducement for recording statement and recording of statements. Section 165 deals with the power of a Police officer to conduct search during investigation in the circumstances mentioned therein.*

*55. The power under the Code to investigate generally consists of following steps : (a) proceeding to the spot; (b) ascertainment of facts and circumstances of the case; (c) discovery and arrest of the suspected offender; (d) collection of evidence relating to commission of offence, which may consist of examination of various persons, including the person accused, and reduction of the statement into writing if the officer thinks fit; (e) the search of places of seizure of things considered necessary for investigation and to be produced for trial; and (f) formation of opinion as to whether on the material collected there is a case to place the accused before the Magistrate for trial and if so, taking the necessary steps by filing a chargesheet under Section 173."*

22. Even in the judgment passed in the case of XYZ (supra) referred by learned counsel for the applicant, the Hon'ble Apex Court in para 23 has observed as under:

*"It is true that the use of the word "may" implies that the Magistrate has discretion in directing the police to investigate or proceeding with the case as a complaint case. But this discretion cannot be exercised arbitrarily and must be guided by judicial reasoning."*

23. In view of aforesaid, this Court is of the view that if investigation in the matter is not required then in that eventuality, the Magistrate/Court of competent of jurisdiction can treat the application under Section 156(3) Cr.P.C. as a 'complaint case'.

24. The undisputed facts of the case are to the effect that :

(i) The alleged incident took place in the premises of the applicant;

(ii) The CCTV is situated in the premises of the applicant;

(iii) The CCTV footage and the recording, as indicated in the application under Section 156(3) Cr.P.C. as also in para 38 of the instant application, quoted in para 8 of this judgment, was/is available with the applicant;

(iv) The applicant himself produced the evidence i.e. CCTV footage and the certificate, which is apparent from record available before this Court, which includes the application filed before the revisional Court.

25. In the aforesaid facts of the case, this Court is of the view that the judgment passed by the Hon'ble Apex Court in the case of **XYZ (supra)** would not help the applicant. For the reason that the CCTV footage in the case of **XYZ (supra)** was

not in possession of the informant/complainant and the same was required as such the Hon'ble Apex took note of the said fact and thereafter observed that in the matter the investigation is required.

26. In the present case, the certificate, as required under Section 65B of the Act of 1872, and evidence i.e. CCTV footage is available with the applicant, as observed above.

27. Having considered the aforesaid, this Court finds that the trial Court as also the revisional Court have not committed any illegality in passing the orders under challenge and the trial Court has rightly treated the application under Section 156(3) Cr.P.C. filed by the applicant as a 'complaint case'. Accordingly, no interference in the matter is required and being so the instant applicant having no force is hereby **rejected**.

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**(2024) 7 ILRA 489**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 05.07.2024**

**BEFORE**

**THE HON'BLE ABDUL MOIN, J.**

Application U/S 482. No. 5955 of 2024
Along With
Application U/S 482 No. 5927 of 2024

**Mohammad Javed Farooqui ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Ashok Kumar Singh

**Counsel for the Opposite Parties:**
G.A.

**Criminal Law- (The Bhartiya Nagrik Suraksha Sanhita, 2023-Section-528) (The Negotiable Instrument Act, 1881-Section 148)-** When Appellate Court considers the prayer under Section 389 Cr.P.C of an accused who has been convicted for offence under Section 138 of the N.I. Act, it is always open for the Appellate Court to consider whether it is an exceptional case which warrants grant of suspension of sentence without imposing the condition of deposit of 20% of the fine/compensation amount and if the Appellate Court comes to the conclusion that it is an exceptional case, the reasons for coming to the said conclusion must be recorded-No exceptional circumstances have been indicated by the learned appellate court as to why it was of the view that 20% of the total fine should not be deposited meaning thereby that there were no exceptional circumstances which were found by the appellate court in not directing for deposit of the 20% of the total fine. **(Para 20, 21, 24 & 26)**

**Application dismissed**. (E-15)

**List of Cases cited:**

1. Jamboo Bhandari Vs M.P. State Industrial Development Corp. Ltd. & ors. in Criminal Appeal No.2741 of 2023 decided on 04.09.2023.

2.Rakesh Ranjan Shrivastava Vs St. of Jhar. & anr. - (2024) 4 SCC 419

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the applicant, Sri Anurag Verma, learned Additional Government Advocate appearing for respondent no.1 and Sri Vimal Kumar, learned counsel, who files Vakalatnama on behalf of respondents no.2 and 3 in both the petitions, which are taken on record.

2. Learned counsels for the contesting parties state that facts of Application U/s 482 Cr.P.C. (now Section 528 of Bharatiya Nyaya Sanhita) No.5955 of 2024 and

Application U/s 482 Cr.P.C. (now Section 528 of Bharatiya Nyaya Sanhita) No.5927 of 2024 are one and the same and that both the matters can be heard and decided together.

3. Accordingly, the Court proceeds to hear and decide both the matters together. For convenience, the facts of Application U/s 482 Cr.P.C. No.5955 of 2024 are being taken into consideration.

4. Under challenge is the order dated 19.04.2024 passed in Criminal Appeal No.111 of 2024 in re: Mohd. Javed Farooqui vs. State of U.P. and others, a copy of which is Annexure-1 to the application, whereby upon an appeal filed by the applicant/petitioner, the learned court has required the appellant/applicant herein, to deposit 20% of the total fine imposed by the learned trial court within 30 days as a precondition for staying of the sentence and realization of fine.

5. The argument of learned counsel for the applicant is that the learned appellate court has patently erred in law in passing the order impugned dated 19.04.2024 to the extent it directs for deposit of 20% of the total fine.

6. The contention is that when from the merits of the case itself it emerges that no cheque had been issued by the applicant consequently there could not have been any occasion of conviction of the applicant and for that matter in the appeal filed by the applicant, there could not be any occasion for the appellate court to have directed for deposit of 20% of the total fine imposed by the trial court.

7. In this regard, reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of **Jamboo Bhandari vs. M.P. State Industrial Development Corporation Ltd. & others** passed in Criminal Appeal No.2741 of 2023 decided on 04.09.2023.

8. Placing reliance on the aforesaid judgment of the Hon'ble Supreme Court in the case of **Jamboo Bhandari (supra)** the argument of learned counsel for the applicant is that for the appellate court to direct the appellant to deposit a certain amount the exceptions should be spelt out per which the amount is required to be deposited. However, the order impugned dated 19.04.2024 passed by the appellate court does not spell out the exceptions which have prevailed on the appellate court per which it has directed the applicant to deposit 20% of the amount of fine and as such the order impugned merits to be set-aside on this ground alone apart from the order impugned reflecting patent non-application of mind to the relevant facts of the case.

9. On the other hand, Sri Anurag Verma, learned AGA as well as Sri Vimal Kumar, learned counsel appearing for the private respondents, have supported the order impugned dated 19.04.2024 by contending that it is only in the exceptional circumstances that the amount as required to be deposited under the provisions of Section 148 of the Negotiable Instrument Act, 1881 (hereinafter referred to as the Act, 1881) is not to be deposited keeping in view the law laid down by the Apex Court in the case of **Jamboo Bhandari (supra)** which aspect of the matter has been considered threadbare by the learned appellate court while passing the order impugned and as such there is no illegality or infirmity in the said order.

10. In support of his argument, Sri Anurag Verma, learned AGA has placed reliance on a recent judgment of Hon'ble Supreme Court in the case of **Rakesh Ranjan Shrivastava vs. State of Jharkhand and another - (2024) 4 SCC 419** wherein Hon'ble Supreme Court after considering its earlier judgment in the case of **Jamboo Bhandari (supra)** has again considered the provisions of Section 148 of the Act, 1881 and has held likewise.

11. Heard learned counsels for the contesting parties and perused the records.

12. From the arguments as raised by the learned counsels for the contesting parties and perusal of records it emerges that in a complaint no.7078 of 2019 filed under Section 138 of the Act, 1881 in re: Asif Ali Ahmed Siddiqui and another vs. Mohd. Jawed Farooqui, the learned court vide judgment and order dated 14.03.2024, a copy of which is Annexure-13 to the application, has convicted the applicant herein under Section 138 of the Act, 1881. Thereafter, by means of order dated 20.03.2024, which is part of Annexure-13 to the application, the applicant has been directed to undergo imprisonment for a period of one year and a fine of Rs.15,00,000/- has also been imposed out of which Rs.11,00,000/- has been directed to be paid to the complainant as compensation. In default of payment of fine, the applicant was directed to undergo 3 months' simple imprisonment.

13. Being aggrieved, the applicant filed an appeal. The learned appellate court vide the order impugned dated 19.04.2024, a copy of which is Annexure-1 to the application, after considering the entire facts and circumstances of the case has stayed the operation of the impugned judgment so far as it relates to the sentence and realization of fine subject to the condition that the appellant/applicant herein deposits 20% of the total fine imposed by the learned trial court within 30 days.

14. Being aggrieved by the said order to the extent that it has directed the applicant to deposit 20% of the total fine, the instant petition has been filed.

15. The argument of learned counsel for the applicant is that the provisions of Section 148 of the Act, 1881, so far as they pertain to the appellant/applicant being required to deposit a certain sum, starts of with the word 'may'. It is contended that it is the discretion of the learned appellate court to have directed for deposit of fine but the learned appellate court without considering the entire facts and circumstances of the case has directed for deposit of 20% of the total fine imposed by the learned trial court which would run contra to the judgment of the Hon'ble Supreme Court in the case of **Jamboo Bhandari (supra)** and as such the order impugned merits to the set-aside on this ground alone.

16. The further argument, as advanced by the learned counsel for the applicant, is that there is no liability of the applicant to pay the aforesaid amount which aspect of the matter has not been considered by the learned appellate court while passing the order impugned.

17. In this regard, the Court may consider the provisions of Section 148 of the Act, 1881, which, on reproduction, read as under:-

***"148. Power of Appellate Court to order payment poending appeal against conviction. -*** *(1) Notwithstanding anything*

*contained in the Code of Criminal Procedure, 1973, in an appeal by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty percent of the fine or compensation awarded by the trial Court:*

*Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under section 143A.*

*(2) The amount referred to in sub-section (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.*

*(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:*

*Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant."*

18. From perusal of Section 148 of the Act, 1881, it emerges that in an appeal filed by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty percent of the fine or compensation awarded by the trial Court.

19. Admittedly, the applicant has been convicted by the learned trial court vide judgment and order dated 14.03.2024 and 20.03.2024. In the appeal filed by the applicant, learned appellate court has required a deposit of 20% of the total fine. Sub-section (1) of Section 143 of the Act, 1881 gives the discretion to the Court to deposit such sum which shall be minimum of 20% of the fine or compensation which aspect of the matter has been considered by Hon'ble Supreme Court in the case of **Jamboo Bhandari (supra)** wherein the Hon'ble Court has held that non-deposit of the said amount would only be there in exceptional cases which warrants grant of suspension of sentence without imposing the condition of deposit of 20% of the fine/compensation amount meaning thereby that in case the appellate court is of the view that 20% amount is not to be deposited the same would fall within the exceptional circumstances and not invariably as is the argument advanced by the learned counsel for the applicant.

20. For the sake of convenience, the relevant observation of Hon'ble Supreme Court in the case **Jamboo Bhandari (supra)** is reproduced as under:-

*"7. Therefore, when Appellate Court considers the prayer under Section 389 of the Cr.P.C. of an accused who has been convicted for offence under Section 138 of the N.I. Act, it is always open for the Appellate Court to consider whether it is an exceptional case which warrants grant of suspension of sentence without imposing the condition of deposit of 20% of the fine/compensation amount. As stated earlier, if the Appellate Court comes to the conclusion that it is an exceptional case, the reasons for coming to the said conclusion must be recorded."*

21. As already indicated above, a perusal of the judgment of Hon'ble Supreme Court in the case **Jamboo Bhandari (supra)** clearly indicates that the Hon'ble Supreme Court has held that non-deposit of the amount under Section 148 by the learned appellate court would be an exception which has also been clearly spelt out by the appellate while requiring non-deposit of the said amount of 20%. In the present case, from perusal of the order impugned as passed by the appellate court dated 19.04.2024 it clearly emerges that no exceptions have been spelt out by the appellate court whereby it did not require deposit of 20% of the fine and as such once no exceptional circumstances have been spelt out by the learned appellate court in the order impugned clearly no error has been committed by the appellate court while requiring the deposit of the 20% amount.

22. Again this aspect of the matter has been considered by Hon'ble Supreme Court in a recent judgment of Rakesh Ranjan Shrivastava (supra) wherein after considering the earlier judgment **Jamboo Bhandari (supra)** the Hon'ble Supreme Court has held as under:-

*"Even sub-section (1) of Section 148 uses the word "may". In the case of Surinder Singh Deswal v. Virender Gandhi, this Court, after considering the provisions of Section 148, held that the word "may" used therein will have to be generally construed as "rule" or "shall". **It was further observed that when the Appellate Court decides not to direct the deposit by the accused, it must record the reasons.** After considering the said decision in the case of Surinder Singh Deswal1, this Court, in the case of Jamboo Bhandari v. Madhya Pradesh State Industrial Development Corporation Limited & Ors., in paragraph 6, held thus:*

*"6. What is held by this Court is that a purposive interpretation should be made of Section 148 NI Act. **Hence, normally, the appellate court will be justified in imposing the condition of deposit as provided in Section 148. However, in a case where the appellate court is satisfied that the condition of deposit of 20% will be unjust or imposing such a condition will amount to deprivation of the right of appeal of the appellant, exception can be made for the reasons specifically recorded."***

(emphasis by the Court)

23. In the case of **Rakesh Ranjan Shrivastava (supra)** the Hon'ble Supreme Court has also considered the use of the word 'may' as used in sub-section (1) of Section 148 of the Act, 1881 to hold that the use of the word 'may' will have to be considered as 'shall' and also reiterated that when the appellate court decides not to direct the deposit by the accused it must record the reasons i.e. the exceptional reason for non-deposit will have to be recorded.

24. As already indicated above, no exceptional circumstances have been indicated by the learned appellate court as to why it was of the view that 20% of the total fine should not be deposited meaning thereby that there were no exceptional circumstances which were found by the appellate court in not directing for deposit of the 20% of the total fine.

25. As regards the argument of the learned counsel for the applicant that there is no liability of the applicant to pay the amount, this argument will always be considered by the appellate court while deciding the appeal.

26. Keeping in view the aforesaid discussion, no case for interference is made out. Accordingly, the application under Section 482 Cr.P.C. is **dismissed**.

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**(2024) 7 ILRA 494**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 29.07.2024**

**BEFORE**

**THE HON'BLE SAURABH LAVANIA, J.**

Application U/S 482. No. 6477 of 2024

**Ravendra Shukla & Anr. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Arvind Kumar Pathak

**Counsel for the Opposite Parties:**
G.A., M.E. Khan, Shashi Kant Mishra

**Criminal Law - Criminal Procedure Code, 1973 - Section 482 - Indian Penal Code, 1860 - Sections 419, 420, 504 & 406 - Application U/s 482** – for quashing the impugned chargesheet & cognizance order as well as entire criminal proceedings filed against the applicants – court finds that, earlier, in year 2022, both the applicants filed an Application u/section 482 Cr.P.C in which they have challenged the same impugned orders arising out of same criminal proceedings which are assailed in the instant application – held, in view of law laid down by the Hon'ble Apex court in 'Bhisham Lal Verma' case second Application on the same grounds is not maintainable – hence, indulgence in the matter is required – accordingly, present Application is rejected. (Para – 5, 15, 16, 17)

**Application u/s 482 Dismissed**. (E-11)

**List of Cases cited:**

1. Satendra Kumar Antil Vs, CBI & anr. (SLP to Appeal (Crl.) No. 5191 of 2021,

2. Oswal Fats & oils Ltd. Vs Additional Commissioner (Admin.) Bareilly Division, Bareilly & ors.(2010 4 SCC 728),

3. Kishore Samrite Vs St. of UP & ors.(2013 2 SCC 398),

4. Bhisham Lal Verma Vs St. of U P & anr.(2023 SCC online SC 1399).

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Shri Gurudutt Pandey, learned counsel for the applicants, learned A.G.A. for the State as well as Shri Shashi Kant Mishra, learned counsel appearing for opposite party No.2 and perused the record.

2. The applicants, namely, Ravendra Shukla and Kumari Mamta, have approached this Court seeking following main reliefs:-

*"(a) To allow the petition and quash the impugned Charge sheet No. 221 of 2021 dated 09-06-2021 in Case Crime no. 0037/2021 under Section 419, 420, 504 and 506 I.P.C, Police Station Cantt, District Ayodhya along with Cognizance Order dated 03-02-2022 passed by the learned ACJM-I, Faizabad bearing Case No. 258 of 2022, annexed here with as Annexure Nos. 9 and 10 respectively and set aside the Revision Order.*

*(b) To quash the entire proceeding of Criminal Case No. 258 of 2022: State of U.P. vs Mamta and others arises out of Crime No. 0037/2021 under Section 419. 420, 504, and 506 1.P.C. registered at Police Station Cantt, Ayodhya.*

*(c) To stay the operation and implementation of the proceeding pending before the learned Trial Court A.C.J.M-I of District, Ayodhya, registered as Case No: 258 of 2022: State of U.P. vs Mamta and others, during the pendency and final disposal of the instant petition."*

3. From the material available on record, it is apparent that applicants approached this Court by means of ***Application U/s 482 No.5705 of 2022 "Mamta and Another Vs. State of U.P. and Another"*** challenging the charge sheet No.221 of 2021 dated 09.06.2021 in Case Crime No.037 of 2021 under Sections 419, 420, 504 and 506 I.P.C., Police Station-Cantt, District- Ayodhya and also the summoning order dated 03.02.2022 passed by ACJM-I, Faizabad now Ayodhya bearing Case No.258 of 2022.

4. The above indicated **Application U/s 482 Cr.P.C. No.5705 of 2022** was disposed of on 26.08.2022. The order dated 26.08.2022 reads as under:-

*"1. Present petition under Section 482 Cr.P.C. has been filed seeking quashing of the proceedings of Charge-sheet No.221 of 2021 dated 09.06.2021 in Case Crime No.037 of 2021 under Sections 419, 420, 504, 506 IPC, Police Station Cantt, District Ayodhya along with summoning order dated 03.2.2022 passed by learned ACJM-I, Faizabad bearing Case No.258 of 2022.*

*2. Learned counsel for the petitioners submits that the petitioners want to surrender and apply for regular bail. Only prayer is that while considering the bail application of the petitioners, trial Court should take into consideration order dated 07.10.2021 read with judgment dated 11.07.2022 of the Supreme Court rendered in the case of Satender Kumar Antil vs Central Bureau of Investigation & Ors: SLP(Crl) No.5191 of 2021.*

*3. Considering the aforesaid submission, present petition is disposed of with liberty to the petitioners to surrender before the trial Court within a period of 15 days and apply for regular bail. Trial Court is directed to consider the bail application of the petitioners in accordance with law and also take into account the order of the Supreme Court in the case of Satender Kumar Antil (supra)."*

5. It appears from the above quoted order that the charge sheet No.221 of 2021 dated 09.06.2021 in Case Crime No.037 of 2021 under Sections 419, 420, 504 and 506 I.P.C., Police Station- Cantt, District-Ayodhya, which has also been challenged in the instant case, was assailed and summoning order was also assailed and thus, it is apparent that entire proceedings of Criminal Case No.258 of 2022 *"State vs. Mamta and another"* arising out of Case Crime No.037 of 2021 was challenged and the counsel for the applicants did not press the prayers sought in the earlier petition and prayed for seeking benefit of judgment passed by the Hon'ble Apex Court in the case of ***Satendra Kumar Antil Vs. Central Bureau of Investigation and another (Special Leave to Appeal (Crl.) No.5191 of 2021*** and considering the said prayer, this Court disposed of the ***Application U/s 482 Cr.P.C. No.5705 of 2022*** with liberty to the applicants to surrender before the trial Court within a period of 15 days and apply for regular bail.

6. After the aforesaid, the applicants did not appear before the Court concerned seeking benefit of the judgment of Hon'ble Apex Court passed in the case of ***Satendra Kumar Antil (supra)*** in terms of the order

of this Court dated 26.08.2022 passed in the **Application U/s 482 Cr.P.C. No.5705 of 2022** and challenged the summoning order dated 03.02.2022, which was in issue in **Application U/s 482 Cr.P.C. No. 5705 of 2022**, before the Sessions Judge, Ayodhya (in short Revisional Court) by preferring the Criminal Revision No.101 of 2024 (Ravendra Shukla Vs. State and Another).

7. The Revisional Court upon due consideration of the facts of the case rejected the Revision vide order dated 15.05.2024, the relevant portion of which is extracted herein under:-

".........5. मैंने उभयपक्ष के विद्वान अधिवक्तागण की बहस को विस्तारपूर्वक सुना तथा विद्वान अवर न्यायालय द्वारा पारित आलोच्य आदेश का परिशीलन किया।

6. धारा 397 दं०प्र०सं० के अन्तर्गत पुनरीक्षण के स्तर पर पुनरीक्षण न्यायालय को केवल प्रश्नगत आदेश की शुद्धता, वैधता व औचित्यता देखना होता है और पुनरीक्षण न्यायालय का क्षेत्राधिकार बहुत सीमित होता है और नियमित रूप से प्रयोग नहीं किया जा सकता है।

7. प्रस्तुत मामले में विद्वान अवर न्यायालय द्वारा मुकदमा अपराध संख्या 37/2021, अन्तर्गत धारा 419, 420, 504, 506 भा०दं०सं०, थाना कैण्ट, जनपद फैजाबाद/अयोध्या के प्रकरण में धारा 173 दं०प्र०सं० के अन्तर्गत अभियुक्तगण के विरूद्ध आरोपपत्र प्राप्त होने पर आलोच्य आदेश दिनांकित 03.02.2022 के द्वारा अपराध का प्रसंज्ञान लिया गया।

8. दण्ड प्रक्रिया संहिता की धारा 190 में मजिस्ट्रेटों द्वारा अपराध का संज्ञान लिया जाना प्राविधानित है, जो निम्नवत् है-

190. मजिस्ट्रेटों द्वारा अपराधों का संज्ञान- (1) इस अध्याय के उपबन्धों के अधीन रहते हुये, कोई प्रथम वर्ग मजिस्ट्रेट और उपधारा (2) के अधीन विशेषतया सशक्त किया गया कोई द्वितीय वर्ग मजिस्ट्रेट, किसी भी अपराध का संज्ञान निम्नलिखित दशाओं में कर सकता है-

(क) उन तथ्यों का, जिनसे ऐसा अपराध बनता है, परिवाद प्राप्त होने पर,

(ख) ऐसे तथ्यों के बारे में पुलिस रिपोर्ट पर,

(ग) पुलिस अधिकारी से भिन्न किसी व्यक्ति से प्राप्त इस इत्तिला पर या स्वयं अपनी इस जानकारी पर कि ऐसा अपराध किया गया है।

(2) मुख्य न्यायिक मजिस्ट्रेट किसी द्वितीय वर्ग मजिस्ट्रेट को ऐसे अपराधों का, जिनकी जांच या विचारण करना उसकी क्षमता के अन्दर है, उपधारा (1) के अधीन संज्ञान करने के लिये सशक्त कर सकता है।

9. प्रस्तुत मामले में विद्वान अवर न्यायालय द्वारा उपरोक्त विकल्प (ख) के आधार पर प्रेषित पुलिस रिपोर्ट पर अपराध का प्रसंज्ञान लिया गया है। प्रथम सूचना रिपोर्ट में यह तथ्य उल्लिखित है कि

अभियुक्तगण नमिता शर्मा, ममता एवं रविन्द्र शुक्ला ने संयुक्त रूप से आपराधिक षड्यन्त्र करते हुये धोखाधड़ी कर पट्टा अनुबन्ध विलेख दिनांक 09.12.2020 तैयार कर अनुचित लाभ प्राप्त करने के उद्देश्य से वादी की कथित भूमि पर अवैध कब्जा करने का प्रयास किया गया एवं वादी को गालियां व जानमाल की धमकी दी गयी। अभियुक्ता नमिता शर्मा द्वारा अपने पक्ष में कथित पंजीकृत पट्टा विलेख तहरीर कराने एवं सह अभियुक्तगण ममता एवं रविन्द्र शुक्ला को हाँसिया गवाह होना उल्लिखित किया गया है। विवेचक द्वारा दौरान विवेचना साक्षीगण / अभियुक्तगण का बयान अंकित किया गया एवं सम्बन्धित अभिलेखों को प्राप्त कर केस डायरी के साथ संलग्न किया गया। विवेचक द्वारा विवेचना सम्बन्धी औपचारिकताओं को पूर्ण करने के पश्चात् संकलित साक्ष्य के आधार पर विवेचनोपरान्त अभियुक्तगण के विरूद्ध आरोपपत्र न्यायालय प्रेषित किया गया। तत्पश्चात् विद्वान अवर न्यायालय द्वारा न्यायिक मस्तिष्क का प्रयोग करते हुये प्रसंज्ञान लिये जाने का पर्याप्त आधार पाते हुये अपराध का प्रसंज्ञान लिया गया। विधि निर्णय *Sunil Bharti Mittal Vs. Central Bureau of Investigation, AIR 2015 SC 923, Supreme Court"*, के मामले में माननीय उच्चतम न्यायालय ने यह सिद्धान्त प्रतिपादित किया है कि-

*"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.."*

10. विधि निर्णय *"U.P. Pollution Control Board Vs. Dr. Bhupendra Kumar Modi and others, 2009 (1) Crimes 216"* के मामले में माननीय उच्चतम न्यायालय ने यह सिद्धान्त प्रतिपादित किया है कि-

*"It is 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 proceedings against the accused."*

11. विधि निर्णय *"Sonu Gupta Vs. Deepak Gupta, (2015) 3 SCC 424,"* के मामले में माननीय उच्चतम न्यायालय ने यह सिद्धान्त प्रतिपादित किया है कि-

*"At the stage of cognizance and summoning the Magistrate is required to apply his judicial mind only with a view to take cognizance of the offence, or, in other words, to find out whether prima facie case has been made out for summoning the accused persons. At this stage, the learned Magistrate is not required to consider the defence version or materials or arguments nor he is required to evaluate the merits of the materials or evidence of the complainant, because the Magistrate must not undertake the exercise to find out at this stage whether the materials will lead to conviction or not."*

12. विपक्षीगण की तरफ से प्रस्तुत विधि निर्णय *"Prabhakar Panday Vs. State of U.P. and others, Criminal Revision. No 2341 of 2001, Allahabad High,"* के मामले में माननीय उच्च न्यायालय ने यह सिद्धान्त प्रतिपादित किया है कि-

*"On exercising the revisional power, learned Sessions Court cannot quash the cognizance and summoning order passed by the Magistrate, in exercising its revisional power, jurisdiction of Sessions Court is very limited and the Sessions Court can only examine the illegality, irregularity and impropriety of the order passed by the Magistrate."*

13. पुनरीक्षणकर्ता की तरफ से प्रस्तुत विधि निर्णय सत्यपाल बनाम स्टेट ऑफ यू०पी० एवं अन्य उपरोक्त में मामले में उल्लिखित तथ्य प्रस्तुत मामले के तथ्य से भिन्न होने के कारण उसका कोई लाभ उन्हें प्राप्त नहीं हो सकता। उक्त मामले में प्रिन्टेड प्रोफार्मा पर प्रसंज्ञान आदेश पारित किया गया था, जबकि प्रस्तुत मामले में प्रिन्टेड प्रोफार्मा पर प्रसंज्ञान आदेश पारित नहीं है। इसी प्रकार पुनरीक्षणकर्ता विधि निर्णय मोहम्मद इब्राहिम एवं अन्य बनाम स्टेट ऑफ बिहार एवं अन्य उपरोक्त का भी कोई लाभ पुनरीक्षणकर्ता प्राप्त करने का अधिकारी नहीं है। उक्त मामले में उन्मोचन प्रार्थनापत्र के सम्बन्ध में आदेश पारित है, जबकि प्रस्तुत मामला विद्वान अवर न्यायालय द्वारा अपराध कां प्रसंज्ञान लिये जाने से सम्बन्धित है।

14. इस प्रकार माननीय न्यायालयों द्वारा उपरोक्त विधि व्यवस्थाओं में प्रतिपादित सिद्धान्त के आलोक में प्रस्तुत मामले के तथ्यों एवं परिस्थितियों के सन्दर्भ में विद्वान अवर न्यायालय द्वारा पारित आलोच्य आदेश में की गयी अवधारणा विधि सम्मत प्रतीत होती है। आलोच्य आदेश के परिशीलन से स्पष्ट है कि विद्वान अवर न्यायालय ने पत्रावली पर उपलब्ध साक्ष्य का न्यायोचित विश्लेषण कर आलोच्य आदेश पारित किया है। आलोच्य आदेश में न तो कोई अशुद्धता है, न कोई अनियमितता है और न ही कोई अवैधानिकता है। विद्वान अवर न्यायालय ने अपने निहित क्षेत्राधिकार का समुचित प्रयोग करते हुये आलोच्य आदेश पारित किया है, जिसमें हस्तक्षेप का कोई औचित्य नहीं है। पुनरीक्षण आधारहीन है, जो निरस्त किये जाने योग्य है।

<u>आदेश</u>

दाण्डिक पुनरीक्षण निरस्त किया जाता है।

विद्वान अवर न्यायालय द्वारा पारित आलोच्य आदेश दिनांकित 03.02.2022 की पुष्टि की जाती है।

अवर न्यायालय का अभिलेख इस निर्णय की एक प्रति के साथ अविलम्ब अवर न्यायालय को वापस प्रेषित किया जाये।"

8. It is apt to indicate that Memo of Revision has not been placed on record,

though the same, to the view of this Court, is relevant to ascertain some facts including that as to whether therein the facts related to filing of earlier **Application U/s 482 Cr.P.C. No.5705 of 2022** were disclosed.

9. The order passed by the Revisional Court dated 15.05.2024, relevant portion of which is extracted herein-above, indicates that applicants before the Revisional Court concealed the materiel facts related to order dated 26.08.2022 passed in **Application U/s 482 Cr.P.C. No.5705 of 2022,** wherein the summoning order dated 03.02.2022, which was assailed before the Revisional Court, was assailed, but the same was not pressed.

10. In regard to the concealment of facts, the view of the Hon'ble Apex Court can be deduced from various pronouncements.

11. In ***Oswal Fats & Oils Ltd. Vs. Additional Commissioner (Administration), Bareilly Division, Bareilly and others, (2010) 4 SCC 728*** the Hon'ble Apex Court held that a person who approaches the Court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the Court to bring out all the facts and refrain from concealing/suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the Court not only has the right but a duty to deny relief to such person.

12. In ***Kishore Samrite vs. State of Uttar Pradesh and others, (2013) 2 SCC 398*** the Hon'ble Apex Court observed and held as under in Paras 34 to 39:-

*"34. It has been consistently stated by this Court that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice-delivery System.*

*35. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth.* ***To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood, must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the***

***Court. One way to curb this tendency is to impose realistic or punitive costs.***

*36. 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)].*

*37. 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.*

*38. 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].*

*39. 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)."*

13. In ***Kishore Samrite (supra),*** the Hon'ble Apex Court has clearly held that it is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curved and the Court must ensure that there is no wrongful unauthorized or unjust gain to any one as a result of abuse of the process

of the Court and one way to curve this tendency is to impose realistic or punitive costs.

14. In ***Kishore Samrite (supra),*** the Hon'ble Supreme Court held that 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 court.

15. The present one is the second Application U/s 482 Cr.P.C. on the same facts and for the same reliefs except with regard to the challenge made to the order dated 15.05.2024 passed by the revisional Court in the revision filed by the applicants challenging the summoning order dated 03.02.2022, which was challenged earlier in **Application U/s 482 Cr.P.C. No.5705 of 2022** and this Court did not cause interference in the same, and as such this Court finds it appropriate to take note of the observations made by the Hon'ble Apex Court passed in the case of ***Bhisham Lal Verma Vs. State of Uttar Pradesh and another (2023) SCC OnLine SC 1399*** . The relevant para are extracted herein-under:-

*"6. Long thereafter, the petitioner filed his first petition under Section 482 Cr.P.C., viz., Criminal Misc. Application No. 8465 of 2018, before the Allahabad High Court. Therein, he chose to challenge only the Government's sanction order dated 03.12.2013. The State opposed the application, pointing out that a challenge to the sanction could be made before the Trial Court. Thereupon, the petitioner's counsel sought liberty to approach the Trial Court by way of an appropriate application challenging the sanction. Accepting that plea, the High Court disposed of the application, vide order dated 15.12.2020, granting liberty to the petitioner to approach the Trial Court and challenge the sanction order. Significantly, at the time of filing of this first petition under Section 482 Cr.P.C., the charge sheet was very much on record and the learned Sessions Judge, Rampur, had already taken cognizance.*

*7. However, it was only in the year 2022 that the petitioner felt inspired to file a second petition under Section 482 Cr.P.C., viz., Criminal Misc. Application No. 2014 of 2022. His prayers therein were to quash the charge sheet dated 30.04.2015; the cognizance order dated 12.06.2015; and the proceedings in Special Case No. 19 of 2016, insofar as he was concerned. This application was dismissed by the Allahabad High Court, vide order dated 20.02.2023. Therein, the High Court noted that the petitioner had earlier filed Criminal Misc. Application No. 8465 of 2018 under Section 482 Cr.P.C. with a limited prayer - to quash the sanction order dated 30.12.2013. Holding that it was not open to the petitioner to go on challenging the proceedings one by one and as he had not felt aggrieved by the charge sheet or the order of cognizance when he had filed the first petition under Section 482 Cr.P.C., the High Court concluded that the subsequent petition challenging the same would not be maintainable and dismissed the application. It is against this order that the petitioner approached this Court by way of the present case.*

*8. On behalf of the petitioner, Mr. Pradeep Kumar Singh Baghel, learned senior counsel, would argue that a second petition is maintainable under Section 482 Cr.P.C.. He relied on the judgment of this Court in Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Mohan Singh and others1. Therein, it was held that a subsequent application under Section 561-A of the Code of Criminal Procedure, 1898, presently Section 482 Cr.P.C, would be maintainable in changed circumstances. It was affirmed that a subsequent application, which is not a (1975) 3 SCC 706 repeat application squarely on the same facts and circumstances, would be maintainable. To the same effect was the more recent decision of this Court in Anil Khadkiwala vs. State (Government of NCT of Delhi) and another2. Earlier, in S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and another 3, this Court held that when the first petition under Section 482 Cr.P.C was withdrawn with liberty to avail remedies, if any, available in law, the High Court would not be denuded of its inherent jurisdiction under Section 482 Cr.P.C. on being petitioned again and the principle of res judicata would not stand attracted. Again, in Vinod Kumar, IAS. vs. Union of India and others4, a 3-Judge Bench of this Court observed that dismissal of an earlier petition under Section 482 Cr.P.C would not bar filing of a subsequent petition thereunder in case the facts so justify.*

*9. Mr. S. Nagamuthu, learned amicus curiae, would however point out that entertainment of the second petition in Mohan Singh (supra) was held permissible as the circumstances obtaining at the time of the subsequent petition were clearly different from what they were at the time of the earlier one and that was the distinguishing factor which saved the second petition. He would further point out that, in Simrikhia vs. Dolley (2019) 17 SCC 294 (2007) 4 SCC 70 Writ Petition No. 255 of 2021, decided on 29.06.2021 = 2021 SCC OnLine SC 559 Mukherjee and Chhabi Mukherjee and another 5, this Court cautioned that the inherent jurisdiction under Section 482 Cr.P.C cannot be invoked to override the bar of review under Section 362 Cr.P.C. Reference was made to Sooraj Devi vs. Pyare Lal and another 6 which held that the inherent power of the Court could not be exercised for doing that which is specifically prohibited by the Code of Criminal Procedure, 1973. He also drew our attention to R. Annapurna vs. Ramadugu Anantha Krishna Sastry and others7, wherein a quash petition under Section 482 Cr.P.C. was dismissed on 28.01.1995 and without mentioning the same, another petition was filed under Section 482 Cr.P.C. with a similar prayer. Noting that the second petition was not made on the strength of anything which had developed after 28.01.1995 but only on the facts which subsisted prior to that date, this Court held that the second petition was not maintainable, as the High Court did not have the power to upset the order dated 28.01.1995 which had attained finality.*

*10. In S. Madan Kumar vs. K. Arjunan 8, the Madras High Court observed that a person who invokes Section 482 Cr.P.C. should honestly come before the Court raising all the pleas available to him at that point of (1990) 2 SCC 437 (1981) 1 SCC 500 (2002) 10 SCC 401 (2006) 1 MWN (Cri) DCC 1 = 2006 SCC Online Mad 94 time and he is not supposed to approach the Court with instalment pleas. It was further observed that there may be a change of circumstances during the course of criminal proceedings which would give scope for the person aggrieved*

*to invoke the inherent jurisdiction of the Court, but when he is posted with all the facts and circumstances of a case, he cannot withhold part of it for the purpose of filing yet another petition seeking the same relief.*

*11. We are in complete agreement with these observations of the Madras High Court. Though it is clear that there can be no blanket rule that a second petition under Section 482 Cr.P.C. would not lie in any situation and it would depend upon the facts and circumstances of the individual case, it is not open to a person aggrieved to raise one plea after the other, by invoking the jurisdiction of the High Court under Section 482 Cr.P.C., though all such pleas were very much available even at the first instance. Permitting the filing of successive petitions under Section 482 Cr.P.C. ignoring this principle would enable an ingenious accused to effectively stall the proceedings against him to suit his own interest and convenience, by filing one petition after another under Section 482 Cr.P.C., irrespective of when the cause therefor arose. Such abuse of process cannot be permitted."*

16. In view of above, this second application on the same grounds is not maintainable.

17. Having considered the aforesaid facts of the case, as also taking note of the observations of the Hon'ble Apex Court in the judgments referred above, this Court is of the view that no indulgence in the matter is required. Accordingly, the present application is **rejected**. No order as to costs.

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**(2024) 7 ILRA 503**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 24.07.2024**

**BEFORE**

**THE HON'BLE SAURABH LAVANIA, J.**

Application U/S 482. No. 6521 of 2024

**Prem Narayan Mishra ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Dhirendra Pratap Singh

**Counsel for the Opposite Parties:**
G.A.

**Criminal Law - Criminal Procedure Code, 1973 - Sections 156(3), 202 & 482 -** Application U/s 482 – for quashing the impugned orders – wherein Application of the applicant moved U/section 156(3) Cr.P.C was rejected being dispute in question is related with a forged Will which comes under the purview of a civil court and the said order was also affirmed by the revisional court –in view of perusal of facts of the case, court finds that, impugned orders have rightly been passed as the dispute essentially appears to be a civil dispute - held, in view of law laid down under the various pronouncement by the Hon'ble Apex court, a person should not be permitted to give a criminal colour to a civil dispute – accordingly, present Application is dismissed. (Para – 20, 21)

**Application u/s 482 Dismissed**. (E-11)

**List of Cases cited:**

1. Sukhwasi Vs St. of U.P. - 2007 SCC OnLine All 1088,

2. Lalita Kumari Vs St. of U.P. - (2014) 2 SCC 1

3. Ramdev Food Products Pvt. Ltd.Vs St. of Guj. - (2015) 6 SCC 439),

4. Priyanka Srivastava Vs St. of U.P., - (2015) 6 SCC 287,

5. Devarapalli Lakshminarayana Reddy Vs Vs Narayana Reddy [(1976) 3 SCC 252),

6. Anil Kumar Vs M.K. Aiyappa - (2013) 10 SCC 705),

7. Dilawar Singh Vs St. of Delhi - (2007) 12 SCC 641),

8. Mohd. Yousuf Vs 19 Afaq Jahan - (2006) 1 SCC 627),

9. CREF Finance Ltd. Vs Shree Shanthi Homes (P) Ltd.- (2005) 7 SCC 467),

10. Madhao v. St. of Mah. - (2013) 5 SCC 615),

11. Ramdev Food Products (P) Ltd. Vs St. of Guj. - (2015) 6 SCC 439),

12. Lalita Kumari Vs St. of U.P. - (2014) 2 SCC 1),

13. Criminal Revision No. 4629 of 2019 (Vishwanath Vs St. of U.P. & ors. dated 09.12.2019,

14. XYZ Vs St. of M.P. & ors. - (2023) 9 SCC 705,

15. Kailash Vijayvargiya Vs Rajlakshmi Chaudhari & ors.- 2023 SCC OnLine SC 569.

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the applicant and learned A.G.A. for the State and perused the records.

2. By means of the present application, the applicant has impeached the order dated 28.07.2023 passed by Additional District and Sessions Judge, Court No.1, Pratapgarh (in short "Revisional Court") in Criminal Revision No. 40 of 2016 (Prem Narayan vs. State of U.P. and 6 Others) and also the order dated 29.01.2016 passed by the Additional C.J.M., Court No.13, Pratapgarh (in short "Magistrate") in Misc. Case No. 335 of 2015 (Prem Narayan vs. Awadhesh Kumar).

3. By the impugned order dated 29.01.2016, the trial Court rejected the application preferred by the applicant under Section 156(3) Cr.P.C.. The relevant portion of the order dated 29.01.2016 reads as under:-

*"मामला राजस्व न्यायालय से सम्बन्धित है। तथाकथित वसीयत कूटकृत है या नहीं इसका निर्धारण सक्षम न्यायालय द्वारा ही किया जाना न्यायोचित है। प्रार्थना पत्र में वर्णित तथ्यों के अवलोकन से स्पष्ट हो रहा है कि वर्तमान प्रकरण सिविल प्रकृति का है तथा माननीय उच्चतम न्यायालय ने मो० इब्राहिम बनाम बिहार राज्य ए. एस. सी 2009 (67) पेज 629 में यह विधिक मत प्रकट किया गया है कि जहां मामला शुद्धतः दीवानी प्रकृति के है उन्हे दाण्डिक आवरण पहनाकर मामला प्रस्तुत न किया जाय। इसी प्रकार माननीय उच्चतम न्यायालय द्वारा मेसर्स इण्डिया कार्पोरेशन बनाम मेसर्स एण्ड ए. ई. पी सी एवं अन्य जे टी 2006 (6) सुप्रीम कोर्ट पेज 474 तथा माननीय उच्च न्यायालय की विधि व्यवस्था जी सागर सूरी व अन्य बनाम स्टेट आफ यू०पी० एवं अन्य 2002 एस सी सी 639 के परिप्रेक्ष्य में एवं प्रस्तुत मामले के तथ्य एवं परिस्थितियों को देखते हुये प्रार्थना पत्र स्वीकृत किये जाने का आधार पर्याप्त नहीं है और प्रस्तुत प्रार्थना पत्र अन्तर्गत धारा 156 (3) द०प्र०सं० खारिज किये जाने योग्य है।*

*आदेश*

*प्रार्थी प्रेमनारायण द्वारा प्रस्तुत प्रार्थना पत्र अन्तर्गत धारा 156 (3) द०प्र०सं० सिविल प्रकृति का होने के कारण खारिज किया जाता है।"*

4. Being aggrieved by the order dated 29.01.2016, the applicant filed Criminal Revision No. 40 of 2016 (Prem Narayan vs. State of U.P. and 6 Others) and the Revisional Court dismissed the said revision vide order dated 28.07.2023 with following observations:-

*"The grounds shown in the revision also established that there involves a controversy of his civil nature. The findings arrived by the learned Trial Court is in accordance with law and the learned Magistrate has relied upon the case laws passed by the Hon'ble Apex Court and Hon'ble High Courts.*

*8.- There is no illegality or impropriety in the impugned order. Revision is devoid of merits and is liable to be dismissed.*

*Order*

*Crl Revision N0-40 of 2016 preferred by the revisionist is accordingly dismissed. Record of the Learned Trial Court be returned to Trial Court. And record of this revision be consigned in accordance with law."*

5. From the submissions made by the learned counsel for the applicant as also the averments made in the application under consideration, the order(s) aforesaid have been impeached by the applicant on the ground that from a bare reading of the application under Section 156(3) Cr.P.C. it appears that cognizable offence is made out and as such the order dated 29.01.2016 rejecting the application under Section 156(3) Cr.P.C. and also the order dated 28.07.2023 affirming the order dated 29.01.2016 are liable to be interfered with by this Court.

6. Per contra, learned AGA stated that a bare reading of the application under Section 156(3) Cr.P.C. would show that subject matter of the same relates to a "Will", which, according to the applicant, is forged and the genuineness of the "Will" can be ascertained by the Court of first instance having competent jurisdiction on the basis of evidence adduced before it and accordingly no interference of this Court in the present application is required. Prayer is to dismiss the application.

7. Considered the submissions of learned counsel for the parties and perused the records.

8. Law dealing with an application under Section 156(3) Cr.P.C. has already been settled in various pronouncements including the following judgments:-

9. Relevant paras of the judgment passed in the case of **Sukhwasi vs. State of U.P.,** reported in **2007 SCC OnLine All 1088;** wherein this Court answered the question referred on account of difference of opinion on the issue of exercise of power under Section 156(3) Cr.P.C., are as under:-

*""Whether the Magistrate is bound to pass an order on each and every application under Section 156(3) Cr.P.C. containing allegations of commission of a cognizable offence for registration of the F.I.R. and its investigation by the police even if those allegations, prima-facie, do not appear to be genuine and do not appeal to reason, or he can exercise judicial*

*discretion in the matter and can pass order for treating it as 'complaint' or to reject it in suitable cases"?*

*XXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX*

*18. It is hardly possible to infer from the aforesaid observations that the Magistrate cannot treat an application under Section 156(3) Cr.P.C. as a 'complaint'. Even a nebulous of far fetched interpretation will not lead to that inference. The inference drawn by Hon'ble Vinod Prasad, J. is not logical.*

*19. The Hon'ble Judge has also referred to the case of State of Haryana v. Bhajan Lal: JT 1990 (4) SC 650 : (1992 Supp (1) SCC 335 : AIR 1992 SC 604) and has extracted the following observations:— (Paras 30, 32)*

*"At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned police officer cannot embark upon any enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer-in-charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 157 of the Code to investigate, subject to the proviso to Section 157 (as we have proposed to make a detailed discussion about the power of a police officer to the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the issuing part of this judgment, we do not propose to deal with those sections in extenso in the present context).*

*In case an offence incharge of a police station refuses to exercise the jurisdiction in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the superintendent of police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section (3) of Section 154 of the Code.*

*Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, "reasonable complaint", and "credible information" are used. Evidently, the non-qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that 'every complaint or information' preferred*

*to an officer-in-charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer-in-charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 189(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence."*

*"It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid therefore, officer-in-charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer had no other option except to enter the substance thereof in the prescribed from, that is to say, to register a case on the basis of such information."*

*(Emphasis mine)*

*20. As in the earlier case, a completely irrational and egregiously erroneous inference has been drawn from the aforesaid observation. The observations relate to the registration of a case by a police officer as will appear from the last paragraph with emphasis and they have nothing to do with the order passed by the Magistrate under Section 156(3) Cr.P.C.*

*21. It will not be out of place to note that even for registration of a case by a police officer, the condition is that he must have reason to suspect the commission of an offence as will appear from the following quotations extracted from the case of Ramesh Kumari v. State NCT of Delhi: JT 2006 (2) SC 548 : ((2006) 2 SCC 677 : AIR 2006 SC 1322) the following are the words extracted:—*

*"The true test is whether the information furnished provides a reason to suspect the commission of an offence which the concerned police officer is empowered under Section 156 of the code to investigate. If it does he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolve of his duty to investigate the case and discover the true facts, if he can."*

*22. In a recent pronouncement, Hon'ble Mr. Justice Shiv Charan Sharma in the case of Chandrika Singh v. State of U.P. (2007 (58) ACC 777) : (2007 (4) ALJ 157), has held that a Magistrate can treat an application under Section 156(3) Cr.P.C. as a complaint. The Hon'ble Judge referred to various cases in his judgment and has come to this conclusion thereafter. It was observed by Shiv Charan, J. as follows (paras 24 to 26):*

*"In view of this judgment of Full Bench, the Magistrate is fully competent to pass an order to register a case and investigate on an application under Section 156(3) Cr.P.C., all the application under Section 156(3) Cr.P.C. may be treated as*

*complaint and in the circumstance, the Magistrate shall follow the procedure as provided in Chapter XV Cr.P.C. This, judgment of Full Bench has not been set aside. Hence, in view of the Apex Court and Full Bench of this Court the Magistrate is fully competent to treat an application under Section 156 Cr.P.C. as a complaint and in the present case the Magistrate passed an order in the circumstances of the case that it may be registered as a complaint case and proceed to record the statement under Sections 200 and 202 Cr.P.C. There appears no illegality and impropriety in the order of the Magistrate.*

*This controversy must come to an end that an application under Section 156(3) Cr.P.C. can only be treated as an application for passing an order for registration of the case and investigation cannot be treated as a complaint case. The Magistrate is not bound in each and every case to pass an order to register a case and investigate if cognizable offence is made out. The Magistrate is fully competent to use this judicial direction in the matter. This is wrong notion that if an application has been moved under Section 156(3) Cr.P.C. that the only order can be passed for registration in the matter. The magistrate has got direction under Section 190 Cr.P.C. to take the cognizance directly or to pass an order that the police to investigate and then take cognizance on submissions of a report under Section 173 Cr.P.C. The Magistrate is also expected to act under some guidelines and it should not be left at the arbitrary discretion of the Magistrate to pass an order or not to pass an order to register the case and investigation under Section 156(3) Cr.P.C. In Gulab Chandra Upadhaya v. State of U.P. (2002 All LJ 1225). Hon'ble Single Judge of this Court laid down the guidelines for the guidance of Magistrate while deciding the application under Section 156(3) Cr.P.C. and the guidelines cannot be said against any provision of law or check on the judicial direction of the Magistrate. Even Hon'ble Apex Court also held that the Magistrate has got a direction to pass an order to register the case and investigation under Section 156(3) Cr.P.C. or to treat an application as a complaint case.*

*In the law laid down by Hon'ble the Apex Court and various judgments of this Court clearly laid down that the Magistrate is not always bound to pass an order to register a case and investigation when application under Section 156(3) Cr.P.C. is moved. It will not be proper to deal with this hypothetical position that if the Magistrate is of opinion that false and frivolous allegation has been made in application then he may reject the application or it is for the investigating officer to decide the truthfulness of the story and if found false then launch prosecution against the applicant. But it is discretion of the Magistrate to be used judiciously while disposing of the application.*

*For the reasons mentioned above, I am of the opinion that the Magistrate is not always bound to pass an order for register of the case and investigation after receipt of the application under Section 156(3) Cr.P.C. disclosing a cognizable offence. The Magistrate may use his discretion judiciously and if he is of the opinion that in the circumstances of the case, it will be proper to treat the application as a complaint case then he may proceed according to the procedure provided under Chapter XV of Cr.P.C. I am also of the opinion that it is not always mandatory in each and every case for the Magistrate to pass an order to register and investigate on receipt of the application*

*under Section 156(3) Cr.P.C. In the present case, the Magistrate is perfectly within the judicial power to treat the application under Section 156(3) Cr.P.C. as a complaint case. There is no illegality or impropriety in the order. The revision is devoid of merit and is liable to be dismissed."*

*23. The Full Bench decision of Ram Babu Gupta's case (2001 All LJ 1587) (supra) also lays down that the Magistrate can treat an application under Section 156(3) Cr.P.C. as a complaint. This will appear from the following observations (Para 18):—*

*"Coming to the second question noted above, it is to be at once stated that a provision empowering a Court to Act in a particular manner and a provision creating a right for an aggrieved person to approach a Court or authority, must be understood distinctly and should not be mixed up. While Sections 154, 155 sub-section (1) and (2) of 156, Cr.P.C. confer right on an aggrieved person to reach the police, 156(3) empowers a Magistrate to act in a particular manner in a given situation. Therefore, it is not possible to hold that where a bare application is moved before Court only praying for exercise of powers under Section 156(3) Cr.P.C., it will remain an application only and would not be in the nature of a complaint. It has been noted above that the Magistrate has to always apply his mind on the allegations in the complaint where he may use his powers under Section 156(3) Cr.P.C. In this connection, it may be immediately added that where in an application, a complainant states facts which constitute cognizable offence but makes a defective prayer, such an application will not cease to be a complaint nor can the Magistrate refuse to treat it as a complaint even though there be no prayer seeking trial of the known or unknown accused. The Magistrate has to deal with such facts as constitute cognizable offence and for all practical purposes even such an application would be a complaint. This Court can do no better than refer to the following observations in Suresh Chand Jain: ((2001) 2 SCC 628 : AIR 2001 SC 571) (supra) (Para 10):—*

*"The position is thus clear. Any judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code…………… could take further steps contemplated in Chapter XII of the Code only thereafter."*

10. In the case of **Lalita Kumari vs. State of U.P.,** reported in **(2014) 2 SCC 1**; the Hon'ble Apex Court concluded as under:-

*"120. In view of the aforesaid discussion, we hold:-*

*120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.*

*120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.*

*120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.*

*120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.*

*120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.*

*120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:*

*(a) Matrimonial disputes/family disputes*

*(b) Commercial offences*

*(c) Medical negligence cases*

*(d) Corruption cases*

*(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.*

*The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.*

*120.7 . While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks' time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry.*

*120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."*

11. In the case of **Ramdev Food Products Private Limited vs. State of Gujarat** reported in **(2015) 6 SCC 439,** the appellant making allegations of preparing forged partnership deed, sought directions for investigation under Section 156(3) Cr.P.C. and the Magistrate instead of directing investigation as prayed for, thought it fit to conduct further inquiry under Section 202 and sought report of the Police Sub-Inspector within thirty days and being aggrieved by the order of Magistrate the appellant approached the High Court and the High Court declined to interfere in the order of Magistrate and thereafter the appellant approached the Hon'ble Apex Court and after considering the facts and issue involved the Hon'ble Apex Court framed three questions and while dealing with question as to "(i) Whether the discretion of the Magistrate to call for a report under Section 202 instead of directing investigation under Section 156(3) is controlled by any defined parameters?" the Hon'ble Apex Court observed as under:-

*"15. Cognizance is taken by a Magistrate under Section 190 (in Chapter XIV) either on "receiving a complaint", on "a police report" or "information received" from any person other than a police officer or upon his own knowledge.*

*16. Chapter XV deals exclusively with complaints to Magistrates. Reference*

*to Section 202, in the said Chapter, shows that it provides for "postponement of issue of process" which is mandatory if the accused resides beyond the Magistrate's jurisdiction (with which situation this case does not concern) and discretionary in other cases in which event an enquiry can be conducted by the Magistrate or investigation can be directed to be made by a police officer or such other person as may be thought fit "for the purpose of deciding whether or not there is sufficient ground for proceeding". We are skipping the proviso as it does not concern the question under discussion. Clause (3) provides that if investigation is by a person other than a police officer, he shall have all the powers of an officer in charge of a police station except the power to arrest.*

*17. Chapter XII, dealing with the information to the police and their powers to investigate, provides for entering information relating to a "cognizable offence" in a book to be kept by the officer in charge of a police station (Section 154) and such entry is called "FIR". If from the information, the officer in charge of the police station has reason to suspect commission of an offence which he is empowered to investigate subject to compliance with other requirements, he shall proceed, to the spot, to investigate the facts and circumstances and, if necessary, to take measure, for the discovery and arrest of the offender [Section 157(1)].*

*18. In Lalita Kumari v. State of U.P. [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] , this Court dealt with the questions : (SCC p. 28, para 30)*

*"30.1. (i) Whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and*

*30.2. (ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused."*

*These questions were answered as follows : (Lalita Kumari case [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] , SCC pp. 35-36, 41, 51-52, 57-59 & 61, paras 49, 72-73, 94, 107-108, 111, 114-15 & 120)*

*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.*

***'Shall'***

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*72. It is thus unequivocally clear that registration of FIR is mandatory and also that it is to be recorded in the FIR book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the superior police officers as well as by the competent*

*court to which copies of each FIR are required to be sent.*

*"**Information**"*

*73. The legislature has consciously used the expression 'information' in Section 154(1) of the Code as against the expression used in Sections 41(1)(a) [Ed. : Vide Act 5 of 2009, w.e.f. 1-1-2010 Sections 41(1)(a) and (b) of the principal Act were substituted with differently worded Sections 41(1)(a) and (b) : the new clause (b) being substantially in pari materia with the old clause (a). A new clause (ba) was also added. The old clause (a) mentioned in most of the judgments cited hereinbelow stood as follows:"41. (1)(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or"The new Sections 41(1)(a), (b) and (ba) are as follows:"41. (1)(a) who commits, in the presence of a police officer, a cognizable offence;(b) against whom a reasonable complaint has been made, or credible information has been received …(ba) against whom credible information has been received that he has committed a cognizable offence …"Clause (g) of Section 41(1) remains unaltered.] and (g) where the expression used for arresting a person without warrant is 'reasonable complaint' or 'credible information'. The expression under Section 154(1) of the Code is not qualified by the prefix 'reasonable' or 'credible'. The non-qualification of the word 'information' in Section 154(1) unlike in Sections 41(1)(a) [Ed. : Vide Act 5 of 2009, w.e.f. 1-1-2010 Sections 41(1)(a) and (b) of the principal Act were substituted with differently worded Sections 41(1)(a) and (b) : the new clause (b) being substantially in pari materia with the old clause (a). A new clause (ba) was also added. The old clause (a) mentioned in most of the judgments cited hereinbelow stood as follows:"41. (1)(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or"The new Sections 41(1)(a), (b) and (ba) are as follows:"41. (1)(a) who commits, in the presence of a police officer, a cognizable offence;(b) against whom a reasonable complaint has been made, or credible information has been received …(ba) against whom credible information has been received that he has committed a cognizable offence …"Clause (g) of Section 41(1) remains unaltered.] and (g) of the Code is for the reason that the police officer should not refuse to record any information relating to the commission of a cognizable offence on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, reasonableness or credibility of the said information is not a condition precedent for the registration of a case.*

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*94. Principles of democracy and liberty demand a regular and efficient check on police powers. One way of keeping check on authorities with such powers is by documenting every action of theirs.*

*Accordingly, under the Code, actions of the police, etc. are provided to be written and documented. For example, in case of arrest under Section 41(1)(b) of the Code, the arrest memo along with the grounds has to be in writing mandatorily; under Section 55 of the Code, if an officer is deputed to make an arrest, then the superior officer has to write down and record the offence, etc. for which the*

*person is to be arrested; under Section 91 of the Code, a written order has to be passed by the officer concerned to seek documents; under Section 160 of the Code, a written notice has to be issued to the witness so that he can be called for recording of his/her statement, seizure memo/panchnama has to be drawn for every article seized, etc.*

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*107. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for 'anticipatory bail' under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court.*

*108. It is also relevant to note that in Joginder Kumar v. State of U.P. [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] , this Court has held that arrest cannot be made by the police in a routine manner. Some important observations are reproduced as under : (SCC pp. 267-68, para 20)*

*'20. ... No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.'*

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*111. Besides, the Code gives power to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The section itself states that a police officer can start investigation when he has "reason to suspect the commission of an offence". Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.*

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*(emphasis in original)*

*114. It is true that a delicate balance has to be maintained between the*

*interest of the society and protecting the liberty of an individual. As already discussed above, there are already sufficient safeguards provided in the Code which duly protect the liberty of an individual in case of registration of false FIR. At the same time, Section 154 was drafted keeping in mind the interest of the victim and the society. Therefore, we are of the cogent view that mandatory registration of FIRs under Section 154 of the Code will not be in contravention of Article 21 of the Constitution as purported by various counsel.*

*Exceptions*

*115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.*

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*120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:*

*(a) Matrimonial disputes/family disputes*

*(b) Commercial offences*

*(c) Medical negligence cases*

*(d) Corruption cases*

*(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay."*

*19. Thus, this Court has laid down that while prompt registration of FIR is mandatory, checks and balances on power of police are equally important. Power of arrest or of investigation is not mechanical. It requires application of mind in the manner provided. Existence of power and its exercise are different. Delicate balance had to be maintained between the interest of society and liberty of an individual. Commercial offences have been put in the category of cases where FIR may not be warranted without enquiry.*

*20. It has been held, for the same reasons, that direction by the Magistrate for investigation under Section 156(3) cannot be given mechanically. In Anil Kumar v. M.K. Aiyappa [(2013) 10 SCC 705 : (2014) 1 SCC (Cri) 35] , it was observed : (SCC p. 711, para 11)*

*11. "The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed case [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint,*

*documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."*

*The above observations apply to category of cases mentioned in para 120.6 in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] .*

*21. On the other hand, power under Section 202 is of different nature. Report sought under the said provision has limited purpose of deciding "whether or not there is sufficient ground for proceeding". If this be the object, the procedure under Section 157 or Section 173 is not intended to be followed. Section 157 requires sending of report by the police that the police officer suspected commission of offence from information received by the police and thereafter the police is required to proceed to the spot, investigate the facts and take measures for discovery and arrest. Thereafter, the police has to record statements and report on which the Magistrate may proceed under Section 190. This procedure is applicable when the police receives information of a cognizable offence, registers a case and forms the requisite opinion and not every case registered by the police.*

*22. Thus, we answer the first question by holding that:*

*22.1. The direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone the issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued.*

*22.2. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed". Category of cases falling under para 120.6 in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] may fall under Section 202."*

12. In the case of **Priyanka Srivastava vs. State of U.P.,** reported in **(2015) 6 SCC 287;** subject matter of which relates to preferring an application under Section 156(3) Cr.P.C. by the borrower against the Officer of the financial institution after initiation of proceedings under SARFAESI Act, 2002, the Hon'ble Apex Court, after considering the judgment(s) passed in the case of Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy [(1976) 3 SCC 252 : 1976 SCC (Cri) 380] (Para 17); Anil Kumar v. M.K. Aiyappa [(2013) 10 SCC 705 : (2014) 1 SCC (Cri) 35] (Para 11); Dilawar Singh v. State of Delhi [(2007) 12 SCC 641 : (2008) 3 SCC (Cri) 330] (Para 18); Mohd. Yousuf v. Afaq Jahan, (2006) 1 SCC 627, SCC p. 631, Para 11 : (2006) 1 SCC (Cri) 460.]; CREF Finance Ltd.v. Shree Shanthi Homes (P) Ltd. [(2005) 7 SCC 467 : 2005 SCC (Cri) 1697]; Madhao v. State of Maharashtra [Madhao v. State of Maharashtra, (2013) 5 SCC 615 : (2013) 4 SCC (Cri) 141] (Para 18); Ramdev Food Products (P) Ltd. v. State of Gujarat [(2015) 6 SCC 439] (Para 22); Lalita

Kumari v. State of U.P. [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] (Para 30), observed as under:-

*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 in Lalita 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."*

13. In the judgment passed in **Criminal Revision No. 4629 of 2019 (Vishwanath Vs. State of U.P. and 4 Ors.) dated 09.12.2019,** wherein this Court while dealing with similar issue, after considering the relevant previsions of Cr.P.C. and various pronouncements, concluded as under:-

*55. Thus, in the whole scheme of the Code of Criminal Procedure as clarified in the pronouncements of the Apex Court ranging from 1951 to 2019, it is evident that if a person has a grievance*

*that his F.I.R. has not been registered by the police, his first remedy is to approach the Superintendent of Police under Section 154(3), Cr.P.C. or other police officer referred to in Section 36, Cr.P.C. If his grievances still persist, then he can approach a Magistrate under Section 156(3), Cr.P.C. He has a further remedy of filing a criminal complaint under Section 200, Cr.P.C. On receipt of the complaint, however, several courses are open to the Magistrate:*

*(i) He may take cognizance of the offence at once and proceed to record statements of the complaints and the witnesses present under Section 200, and proceed under Chapter XV and Chapter XVI, accordingly.*

*(ii) If, he 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 process as he may 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 of proceeding; or dismiss the complaint if there is no sufficient ground for proceeding.*

*(iii) 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 investigation to be made by the police under Section 156(3).*

*(iv) 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 power 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 Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not.*

*56. Thus, the above discussion pertaining to the power of the Magistrate under Section 156(3) in Chapter XII read with Section 190 in Chapter XIV of the Code leaves no room for doubt that there is nothing in the Code of Criminal Procedure, which curtails or puts any embargo on the power of the Magistrate to make an "inquiry" as defined under Section 2(g) of the Code or to order for "investigation" defined under Section 2(h) of the Code, in dealing with the application under Section 156(3), Cr.P.C. i.e., in exercise of the power conferred upon it under Chapter XII or Chapter XIV of the Code to satisfy itself about the veracity of the allegations of commission of a criminal offence made therein.*

*57. In its discretionary power, it is open for the Magistrate to direct the police to register a criminal case under Section 154, Cr.P.C. and conduct investigation. At the same time, it is open for the Magistrate, where the facts of the case and the ends of justice so demand, to take cognizance of the matter by treating it as a complaint and proceed for the "inquiry" under Sections 200 and 202, Cr.P.C.*

*58. It cannot be said nor it could be demonstrated that in each case, without application of its independent mind, the Magistrate shall issue simply direction "to register and investigate" i.e., to lodge a first information report on an application filed under Section 156(3), Cr.P.C. The power to conduct a preliminary inquiry into the report of commission of criminal offence(s), conferred on the Magistrate within the scheme of the Code of Criminal Procedure has not been curtailed by any of*

*the observations made by the Apex Court in the case of Lalita Kumari, MANU/SC/1166/2013MANU/SC/1166/2013 : 2014(2) SCC 1.*

*59. However, it is pertinent to note that while exercising its discretionary power under Section 156(3), Cr.P.C., the Magistrate like any other court of discretionary jurisdiction is to act fairly and consciously and ensure that the discretion conferred upon it is exercised within the limits of judicial discretion. The entire emphasis is to act in an unbiased and just manner, strictly in accordance with law, to find but the truth of the case which shall come before it.*

*60. It is a Magistrate who is the competent authority to take cognizance of an offence and it is his duty to decide whether on the basis of the record and documents produced, an offence is made out or not and if made out, what course of law should be adopted. Emphasis is laid to the statement in Vinubhai (supra), wherein it is stated that "it is the judicial conscience of the Magistrate which has to be satisfied with reference to the record and the documents placed before him by the investigating agency, in coming to an appropriate conclusion in consonance with the principles of law." It would not be out of place to note para '17' of the report in Vinubhai, at this stage:*

*"17. It is clear that a fair trial must kick off only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not/are not arraigned to stand trial That this is the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India cannot be doubted. It is the hovering omnipresence of Article 21 over the Cr.P.C. that must needs inform the interpretation of all the provisions of the Cr.P.C., so as to ensure that Article 21 is followed both in letter and in spirit."*

*(Emphasis added)*

*61. Applying the above legal principles, in the facts of the present case, this Court finds that the application under Section 156(3), Cr.P.C. was filed after a period of two months of the alleged incident and it was noted by the court concerned that nothing could be traced in favour of the prosecution by medical examination etc. In the circumstances before it, the court deemed it fair, just and proper to search the evidence(s) which is/are well known to the applicant and in his possession so as to find out the truth of the allegations in the application.*

*62. Having perused the contents of the application and the order of the court below, it cannot be said that the court concerned has committed illegally in exercise of its discretionary jurisdiction under Section 156(3), Cr.P.C. or it has exceeded in its jurisdiction in any manner or has exercised jurisdiction not vested in it in law. It cannot be said also that any material injustice has been caused to the applicant on account of the decision of the court below to treat the application under Section 156(3), Cr.P.C. as a complaint for the purpose of deciding whether or not there is sufficient ground for proceeding, rather than directing the police to register an F.I.R. and investigate under Section 154 of the Code."*

14. The Hon'ble Apex Court in the case of **XYZ vs. State of Madhya Pradesh and Others** reported in **(2023) 9 SCC 705;** observed as under:-

*"14. First, we find it appropriate to reiterate the duty of police to register an FIR whenever a cognizable offence is made out in a complaint. A Constitution Bench of this Court in Lalita Kumari v. State of U.P. [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] has laid out the position of law as summarised in the following extract of the decision : (SCC p. 60, para 119)*

*"119. Therefore, in view of various counterclaims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR."*

*15. We cannot help but note that the police's inaction in this case is most unfortunate. It is every police officer's bounden duty to carry out his or her functions in a public-spirited manner. The police must be cognizant of the fact that they are usually the first point of contact for a victim of a crime or a complainant. They must abide by the law and enable the smooth registration of an FIR. Needless to say, they must treat all members of the public in a fair and impartial manner. This is all the more essential in cases of sexual harassment or violence, where victims (who are usually women) face great societal stigma when they attempt to file a complaint. It is no secret that women's families often do not approve of initiating criminal proceedings in cases of sexual harassment. Various quarters of society attempt to persuade the survivor not to register a complaint or initiate other formal proceedings, and they often succeed. Finally, visiting the police station and interacting with police officers can be an intimidating experience for many. This discomfort is often compounded if the reason for visiting the police station is to complain of a sexual offence.*

*16. This being the case, the police ought not to create yet another obstacle by declining to register an FIR despite receiving a complaint regarding sexual harassment. Rather, they should put the complainant at ease and try to create an atmosphere free from fear. They ought to be sensitive to her mental state and the fact that she may have recently been subjected to a traumatic experience.*

*17. Whether or not the offence complained of is made out is to be determined at the stage of investigation and/or trial. If, after conducting the investigation, the police find that no offence is made out, they may file a B Report under Section 173CrPC. However, it is not open to them to decline to register an FIR. The law in this regard is clear — police officers*

*cannot exercise any discretion when they receive a complaint which discloses the commission of a cognizable offence.*

*18.Second, we deal with the issue of the discretion granted to a Magistrate vis-à-vis the exercise of powers under Section 156(3)CrPC. On this issue, the High Court has held that the JMFC was not under an obligation to direct the police to register the FIR and the use of the expression "may" in Section 156(3)CrPC indicated that the JMFC had the discretion to direct the complainant to examine witnesses under Sections 200 and 202CrPC, instead of directing an investigation under Section 156(3).*

*19. A Division Bench of this Court in Sakiri Vasu v. State of U.P. [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440] expounded upon the Magistrate's powers under Section 156(3)CrPC. In this decision, the Court noted : (SCC pp. 412-15, paras 11, 13, 15 17 & 26)*

*11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154CrPC, then he can approach the Superintendent of Police under Section 154(3)CrPC by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3)CrPC before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.*

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*13. The same view was taken by this Court in Dilawar Singh v. State (NCT of Delhi) [Dilawar Singh v. State (NCT of Delhi), (2007) 12 SCC 641 : (2008) 3 SCC (Cri) 330] . We would further clarify that even if an FIR has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156(3)CrPC, and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order(s) as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156(3)CrPC.*

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*15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.*

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*17. In our opinion Section 156(3)CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3)CrPC, though briefly worded, in our*

*opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.*

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*26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section 154(3)CrPC or other police officer referred to in Section 36CrPC. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156(3)CrPC instead of rushing to the High Court by way of a writ petition or a petition under Section 482CrPC. Moreover, he has a further remedy of filing a criminal complaint under Section 200CrPC. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?"*

*(emphasis supplied)*

*20. <u>It is clear from the above extract that the Magistrate has wide powers under Section 156(3) which ought to be exercised towards meeting the ends of justice. A two-Judge Bench of this Court in Srinivas Gundluri v. Sepco Electric Power Construction Corpn. [Srinivas Gundluri v. Sepco Electric Power Construction Corpn., (2010) 8 SCC 206 : (2010) 3 SCC (Cri) 652] , further clarified the powers of a Magistrate and held that whenever a cognizable offence is made out on the bare reading of complaint, the Magistrate may direct police to investigate : (SCC pp. 218-19, para 23)</u>*

*"23. To make it clear and in respect of doubt raised by Mr Singhvi to proceed under Section 156(3) of the Code, what is required is a bare reading of the complaint and if it discloses a cognizable offence, then the Magistrate instead of applying his mind to the complaint for deciding whether or not there is sufficient ground for proceeding, may direct the police for investigation. In the case on hand, the learned Single Judge [Srinivas Gundluri v. Sepco Electric Power Construction Corpn., 2009 SCC OnLine Chh 308] and the Division Bench [Srinivas Gundhuri v. Sepco Electric Power Construction Corpn., WA No. 281 of 2009, order dated 1-4-2010 (Chh)] of the High Court rightly pointed out that the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding and, therefore, we are of the view that the Magistrate has not committed any illegality in directing the police for investigation. In the facts and circumstances, it cannot be said that while directing the police to register FIR, the Magistrate has committed any illegality. As a matter of fact, even after receipt of such report, the Magistrate under Section 190(1)(b) may or may not take cognizance of offence. In other words, he is not bound to take cognizance upon submission of the police report by the investigating officer, hence, by directing the police to file charge-sheet or final report and to hold investigation with a particular result cannot be construed that the Magistrate has exceeded his power as provided in sub-section (3) of Section 156."*

*21. In the present case, the narration of facts makes it clear that upon the invocation of the jurisdiction of the Magistrate under Section 156(3)CrPC, the JMFC came to the conclusion that serious allegations had been levelled against the accused by the appellant and, that, from a perusal of the documents in this regard, the statements of the complainant were satisfactory. After taking note of the fact that the police had at an earlier stage reported that the occurrence of an incident or offence was not found, the JMFC opined*

*that, from the facts which were set out by the complainant in the complaint, prima facie, the occurrence of an offence was shown.*

*22. It is true that the use of the word "may" implies that the Magistrate has discretion in directing the police to investigate or proceeding with the case as a complaint case. But this discretion cannot be exercised arbitrarily and must be guided by judicial reasoning. An important fact to take note of, which ought to have been, but has not been considered by either the trial court or the High Court, is that the appellant had sought the production of DVRs containing the audio-video recording of the CCTV footage of the then Vice-Chancellor's (i.e. the second respondent) chamber. As a matter of fact, the Institute itself had addressed communications to the second respondent directing the production of the recordings, noting that these recordings had been handed over on his oral direction by the then Registrar of the Institute as he was the Vice-Chancellor. Due to the lack of response despite multiple attempts, the Institute had even filed a complaint with PS Gole Ka Mandir on 29-10-2021 for registering an FIR against the second respondent for theft of the DVRs.*

*23. Therefore, in such cases, where not only does the Magistrate find the commission of a cognizable offence alleged on a prima facie reading of the complaint but also such facts are brought to the Magistrate's notice which clearly indicate the need for police investigation, the discretion granted in Section 156(3) can only be read as it being the Magistrate's duty to order the police to investigate. In cases such as the present, wherein, there is alleged to be documentary or other evidence in the physical possession of the accused or other individuals which the police would be best placed to investigate and retrieve using its powers under the CrPC, the matter ought to be sent to the police for investigation."*

15. Expression "Investigation" has been defined in Section 2(h) of Cr.P.C. which reads as under:-

*""investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf;"*

16. Regarding expression "investigation", it would be appropriate to refer the paras 53 to 55 of the judgment passed in the case of **Kailash Vijayvargiya vs. Rajlakshmi Chaudhari and Others;** reported in **2023 SCC OnLine SC 569.** The Hon'ble Apex Court by this judgment remanded the matter back to the Magistrate to decide the application under Section 156(3) Cr.P.C. preferred by the victim afresh, wherein allegations were levelled to attract the offence indicated under Section 417, 376, 406, 313, 120 IPC, which was initially rejected by the Magistrate, and thereafter the Magistrate in compliance of order of remand of High Court, without recording reasons, directed the Police to lodge an FIR and investigate the matter. The aforesaid paras are reproduced hereinunder:-

*"53. The Code vide Chapter XII, ranging from Section 154 to Section 176, deals with information to the Police and their power to investigate. Section 154 deals with the information relating to the commission of a cognizable offence and fiats the procedure to be adopted when prima facie commission of a cognizable offence is made out. Section 156 authorises*

*a police officer in-charge of a Police station to investigate any cognizable offence without the order of a Magistrate. Sub-section (3) of Section 156 provides for any Magistrate empowered under Section 190 to order an investigation as mentioned in Section 156(1). In cases where a cognizable offence is suspected to have been committed, the officer in-charge of the Police station, after sending a report to the Magistrate empowered to take cognizance of such offence, is entitled under Section 157 to investigate the facts and circumstances of the case and also to take steps for discovery and arrest of the offender. Clauses (a) and (b) of the proviso to sub-section (1) to Section 157 give discretion to the officer in-charge not to investigate a case, when information of such offence is given against any person by name and the case is not of serious nature; or when it appears to the officer in-charge of the Police station that there is no sufficient ground for entering the investigation. In each of the cases mentioned in clauses (a) and (b) to the proviso to sub-section (1) to Section 157, the officer in-charge of the Police station has to file a report giving reasons for not complying with the requirements of sub-section (1) and in a case covered by clause (b) to the proviso, also notify the informant that he will not investigate the case or cause it to be investigated. Section 159 gives power to a Magistrate, on receiving such report of the officer in-charge, to either direct an investigation or if he thinks fit, proceed to hold a preliminary inquiry himself or through a Magistrate subordinate to him, or otherwise dispose of the case in the manner provided by the Code.*

*54. Sections 160 to 164 deal with the power of the Police to require attendance of witnesses, examination of witnesses, use of such statements in evidence, inducement for recording statement and recording of statements. Section 165 deals with the power of a Police officer to conduct search during investigation in the circumstances mentioned therein.*

*55. The power under the Code to investigate generally consists of following steps : (a) proceeding to the spot; (b) ascertainment of facts and circumstances of the case; (c) discovery and arrest of the suspected offender; (d) collection of evidence relating to commission of offence, which may consist of examination of various persons, including the person accused, and reduction of the statement into writing if the officer thinks fit; (e) the search of places of seizure of things considered necessary for investigation and to be produced for trial; and (f) formation of opinion as to whether on the material collected there is a case to place the accused before the Magistrate for trial and if so, taking the necessary steps by filing a chargesheet under Section 173."*

17. As per settled view, the Magistrate/Court of competent of jurisdiction, after verifying the truth and veracity of the allegations made in the application under Section 156(3) Cr.P.C., can (i) pass an order contemplated by Section 156(3) Cr.P.C., (ii) direct examination of complaint and witnesses and proceed further in the manner provided by Section 202 Cr.P.C. and (iii) can also direct the preliminary inquiry by police in terms of law laid down in the judgment passed in the case of ***Lalita Kumari (supra).*** The Magistrate/Court of competent jurisdiction is also empowered to reject the application under Section 156(3) Cr.P.C..

18. In other words, the Magistrate/Court of competent jurisdiction while dealing with an application under Section 156(3) Cr.P.C. is empowered to pass an order for registration of FIR and investigate into the matter or to treat such application as a 'Complaint Case', if Investigation in the matter is not required and he is fully empowered to reject the application under Section 156(3) Cr.P.C.

19. From the application under consideration as also the application under Section 156(3) Cr.P.C. which is on record as Annexure No. 3, this Court finds that applicant and opposite party No.5/Jagdish Kumar are real brother and opposite party No.2 to 4 namely Avdhesh Kumar, Krishna Kumar and Dinesh Kumar are nephew of the applicant and opposite party No.6/Rakraksha Pandey is the father-in-law of opposite party No.5/Jagdish Pandey, who based upon the "Will" dated 28.07.1990, alleged to have been forged, claimed right over the property of the testator (father of applicant and opposite party No.5/Jagdish Kumar) by filing a Case No. 681-682/913 under Section 34 of the U.P. Land Revenue Act, 1901 in the year 2008 and thereafter the applicant after huge delay preferred an application dated 27.08.2015 under Section 156(3) Cr.P.C. before the Magistrate.

20. Having considered the aforesaid facts and circumstances of the case as also the settled principle of law on the issue, this Court is of the view that the impugned order(s) dated 29.01.2016 and 28.07.2023 have rightly been passed as the dispute essentially appears to be a civil dispute and application under Section 156(3) Cr.P.C. was moved after huge delay and the Hon'ble Apex Court in various pronouncements has stated that a person should not be permitted to give a criminal colour to a civil dispute.

21. For the reasons aforesaid, this Court finds no force in the present application. It is accordingly ***dismissed***. Costs made easy.

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**(2024) 7 ILRA 524**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 31.07.2024**

**BEFORE**

**THE HON'BLE OM PRAKASH SHUKLA, J.**

Application U/S 482. No. 6975 of 2013

**Smt. Suman Mishra ...Applicant**
**Versus**
**State of U.P. & Ors. ...Opposite Parties**

**Counsel for the Applicant:**
Shishir Pradhan

**Counsel for the Opposite Parties:**
G.A., Ashok Kr. Verma

**Criminal Law - Criminal Procedure Code, 1973 - Sections 6, 190(1)(a) & 482 – Domestic Violence Act, 2005 - Sections 12, 22, 28 & 29: - Application U/s 482** – against impugned orders – wherein her prayer for quashing the proceedings initiated against her under D.V. Act, arsing out from a complaint case as well as to delete her name from that complaint case was rejected which was affirmed by the revisional court below – question of maintainability – preliminary objection, on the ground that, proceeding u/section 482 of the Cr.P.C. for quashing the proceeding initiated u/section 12 of the D.V. Act is not maintainable by relying upon the decision of the Hon'ble supreme court in a case of *'Arul Danial Vs Suganya'* and the remedy available to such a party would be a statutory appeal before the Session Court u/section 29 of the D.C. Act, - court finds that, the provision of section 482 Cr.P.C. cannot be allowed to short-circuit the

proceedings under the provisions of D.V. Act, - the power of quashing a criminal proceeding u/s 482 should be exercise very sparingly and with circumspection and that too in the rarest of rare case – held, application made under section 482 Cr.P.C. challenging the proceeding under section 12 of the D.V. Act is not maintainable – accordingly, application is dismissed with liberty to the applicant to take recourse as provided under law if so desires.(Para – 17, 29, 31, 32)

**Application u/s 482 Dismissed**. (E-11)

**List of Cases cited**:

1. Sou. Sandhya Manoj Wankhade Vs Manoj Bhimrao Wankhade & ors.- 2011 (3) SCC 650,

2. Prabha Tyagi Vs Kamlesh Devi - (2022) 8 SCC 90,

3. Kamatchi Vs Laxmi Narayanan - (2022) 15 SCC 50,

4. Dr. P. Pathamanathan & ors.Vs Tmt. Vs Monika & ors.- 2021 SCC Online (Madras) 8731,

5. Adalat Prasad Vs Ruplal Jindal, reported in (2004) 7 SCC 338,

6. Preeti Gupta & anr. Vs St. of Jharkhand & anr. (Criminal Appeal No. 1512/2010, decided on 13.08.2010),

7. St. of Har. and Bhajan Lal & ors.- 1992 Supp. (1) SCC 335,

8. Mohammad Maqeenuddin Ahmed Vs St. of Andhra Pradesh & anr.- 2007CriLJ 3361,

9. Arul Daniel Vs Suganya - 2022 SCC OnLine Mad 5435,

10. Dr. P. Pathmanathan Vs Vs Monica - 2021 SCC OnLine Mad 8731,

11. Sarah Mathew Vs Institute of Cardio Vascular Diseases - (2014) 2 SCC 62,

12. Kunapareddy Vs Kunapareddy Swarna Kumari, (2016) 11 SCC 774).

(Delivered by Hon'ble Om Prakash Shukla, J.)

**A. Prelude**

1. Applicant, **Smt. Suman Mishra,** who is the sister-in-law of opposite party no.2-Smt. Parul Mishra, has filed the instant application under Section 482 of the Code of Criminal Procedure, 1973, assailing the order dated 13.04.2012 passed by the Chief Judicial Magistrate, Barabanki in Complaint Case No. 744 of 2012 : Smt. Parul Mishra and another Vs. Nishant Mishra and others, as well as the order dated 21.09.2013 passed by the learned Additional Sessions Judge/Special Judge (E.C. Act), Barabanki in Criminal Revision No. 112 of 2012 : *Smt. Suman Mishra Vs. Smt. Parul Mishra and others.*

2. Apparently, by the impugned order dated 13.04.2012, application filed by the applicant dated 09.08.2011 seeking to quash the proceeding instituted against her by Smt. Parul Mishra (opposite party no.2 herein) in Complaint Case No. 744 of 2012 and a prayer to delete her name arrayed as opposite party No.7 in Complaint Case No. 744 of 2012, was rejected, which came to be affirmed by the learned Additional Sessions Judge/Special Judge (E.C. Act), Barabanki in Criminal Revision No. 112 of 2012 while rejecting the revision, by the impugned order dated 21.09.2013.

**B. Factual background**

3. Shorn of unnecessary details, facts in brief, as borne out from the pleadings, are that opposite party no.2-Smt. Parul Mishra had approached the Court of Chief Judicial Magistrate, Lucknow by filing application/complaint under Section 12 of the Protection of Woman from Domestic Violence Act, 2005 (hereinafter referred to as **'DV Act, 2005'**) against nine persons including the applicant, thereby seeking

protection orders, residence orders and compensation orders to be passed under various provisions of DV Act, 2005 and also seeking for monetary reliefs under Section 22 of the DV Act, 2005.

4. It was stated in the aforesaid application/complaint case by the opposite party no.2-Smt. Parul Mishra that her marriage was solemnized with Nishant Mishra in accordance with Hindu rites, rituals and customs on 20.02.2007. At the time of marriage, her parents and relatives gave sufficient dowry and Stridhan, including one Maruti WagonR Car, cash, Jewellery, furniture and household items, value of which would be Rs.20,00,000/-. Out of the said wedlock, one daughter, namely, Km. Garvita alias Vibhu was born. Her husband Nishant Mishra is working as Assistant Engineer (Mechanical Boiler Maintenance Care)/Chief General Manager, Parichha Thermal Power Station, Jhansi and his monthly salary from all sources was Rs.50,000/-. After marriage, opposite party no.2 was living her marital life in a joint family, but her husband, father-in-law, mother-in-law, brother-in-law, sister-in-law (applicant herein) and other opposite parties in the aforesaid complaint case used to torture her by insulting and harassing her in various ways and they also used to assault and abuse her from time to time and they even were planning to kill her by giving slipping pill.

5. Apparently, vide order dated 15.04.2011, the Chief Judicial Magistrate, in view of the aforesaid complaint of the opposite party No.2, directed to register the aforesaid complaint/ application as miscellaneous case and also directed the Protection Officer to submit a domestic incident report. In compliance thereof, the complaint/ application of the opposite party no.2-Smt. Parul Mishra and Kumari Garvita alias Vibhu was registered as Complaint Case No. 774 of 2012.

6. On perusal of Annexure No.2, which is an application filed by the applicant before the Chief Judicial Magistrate, Barabanki, it seems that a preliminary inquiry was conducted by the Protection Officer for compliance of the aforesaid order of the Chief Judicial Magistrate dated 15.04.2011 and for this purpose, the Protection Officer had issued notice to the applicant requiring to submit her reply, however, it appears that instead of participating in the preliminary inquiry before the Protection Officer, the applicant had filed an application before the Chief Judicial Magistrate, Barabanki, seeking to quash the proceedings instituted against her and also praying to delete her name as opposite party No.7 from the array of the parties in Complaint Case No. 774 of 2012. The learned Chief Judicial Magistrate, after going through the averments made in the complaint, opined that complainants/opposite parties no.2 and 3 herein had sought relief in para No.26 of the Complaint Case No. 774 of 2012 against all the opposite parties including the applicant, therefore, , application filed by the applicant was not acceptable and accordingly, vide order dated 13.04.2012, application of the applicant was rejected by the Chief Judicial Magistrate, Barabanki.

7. The applicant being aggrieved had filed Criminal Revision No. 112 of 2012 before the Additional Sessions Judge/Special Judge (E.C. Act), Barabanki, challenging the aforesaid order dated 13.04.2012 passed by the Chief Judicial Magistrate, Barabanki, which was rejected while affirming the order dated 13.04.2012 by the Additional Sessions Judge/Special

Judge (E.C. Act), Barabanki vide order dated 21.09.2013.

8. In the aforesaid backdrops, the applicant has approached this Court under Section 482 Cr.P.C., challenging the aforesaid two orders i.e. dated 13.04.2012 passed by the Chief Judicial Magistrate, Barabanki and the order dated 21.09.2013 passed by the Additional Sessions Judge/Special Judge (E.C. Act), Barabanki.

9. Heard Shri Shishir Pradhan, learned Counsel for the applicant, Shri Mayank Singh, learned Additional Government Advocate for the State and Shri Ashok Kumar Verma, learned Counsel for the opposite parties no. 2 and 3/complainant.

**C. Preliminary Objection**

10. At the outset, Shri Ashok Kumar Verma, learned Counsel representing the complainants/opposite parties no. 2 and 3 have questioned the maintainability of the present application filed under Section 482 of the Cr.P.C.

11. In order to canvas the issue of maintainability of the application under Section 482 of Cr.P.C., learned Counsel placing reliance on the decision of the Hon'ble Supreme Court in the case of **Sou. Sandhya Manoj Wankhade Vs. Manoj Bhimrao Wankhade and others :** 2011 (3) SCC 650, **Prabha Tyagi Vs. Kamlesh Devi** : (2022) 8 SCC 90, **Kamatchi Vs. Laxmi Narayanan** : (2022) 15 SCC 50. The learned counsel has stated that in Kamatchi vs. Laxmi Narayanan's case (supra), the Apex Court has considered the decision of learned Single Judge of Madras High Court rendered in the case of **Dr. P. Pathamanathan and others vs. Tmt. V. Monika and others** : 2021 SCC Online (Madras) 8731 and has approved the said decision. According to the learned Counsel, Hon'ble Supreme Court in Kamatchi's case (supra), while dealing with the arguments advanced by the Counsel for the respondents in that case, relied on the judgment of **Adalat Prasad vs. Ruplal Jindal,** reported in (2004) 7 SCC 338 and held that the matter where the order of issuance of process is issued in a complaint on taking cognizance, stands on a different footing and cannot be compared with the proceeding under Section 12 of the D.V. Act because the scope of notice under Section 12 of the D.V. Act is to call for a response from the respondent in terms of the Statute so that after considering rival submissions, appropriate order can be issued. Hon'ble Apex Court, by relying upon the decision in the case of Adalat Prasad’s case (supra), has held that considering the nature of the proceedings under the D.V. Act, the same cannot be challenged under Section 482 of the Cr.P.C. Thus, his submission is that a Magistrate exercising jurisdiction under the D.V. Act is not a Criminal Court within the meaning of Section 6 of the Cr.P.C. Moreso, in the instant case, the Chief Judicial Magistrate, while exercising under Section 12 of the D.V. Act, only directed the Protection Officer to inquire into the matter and submit its report and in response thereof, the Protection Officer had issued notice to the opposite parties arrayed in the complaint including the applicant herein, but instead of giving reply to the notice of the Protection Officer, the applicant had filed application seeking to delete her name from the array of the opposite parties in the complaint. According to the learned Counsel, as the Chief Judicial Magistrate under the D.V. Act was not a Criminal Court and the Chief Judicial Magistrate had

not issued any notice or summon the opposite parties of the complaint and the applicant is only aggrieved by the notice issued to her by the Protection Officer, the instant petition/application filed under Section 482 Cr.P.C. is not maintainable to quash the proceedings of the complaint/ application filed under Section 12 of the D.V. Act.

12. Per contra, Shri Shishir Pradhan, learned Counsel representing the applicant has submitted that in Kamatchi's case, the issue involved was with regard to the limitation for filing the proceeding under Section 12 of the D.V. Act in view of section 468 of the Code of Criminal Procedure, 1973. According to learned Counsel, Kamatchi's case (supra), does not deal with the issue of maintainability of the application under Section 482 of Cr.P.C. for quashing the proceeding filed under Section 12 of the D.V. Act,. The observations made by the Hon'ble Supreme Court in paragraph 30 of the decision in Kamatchi's case cannot be relied upon to substantiate the argument that Hon'ble Supreme Court has held that the proceeding under Section 482 of the Cr.P.C., seeking relief of quashing of the D.V. Act proceeding, is not maintainable. Thus, it has been submitted that the argument advanced on behalf of complainants/ opposite parties No. 2 and 3 on the point of maintainability of the present petition should not be entertained.

13. Drawing attention of this Court to Section 28 of the D.V. Act, learned Counsel has submitted that the provisions of Code of Criminal Procedure, 1973 are made applicable to the proceedings under the D.V. Act and, therefore, application under Section 482 of Cr.P.C. cannot be excluded. According to the learned Counsel, main relief claimed by the complainant in the application filed under Section 12 of the D.V. Act was against her husband, who is opposite party no.1 in the complaint and the applicant being the sister-in-law of the complainant has no concern with the relief as claimed in the complaint and as such, the name of the applicant ought to be deleted from the array of the parties in the complaint filed by the complainant under Section 12 of the D.V. Act, however, the learned trial Court has erroneously rejected the application of the applicant in this regard by means of the impugned order.

14. To strengthen his submission, learned Counsel for the applicant has placed reliance upon the judgment of the Hon’ble Supreme Court in **Preeti Gupta and another Vs. State of Jharkhand and another** (Criminal Appeal No. 1512 of 2010, decided on 13.08.2010), **State of Haryana and Bhajan Lal and others** : 1992 Supp. (1) SCC 335 and the judgment of the Hon’ble Andhra Pradesh High Court rendered in the case of **Mohammad Maqeenuddin Ahmed Vs. State of Andhra Pradesh and another** : 2007CriLJ 3361.

**D. Analysis of the aforesaid Preliminary Objection**

15. In view of the rival submissions on the point of maintainability of the present proceedings under Section 482 Cr.P.C., this Court has gone through the record and proceedings and more particularly the judgments relied upon by the learned Counsel for the parties.

16. Much emphasis has been laid by the learned Counsel for the opposite parties no. 2 and 3 on the decision of Hon'ble

Supreme Court in Kamatchi's case (supra) in support of the contention that application under Section 482 of Cr.P.C. is not maintainable for quashing the proceeding filed under Section 12 of the D.V. Act. On the other hand, learned Counsel for the applicant submits that the said decision of Hon'ble Supreme Court was mainly concerned with the point of limitation for the purpose of filing application and not on the point of maintainability of the proceedings under Section 482 of Cr.P.C.

17. Before considering the Judgment of the Hon'ble Supreme Court in Kamatchi's case, it would be profitable to note that a Full Bench of Madras High Court in **Arul Daniel v. Suganya** : 2022 SCC OnLine Mad 5435 has relying on the decision of Hon'ble Supreme Court in Kamatchi's case (supra) has observed that the proceeding under Section 482 of the Cr.P.C. for quashing the proceeding under Section 12 of the D.V. Act is not maintainable and the remedy available to such a party would be a statutory appeal before the Sessions Court under Section 29 of the D.V. Act. Pertinently, the Hon'ble Supreme Court in Kamatchi's case has considered and approved the decision of a learned Single Judge of Madras High Court in **Dr. P. Pathmanathan Vs. V. Monica** : 2021 SCC OnLine Mad 8731. Therefore, this Court deems it apt that before proceeding to appreciate the submissions made by the parties, it would be appropriate to consider the decision of learned Single Bench of Madras High Court in Dr. P. Pathmanathan's case (supra).

18. In Dr. P. Pathmanathan's case (supra), a batch of cases related to the jurisdiction of the High Court to quash a complaint under Section 12 of the D.V. Act in exercise of its inherent power under Section 482 of the Code of Criminal Procedure Code, 1973 was engaging the attention of the learned Single Judge of the Madras High Court, wherein the scheme of the provisions of the D.V. Act was considered. The learned Single Judge relying on various precedents of the Hon'ble Supreme Court as well as the High Court, gave a slew of observation and directions in that batch of cases, which makes for an interesting enumeration, as herein below :-

*" The following directions are, therefore, issued:*

*(i) An application under Section 12 of the D.V. Act, is not a complaint under Section 2(d) of the Cr.P.C. Consequently, the procedure set out in Section 190(1)(a) & 200 to 204, Cr.P.C as regards cases instituted on a complaint has no application to a proceeding under the D.V Act. The Magistrate cannot, therefore, treat an application under the D.V Act as though it is a complaint case under the Cr.P.C.*

*(ii) An application under Section 12 of the Act shall be as set out in Form II of the D.V Rules, 2006, or as nearly as possible thereto. In case interim ex-parte orders are sought for by the aggrieved person under Section 23(2) of the Act, an affidavit, as contemplated under Form III, shall be sworn to.*

*(iii) The Magistrate shall not issue a summon under Section 61, Cr.P.C to a respondent(s) in a proceeding under Chapter IV of the D.V Act. Instead, the Magistrate shall issue a notice for appearance which shall be as set out in Form VII appended to the D.V Rules, 2006. Service of such notice shall be in the manner prescribed under Section 13 of the Act and Rule 12 (2) of the D.V Rules, and*

*shall be accompanied by a copy of the petition and affidavit, if any.*

*(iv) Personal appearance of the respondent(s) shall not be ordinarily insisted upon, if the parties are effectively represented through a counsel. Form VII of the D.V Rules, 2006, makes it clear that the parties can appear before the Magistrate either in person or through a duly authorized counsel. In all cases, the personal appearance of relatives and other third parties to the domestic relationship shall be insisted only upon compelling reasons being shown. (See Siladitya Basak v State of West Bengal (2009 SCC Online Cal 1903)*

*(v) If the respondent(s) does not appear either in person or through a counsel in answer to a notice under Section 13, the Magistrate may proceed to determine the application ex-parte.*

*(vi) It is not mandatory for the Magistrate to issue notices to all parties arrayed as respondents in an application under Section 12 of the Act. As pointed out by this Court in Vijaya Baskar (cited supra), there should be some application of mind on the part of the Magistrate in deciding the respondents upon whom notices should be issued. In all cases involving relatives and other third parties to the matrimonial relationship, the Magistrate must set out reasons that have impelled them to issue notice to such parties. To a large extent, this would curtail the pernicious practice of roping in all and sundry into the proceedings before the Magistrate.*

*(vii) As there is no issuance of process as contemplated under Section 204, Cr.P.C in a proceeding under the D.V Act, the principle laid down in Adalat Prasad v Rooplal Jindal (2004 7 SCC 338) that a process, under Section 204, Cr.P.C, once issued cannot be reviewed or recalled, will not apply to a proceeding under the D.V Act. Consequently, it would be open to an aggrieved respondent(s) to approach the Magistrate and raise the issue of maintainability and other preliminary issues. Issues like the existence of a shared household/domestic relationship etc., which form the jurisdictional basis for entertaining an application under Section 12, can be determined as a preliminary issue, in appropriate cases. Any person aggrieved by such an order may also take recourse to an appeal under Section 29 of the D.V Act for effective redress (See V.K Vijayalekshmi Amma v Bindu. V, (2010) 87 AIC 367). This would stem the deluge of petitions challenging the maintainability of an application under Section 12 of the D.V Act, at the threshold before this Court under Article 227 of the Constitution.*

*(viii) Similarly, any party aggrieved may also take recourse to Section 25 which expressly authorises the Magistrate to alter, modify or revoke any order under the Act upon showing change of circumstances.*

*(ix) In Kunapareddy (cited supra), the Hon'ble Supreme Court upheld the order of a Magistrate purportedly exercising powers under Order VI, Rule 17 of The Code of Civil Procedure, 1908 (hereinafter referred to as "C.P.C."), to permit the amendment of an application under Section 12 of the D.V Act. Taking a cue therefrom, it would be open to any of the respondent(s), at any stage of the proceeding, to apply to the Magistrate to have their names deleted from the array of respondents if they have been improperly joined as parties. For this purpose, the Magistrate can draw sustenance from the power under Order I Rule 10(2) of the C.P.C. A judicious use of this power would ensure that the proceedings under the D.V Act do not generate into a weapon of*

*harassment and would prevent the process of Court from being abused by joining all and sundry as parties to the lis.*

*(x) The Magistrates must take note that the practice of mechanically issuing notices to the respondents named in the application has been deprecated by this Court nearly a decade ago in Vijaya Baskar (cited supra). Precedents are meant to be followed and not forgotten, and the Magistrates would, therefore, do well to examine the applications at the threshold and confine the inquiry only to those persons whose presence before it is proper and necessary for the grant of reliefs under Chapter IV of the D.V Act.*

*(xi) In Satish Chandra Ahuja (cited supra), the Hon'ble Supreme Court has pointed out the importance of the enabling provisions under Section 26 of the D.V Act to avoid multiplicity of proceedings. Hence, the reliefs under Chapter IV of the D.V can also be claimed in a pending proceeding before a civil, criminal or family court as a counter claim.*

*(xii) While recording evidence, the Magistrate may resort to chief examination of the witnesses to be furnished by affidavit (See Lakshman v Sangeetha, 2009 3 MWN (Cri) 257. The Magistrate shall generally follow the procedure set out in Section 254, Cr.P.C while recording evidence.*

*(xiii) Section 28(2) of the Act is an enabling provision permitting the Magistrate to deviate from the procedure prescribed under Section 28(1), if the facts and circumstances of the case warrants such a course, keeping in mind that in the realm of procedure, everything is taken to be permitted unless prohibited (See Muhammad Sulaiman Khan v Muhammad Yar Khan, 1888 11 ILR All 267).*

*(xiv) A petition under Article 227 of the Constitution may still be maintainable if it is shown that the proceedings before the Magistrate suffer from a patent lack of jurisdiction. The jurisdiction under Article 227 is one of superintendence and is visitorial in nature and will not be exercised unless there exists a clear jurisdictional error and that manifest or substantial injustice would be caused if the power is not exercised in favour of the petitioner. (See Abdul Razak v. Mangesh Rajaram Wagle (2010) 2 SCC 432, Virudhunagar Hindu Nadargal Dharma Paribalana Sabai v. Tuticorin Educational Society, (2019) 9 SCC 538.) In normal circumstances, the power under Article 227 will not be exercised, as a measure of self-imposed restriction, in view of the corrective mechanism available to the aggrieved parties before the Magistrate, and then by way of an appeal under Section 29 of the Act."*

19. Having noted the judgment passed by the Hon'ble Madras High Court in Dr. P. Pathmanathan's case (supra), it would be necessary to consider the main question involved before Hon'ble Supreme Court in Kamatchi's case (supra). In Kamatchi's case (supra), the respondents/(husband and in-laws) had challenged the proceeding initiated by the appellant/wife under Section 12 of the D.V. Act by filing an application under Section 482 of the Cr.P.C. The application of the father-in-law and sister-in-law under Section 482 of Cr.P.C. was allowed. However, with regard to the application filed by the husband, although the Hon'ble Madras High Court had rejected the contention of the respondent/husband on merits, however, on the point of limitation, the application under Section 12 of the D.V. Act was dismissed by the High Court as the same was filed after one year by the appellant/wife. The said order was

challenged by the wife by filing an appeal before the Hon'ble Supreme Court. Before the Hon'ble Supreme Court, on behalf of the wife, two submissions were advanced; firstly that the limitation is not provided for filing application under Section 12 of the D.V. Act and the limitation provided under Section 468 of the Cr.P.C. would be applicable only for initiation of criminal prosecution under Sections 31 and 33 of the D.V. Act; and secondly that the judgments relied upon by the High Court were distinguishable and for that purpose reliance was placed on the decision of learned Single Judge of Madras High Court in Dr. P. Pathmanathan's case (supra). Learned Counsel representing the respondent/husband relied upon the decision in the case of **Sarah Mathew vs. Institute of Cardio Vascular Diseases** : (2014) 2 SCC 62 to substantiate his submission that period of limitation would be one year and the same has to be reckoned from the date of the application. The second submission was made by relying upon the decision in Adalat Prasad's case (supra). Hon'ble Supreme Court in Kamatchi's case has reproduced the said written submission in paragraph 10. Said paragraph 10 of the judgment in Kamatchi's case needs to be extracted, which reads as under :-

*"11. In the written submissions, it is also submitted that: -*

*"This Hon'ble Court in Adalat Prasad v. Rooplal Jindal held that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused, or any material implicating the accused, or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated. However, the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code, because the Code does not contemplate a review of an order. Hence in the absence of any review power, or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code."*

20. It is to be noted that in Dr. P. Pathamanathan's case, the issue of limitation was not raised nor the same was dealt with. The issue involved in the said case was with regard to maintainability of proceedings under Section 482 of Cr.P.C for quashing the proceedings filed under Section 12 of the D.V. Act. In order to meet this argument advanced on behalf of the appellant/wife relying upon the decision in Dr. P. Pathmanathan's case, learned Counsel for the respondent/ husband before Hon'ble Supreme Court relied upon the decision in Adalat Prasad's case and submitted that in absence of review power or inherent power with the subordinate criminal courts, the remedy lies only by invoking Section 482 of the Cr.P.C. Negating the argument of the husband, the Hon’ble Supreme Court made the relevant observations in paragraphs 27 to 30, which are being extracted as herein below:

*"28. The special features with regard to an application under Section 12 of the Act were noticed by a Single Judge of the High Court in **Dr. P.Padmanathan & Ors.** as under:*

*"19. In the first instance, it is, therefore, necessary to examine the areas where the D.V. Act or the D.V. Rules have specifically set out the procedure thereby excluding the operation of Cr.P.C. as contemplated under Section 28(1) of the Act. This takes us to the D.V. Rules. At the outset, it may be noticed that a "complaint" as contemplated under the D.V. Act and the D.V. Rules is not the same as a "complaint"*

*under Cr.P.C. A complaint under Rule 2(b) of the D.V. Rules is defined as an allegation made orally or in writing by any person to a Protection Officer. On the other hand, a complaint, under Section 2(d) of the Cr.P.C. is any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence. However, the Magistrate dealing with an application under Section 12 of the Act is not called upon to take action for the commission of an offence. Hence, what is contemplated is not a complaint but an application to a Magistrate as set out in Rule 6 (1) of the D.V. Rules. A complaint under the D.V. Rules is made only to a Protection Officer as contemplated under Rule 4(1) of the D.V. Rules.*

*20. Rule 6 (1) sets out that an application under Section 12 of the Act shall be as per Form II appended to the Act. Thus, an application under Section 12 not being a complaint as defined under Section 2(d) of the Cr.P.C, the procedure for cognizance set out under Section 190(1)(a) of the Code followed by the procedure set out in Chapter XV of the Code for taking cognizance will have no application to a proceeding under the D.V. Act. To reiterate, Section 190(1)(a) of the Code and the procedure set out in the subsequent Chapter XV of the Code will apply only in cases of complaints, under Section 2(d) of Cr.P.C, given to a Magistrate and not to an application under Section 12 of the Act."*

*28. It is thus clear that the High Court wrongly equated filing of an application under Section 12 of the Act to lodging of a complaint or initiation of prosecution. In our considered view, the High Court was in error in observing that the application under Section 12 of the Act ought to have been filed within a period of one year of the alleged acts of domestic violence.*

*29. It is, however, true that as noted by the Protection Officer in his Domestic Inspection Report dated 2.08.2018, there appears to be a period of almost 10 years after 16.09.2008, when nothing was alleged by the appellant against the husband. But that is a matter which will certainly be considered by the Magistrate after response is received from the husband and the rival contentions are considered. That is an exercise which has to be undertaken by the Magistrate after considering all the factual aspects presented before him, including whether the allegations constitute a continuing wrong.*

*30. Lastly, we deal with the submission based on the decision in Adalat Prasad.* ***The ratio in that case applies when a Magistrate takes cognizance of an offence and issues process, in which event instead of going back to the Magistrate, the remedy lies in filing petition under Section 482 of the Code. The scope of notice under Section 12 of the Act is to call for a response from the respondent in terms of the Statute so that after considering rival submissions, appropriate order can be issued. Thus, the matter stands on a different footing and the dictum in Adalat Prasad would not get attracted at a stage when a notice is issued under Section 12 of the Act."***

21. It is to be noted that paragraph 19 of Dr. P. Pathmanathan's case has been considered by the Hon'ble Supreme Court in Kamatchi's case and after considering the same, it was held by the Hon'ble Supreme Court that an application under Section 12 of the D.V. Act cannot be equated with the lodging of complaint or

initiation of the prosecution under the Code of Criminal Procedure, 1973. It was also held by the Hon'ble Supreme Court that the decision in the case of Adalat Prasad (supra) would not come to any rescue, so as to justify the argument to invoke Section 482 Cr.P.C. in DV Act proceeding when a notice is issued under Section 12 of the DV Act. It was also specifically held that Adalat Prasad's case would be applicable when a Magistrate takes cognizance of the offense in terms of Section 190 (1) (a) of the Code of Criminal Procedure, 1973 and issue process and not in the matter of issuance of notice under Section 12 of the DV Act. Thus, it was concluded by the Hon'ble Supreme Court that the matter of taking cognizance for issuance of process and matter under Section 12 of the D.V. Act stands on different footing and therefore, the decision in Adalat Prasad's case would not get attracted at the stage when notice is issued under Section 12 of the Act by the concerned Magistrate.

22. This Court is also in humble agreement with the said analogy drawn by the Hon'ble Supreme Court, more so, Sections 28 and 29 of the DV Act provides as under :-

*"**28. Procedure.**—(1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)...*

***29. Appeal.**—There shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later."*

23. In terms of Section 28 of the DV Act, proceedings under Sections 12 to 23 of the DV Act would be governed by provisions of the Cr.P.C. Further, as per Section 29 of the DV Act, an appeal against the order of the Magistrate shall lie to the Sessions Court. The DV Act does not provide for any further appeal against the order passed by the Sessions Court. This Court in **Dinesh Kumar Yadav v. State of U.P.** : 2016 SCC OnLine All 3848, has held that a revision to the High Court is maintainable against an order passed by the Sessions Court under Section 29 of the DV Act. Relevant observations of the said judgment are set out below:

*"35. Under section 397 of Cr. P.C. "the High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court...". That the Court of Sessions is as an inferior Court to the High Court, cannot be disputed. Thus, the Court of Sessions before which an appeal has been prescribed under section 29 of the Act, 2005 is a Criminal Court inferior to the High Court and, therefore, a revision against its order passed under section 29 will lie to the High Court under section 397 Cr.P.C. section 401 Cr. P.C. is supplementary to section 397 Cr.P.C.*

*xxxx xxxx xxxx xxxx*

*37. In view of the above, as the remedy of an appeal had been provided under section 29 of the Act, 2005 before a Court of Sessions, which means a Court of Sessions referred under section 6 read with sections 7 and 9 of the Cr.P.C., without saying anything more as regards the procedure to be followed in such appeal, and there being nothing to the contrary in the Act of 2005 which may be indicative of exclusion of the application of the provisions of Cr. P.C. to such an appeal,*

*the normal remedies available against a judgment and order passed by a Court of Sessions by way of appeals and revisions prescribed under the Cr. P.C. before the High Court, are available against an order passed in appeal under section 29 of the Act, 2005."*

24. In the instant application, there is no dispute to the fact that the opposite parties no. 2 and 3 had filed an application under Section 12 of the D.V. Act against the applicant and other persons. The Chief Judicial Magistrate, after going through the contents of the said application, gave directions to register the said complaint as miscellaneous case and also called for a report from the Protection Officer. In compliance thereof, the Protection Officer, in order to get the inquiry being conducted, issued notice to the applicant, however, instead of replying to the said notice, applicant has filed an application before the Chief Judicial Magistrate seeking to quash the said proceedings instituted against her under Section 12 of the D.V. Act, which was rejected by the Chief Judicial Magistrate by the impugned order and the same was confirmed by the Additional Sessions Judge by means of the impugned order. As has been held by the learned Single Judge of the Madras High Court, the issuance of notice by the Chief Judicial Magistrate to the Protection officer or for that matter a notice having been issued by the Protection officer to the appellant is not a summon under Section 61 of the Code of Criminal Procedure, 1973, but rather is to be construed as a notice as set out in Form VII appended to the D.V Rules, 2006. In fact, the Hon'ble Supreme Court in Kamatchi's case has held that the scope of notice under section 12 of the Act is to call for a response from the respondents in terms of the statute, so that after considering rival submission, appropriate order can be issued.

25. No doubt, the proceedings under certain sections of the DV Act as specified in sub-section (1) of section 28 are to be governed by the Code of Criminal Procedure, 1973, however, at the same time, the legislature has also incorporated provisions like sub-section (2) of section 28 as well, which empowers the Court to lay down its own procedure for disposal of the application under Section 12 or Section 23(2) of the D.V. Act, which relates to ex-parte reliefs on the basis of affidavit in such form as prescribed under the rules. From time to time, this provisions has been held by the Courts that most of these reliefs are basically civil in nature. Thus, amendment was held to be maintainable under the provisions of D.V. Act (see **Kunapareddy v. Kunapareddy Swarna Kumari**, (2016) 11 SCC 774).

26. However, submission of the learned Counsel for the applicant is that even if the submission of the learned counsel for the opposite parties no.2 and 3 is accepted that an application under Section 12 before the Magistrate is civil in nature, the fact that the Protection Officer had issued notice to the applicant upon which applicant had filed application for quashing of the proceedings initiated against her under Section 12 of D.V. Act, which was rejected by means of the impugned order and the same was affirmed by the impugned order, against which the present application under Section 482 Cr.P.C has been filed, ought to be allowed as the whole proceedings is an abuse of process of law and as such, he has relied on the case of **State of Haryana v. Bhajan Lal (supra).**

27. This Court finds that learned Counsel for the respondent has submitted that application under Section 12 of the DV Act was filed *inter alia* on the ground that opposite parties in the complaint case including the applicant has failed to provide protection, residence and compensation to the complainants and her minor child which comes within the fold of 'economic abuse' as defined under Explanation I of clause (d) of Section 3 of the D.V. Act and as such, the proceedings before the learned Magistrate must be allowed to come to its logical end.

28. Without looking into the other authorities cited by the parties, an observation as was held in the case of **Bhajan Lal (supra)** at para 102 and 103 would be sufficient to understand whether the petitioner has made out a case of interference by this Court under Section 482 Cr.P.C on merits. Paras 102 and 103 of Bhajan Lal's case reads as follows :-

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

*(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*

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

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

*(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer 13 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."*

29. The relations between the parties are not denied. As far as the merits of the allegations as mentioned in the complaint is concerned, the response from the parties have to be filed, so that the same is considered by the Chief Judicial Magistrate. The provisions of section 482 Cr. P.C cannot be allowed to short-circuit the proceedings under the provisions of D.V. Act. Further, there is a rich precedent in the issue that the power of quashing a criminal proceeding under section 482 Cr.P.C 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 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. The allegation of not providing protection, residence and compensation to upkeep the complainant and her minor child is certainly a matter to be looked into by the trial Court and for this, parties have to prove their respective case. This would, thus, not qualify as satisfaction of any of the guidelines laid down at para 102 of the Bhajan Lal's case (Supra). It is also not one of the rarest of rare cases for this Court to take notice and invoke the powers under Section 482 Cr.P.C. The applicant on this front too, cannot convince this Court to decide in her favour.

30. The judgments relied by the learned Counsel for the applicant is distinguishable in the facts and circumstances of the case and the same would not come to her rescue.

**E. <u>Conclusion</u>**

31. Keeping in mind the totality of the facts and circumstances and the aforesaid decisions of the Hon'ble Supreme Court as well as the Hon'ble Madras High Court, this Court is of the considered view that the application made under Section 482 of Cr.P.C. challenging the proceeding under Section 12 of the D.V. Act is not maintainable.

32. However, liberty is granted to the applicant to take recourse as provided under law, if so desires.

33. The present application is, accordingly, **dismissed**.

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**(2024) 7 ILRA 537**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 08.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Application U/S 482. No. 9341 of 2024

**Inder @ Lala ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Ashutosh Kumar Shukla

**Counsel for the Opposite Parties:**
G.A.

**Criminal Law - Criminal Procedure Code, 1973 - Sections 156(3), 177, 178, 182(2), 200, 202, 204 & 482 - Indian Penal Code,**

**1860 - Sections 494, 406 & 506: -** Applications u/s 482 – criminal complainant – lodged by the wife of applicant (O.P. No. 2) against her husband – she alleged that applicant (husband) got married with another lady during her lifetime without any divorce and when confronted, he committed an offence u/s 506 IPC – St.ments recorded - summoning order issued – against present application filed – plea taken that complaint was filed within jurisdiction of District Ghaziabad, whereas they are residing at Delhi therefore court at district Ghaziabad has no jurisdiction in view of u/s 177 & 178 Cr.P.C. - court finds that, - complainant was residing at the given address at Ghaziabad District for last many years after being left by the applicant, - and application moved by the applicant u/section 13 of Hindu Marriage Act, wherein address of the complainant is shown at Ghaziabad district – which reflect that complainant is permanently residing at the given address at Ghaziabad district – hence, court within its local jurisdiction, in present case i.e. in district Ghaziabad – hence, objection in regards to jurisdiction has not merit – and there are sufficient ground to proceed against the applicant – accordingly, present application is rejected. (Para – 9, 10, 11)

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

**List of Cases cited:**

Lalan kumar Singh Vs St. of Mah. (2022 SCC online SC 1383).

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Sri Ashutosh Kumar Shukla, learned counsel for applicant and Sri D.P.S. Chauhan, learned A.G.A. for State.

2. By means of this application, applicant has prayed for quashing of a summoning order dated 3.3.2021 passed in complaint case no.278 of 2019 (Sudesh Vs. Inder @ Lala) under Sections 494, 406 and 506 of I.P.C., P.S. Tronica City, District-Ghaziabad, pending before Court of Civil Judge (J.D.) Fast Tact Court/Judicial Magistrate, Ghaziabad, District-Ghaziabad as well as quashing of consequential proceedings.

3. Applicant before this Court is husband of O.P. No.2 (complainant). The complainant has lodged a criminal complaint that applicant has committed an offence under Section 494 I.P.C. that he got married during lifetime of complainant, without any divorce with her and when he was confronted, he committed an offence under Section 506 I.P.C.

4. Learned Trial Court after considering the statements recorded under Sections 200 and 202 Cr.P.C. passed an order under Section 204 Cr.P.C. whereby applicant was summoned for aforesaid offence.

5. Learned counsel appearing on behalf of applicant submits that the complaint was filed within jurisdiction of District Ghaziabad, whereas after marriage, complainant was residing along with applicant at Delhi, as such in view of Sections 177 and 178 Cr.P.C., Court at Distict Ghaziabad has no jurisdiction. Sections 177 and 178 Cr.P.C. are reproduced hereinafter :

*“**177. Ordinary place of inquiry and trial-** Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.*

***Section 178 – Place of inquiry or trial-***

*(a)When it is uncertain in which of several local areas an offence was committed, or*

*(b) where an offence is committed partly in one local area and partly in another, or*

*(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or*

*(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.*

6. Above submissions are opposed by Sri D.P.S. Chauhan, learned A.G.A. that complainant is a resident of District-Ghaziabad and she after being deserted was staying there only as such in view of Sections 177 and 178 Cr.P.C. as referred above, Court at District-Ghaziabad has jurisdiction to summon the applicant.

7. In order to consider rival submissions, I have carefully perused other relevant Sections i.e. Section 182 (2) Cr.P.C. also which states as under:

***"182. Offence committed by letters, etc.-(1) xxx***

*(2) Any offence punishable under section 494 or section 495 of the Indian Penal Code (45 of 1860) may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the offender last resided with his or her spouse by the first marriage, or the wife by the first marriage has taken up permanent residence after the commission of the offence."*

8. I have carefully perused, material available along with present application that complainant was residing at the given address at District-Ghaziabad for last many years after being left by the applicant.

9. The Court also takes note of an application filed by applicant under provisions of Section 13 of Hindu Marriage Act for dissolution of marriage where, address of complainant is shown at District--Ghaziabad. Similarly in a settlement agreement also, same address has been mentioned, as such it is evident that complainant is permanently residing at the given address at District Ghaziabad, therefore, in view of Section 182 (2) of Cr.P.C. as referred above, Court within its local jurisdiction, wife by first marriage has taken up permanent residence after the commission of offence punishable under Sections 494 or 495 I.P.C, has jurisdiction, i.e. in present case in District-Ghaziabad, therefore, objection of learned counsel for applicant in regard to jurisdiction has no merit.

10. Court also takes note of contents of statement of complainant recorded under Section 200 and statement of witnesses recorded under Section 202 Cr.P.C. as well as order dated 3.3.2021 whereby applicant has been summoned for an offence under Sections 491, 406 and 506 I.P.C. and is of the considered opinion that there are sufficient ground to proceed against applicant and in this regard Court takes note of judgment passed by Supreme Court in ***Lalankumar Singh and others vs. State of Maharashtra, 2022 SCC OnLine SC 1383.***

11. Accordingly, this application has no force and is hereby rejected.

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**(2024) 7 ILRA 539**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 11.07.2024**

**BEFORE**

**THE HON'BLE SHIV SHANKER PRASAD, J.**

Application U/S 482. No. 10718 of 2024

**Smt. Kanchan Rawat & Anr. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Azad Khan

**Counsel for the Opposite Parties:**
G.A.

**Criminal Law - Criminal Procedure Code, 1973 - Sections 125, 125(3), 126, 127, 128 & 482 – Constitution of Indian,1950 - Article 32, 226 & 227-** Application U/s 482 Cr.P.C. – with a prayer to direct the Family court below to pass appropriate order in a Case filed u/s 125 Cr.P.C. as well as direction to pay the interim maintenance allowance – preliminary objection – regarding maintainability of Application – court finds that, the purpose of section 125 of Cr.P.C is to achieve a social purpose in society – proceeding under section 125 Cr.P.C. is quasi Civil and quasi Criminal – section 128 Cr.P.C provides for enforcement of order of maintenance – against any quasi civil or quasi criminal order no writ petition under Article 226 of the COI or any application under section 482 Cr.P.C respectively will be maintainable – consequently, present application is dismissed – however, applicant to approach the proper remedy available under section 128 of the Cr.P.C before the same court. (Para – 20, 23, 25, 29, 30)

**Application u/s 482 Dismissed**. (E-11)

**List of Cases cited:**

Radhey Shyam & anr. Vs Chhabi Nath & ors.(2015-5-SCC-423),

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

1. Heard Mr. Azad Khan, the learned counsel for the applicant and the learned A.G.A. for the State as well as perused the record.

2. **Prayer made in this application**

This application under Section 482 Cr.P.C. has been filed with a prayer to direct the court of Principal Judge, Family Court, Ghazipur to pass appropriate order in Misc. Case No. 57 of 2015 (Kanchan Rawat Vs. Braijlal Rawat) under Section 125 Cr.P.C., Police Station-Kotwali Ghazipur, District-Ghazipur and also for a direction upon the above court to pay the interim maintenance allowance of Rs. 80,000/- in favour of the applicants in the interest of justice.

3. **Matrix of the Case**

The marriage of applicant no. 1, namely, Kanchan Rawat was solemnized with the opposite party no. 2, namely, Brijlal Rawat in accordance with Hindu Rites and Rituals on 01.12.2009. In the said marriage, father of the applicant no. 1 had expend 7 to 8 Lakhs rupees. After marriage, both the couple used to live together with love, peace and pleaser as husband and wife. When such additional demand of dowry was not fulfilled, the in-laws of applicant no.1 used to torture and harass her and the relationship between husband and wife became strained and incompatible and resultantly, she left the house of her in-laws and started living at her parental house during which she delivered a male child, namely, Gaurav Kumar on 2nd November, 2011. Applicant no.1 and her parents made best effort to convince the in-laws of applicant no.1 to maintain her and her son but they could not do the same. Resultantly, she filed a case under Section 125 Cr.P.C. before the Court of the Principal Judge, Family Court, Ghazipur, which was registered as Misc. Case No. 57 of 2015 (Kanchan Rawat Vs. Brijlal) for grant of maintenance. The applicant no. 1 had also moved an interim maintenance application bearing no. 15B before the court of Principal Judge, Family Court, Ghazipur, which was allowed and a direction has been issued to opposite party no. 2 to pay Rs. 4,000/- per month to the

applicants towards maintenance allowance, during the pendency of the case vide order dated 27.06.2017. In compliance of the interim order passed by the Family Court dated 27th June, 2017, opposite party no.2 paid the interim maintenance allowance to the applicants regularly till December, 2021 but in the year 2022, he stopped the payment of such interim maintenance allowance, as directed by the Family Court. Whereafter the applicants made an application before the Principal Judge, Family Court for payment of interim maintenance allowance. On such application being made, opposite party no.2, after laps of one and half year, had given Rs. 4,000/- to the applicants in the court but arrears of such interim maintenance allowance to the tune of Rs. 80,000/- as on 17th December, 2023 has not been paid by opposite party no.2 to the applicants. As a result whereof, the Principal Judge, Family Court directed opposite party no.2 to give Rs. 10,000/- per month to the applicants as interim maintenance allowance towards monthly interim maintenance allowance of Rs. 4,000/- and arrears of interim maintenance allowance of Rs. 80,000/-. However, thereafter opposite party no.2 neither gave arrears of interim maintenance allowance of Rs. 80,000/- nor paid Rs. 10,000/- per month towards maintenance allowance to the applicants.

4. Now the applicants have approached this Court by means of instant application under Section 482 Cr.P.C. to pass appropriate orders in Misc. Case No. 57 of 2015 (Kanchan Rawat Vs. Braijlal Rawat) under Section 125 Cr.P.C., Police Station-Kotwali Ghazipur, District-Ghazipur as also to direct opposite party no.2 to pay the arrears of interim maintenance allowance to the tune of Rs. 80,000/- to the applicants.

5. Before considering the present application on merits by the Court, learned A.G.A. has raised preliminary objection to the maintainability of the present application under Section 482 Cr.P.C. by submitting that basically the applicants by means of the present application seek for execution of the interim order granted by the Principal Judge, Family Court awarding interim maintenance allowance in a case instituted under Section 125 Cr.P.C. but this Court in exercise of powers under Section 482 Cr.P.C. cannot pass such order for execution of an order passed under Section 125 Cr.P.C which is a self-code and a judicial order. He, therefore, submits that the present application is not maintainable and liable to be dismissed. The proper remedy available to the applicants was file an application under Section 128 Cr.P.C. for execution of an order passed under Section 125 Cr.P.C.

6. In reply, the learned counsel for the applicants submits that since the order passed by the Principal Judge, Family Court awarding interim maintenance allowance in favour of the applicants in a case under Section 125 Cr.P.C. is an interim order, therefore, no execution application can be filed under Section 128 Cr.P.C. As such, the present application under Section 482 Cr.P.C. is maintainable.

7. I have considered the submissions advanced on behalf of the learned counsel for the parties and have gone through the records of the present application.

8. The issue which crops up before this Court is as to whether the present application under Section 482 Cr.P.C. basically filed for execution of an order passed under Section 125 Cr.P.C. is maintainable or not?

9. Before coming to the above issue, it would worthwhile to reproduce Section 125 Cr.P.C. For ready reference, the same is quoted hereunder:

***"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 [* * *]*

*[The words "not exceeding five hundred rupees in the whole" omitted by Act 50 of 2001, w.e.f. 24.9.2001.], as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct :*

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

*Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person. [Inserted by Act 50 of 2001, Section 2 (w.e.f. 24-9-2001).]*

*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 re-married.*

*(2) [Any such allowance for the maintenance or interim 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 interim maintenance and expenses of proceeding, as the case may be.] [Substituted by Act 50 of 2001, Section 2 (w.e.f. 24-9-2001).]*

*(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,] [Substituted by Act 50 of 2001, Section 2 for "allowance" (w.e.f. 24-9-*

*2001).] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made : Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.*

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

*(4) No wife shall be entitled to receive an [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] [Substituted by Act 50 of 2001, Section 2 for "allowance" (w.e.f. 24-9-2001).] 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.*

*in sub-section (1), for the words "five hundred rupees", substitute, "five thousand rupees";*

*Vide U.P. Act No. 36 of 2000 following has been amended in Section 125 Cr.P.C. in the State of Uttar Pradesh:*

*(a) in sub-section (1), for the words "five hundred rupees", substitute, "five thousand rupees";*

*(b) after sub-section (5), insert the following sub-section, namely :-*

*"(6) Where in a proceeding under this section it appears to the Magistrate that the person claiming maintenance is in need of immediate relief for his support and the necessary expenses of the proceeding, the Magistrate may, on his application, order the person against whom the maintenance is claimed, to pay to the person claiming the maintenance, during the pendency of the proceeding such monthly allowance not exceeding five thousand rupees and such expenses of the proceeding as the Magistrate consider reasonable and such order shall be enforceable as an order of maintenance."*

10. Section 125 of the Criminal Procedure Code provides for the maintenance to the wife, children, and parents. The court after the party has invoked Section 125 of the Code, may order the respondent, that is the husband, to maintain the wife who is unable to maintain herself by providing monthly maintenance to her. However, there is an exception in the provision. For the purpose of providing maintenance to the wife, the husband has to be sufficient enough to support his wife after the separation and at the same time, the wife must not be living in adultery or living separately with her husband without any sufficient reasons. Even if they are living separately in mutual consent, then also the wife will not be entitled to any sort of maintenance. Whenever the judgment is passed in favour of the wife, the court has to make sure that the husband has sufficient

means to provide maintenance to the wife. The court also needs to make sure that the wife after the separation does not have enough money to maintain herself.

11. **The aim and object of this provision**

Under Section 125 of the code, the provision is available for interim maintenance which means that during the pendency of an application in the court of law, the order may be passed by the Magistrate directing the husband to pay the monthly allowances to the wife. However, the Magistrate has the right to alter the amount of the maintenance to be paid, if he thinks that there is a change in the circumstances of the individual who has been paying or receiving the monthly allowances. All such applications of maintenance can be filed in any district where the person who is liable to pay resides or where the wife resides or where the person last resided with the wife or with the mother or with the illegitimate child. The purpose of Section 125 of CrPC is to achieve a social purpose in society.

The purpose of Section 125 CrPC was explained in the case of **K. Vimal Vs. K. Veeraswamy** reported in *1991 SCC (2) 375* where it was held that Section 125 of the Code had been introduced for achieving a social purpose. The aim of this section is the welfare of the wife by providing her with the required shelter, food after the separation from the husband. It was held in this case that if the wife has lived like a wife and the husband had treated her like a wife for all the years before their separation, then, the wife cannot be denied maintenance by her husband.

Grants of maintenance are a metric of social justice. A man's essential obligation is to provide for his wife, kids, parents, close relatives, etc, while they are incapable of providing for themselves. Preventing immorality and poverty while improving the economic standing of women and children is the motive behind the concept of maintenance. The Cr.P.C. requirements obligate a person to fulfil the moral duty which he owes the community in regard to his wife, children and parents. The obligation is unquestionably lawful and binding on the person.

All communities in India are subject to the Cr.P.C's. provisions, and therefore are very much secular, safe and all-encompassing in character and apply to all faiths, castes and creeds. Whatever personal law is used to guide and control the respective persons affected, the provisions of Section 125 of the Cr.P.C. are enforceable. However, procedures provided under Section 125 of Cr.P.C. are of a summary nature and apply to everyone regardless of caste, creed, or religion. Maintenance can be sought under the individual personal laws of people of different religions, and processes under such personal laws are civil in nature.

The provision found in Chapter IX of Cr.P.C. seeks to shield the neglected wife, parent and children (minor) from complete ruin and destitution through a straightforward, quick and effective restricted relief. Section 125 of CrPC offers a swift solution to prevent famine and social unrest. It differs from a husband's civil liability. It serves as a straightforward summary procedure. It puts into practice a man's fundamental obligation to support his wife, kids and elderly parents who are self-supporting.

The fundamental tenets of the maintenance stance under Section 125 of the Cr.P.C. is that no wife, young children, or elderly parents should be left without and succumb to complete pressure of wants

in order to be persuaded to resort to crimes, etc. A Magistrate of the First Class may take swift action to avoid poverty under a provision in Section 125 of the Cr.P.C.

12. **Purpose of Section 125 Cr.P.C**

The intent behind Section 125 of the Cr.P.C. is to protect dependents who are unable to support themselves from starvation, misery and vagrancy. It is social justice legislation that was specifically passed to safeguard women, children and elderly parents.

The main goal of Section 125 of the Cr.P.C. of 1973 is to support abandoned and impoverished wives, neglected and abandoned children, and vulnerable, elderly and disabled parents. As a result, this provision promotes social welfare and social service. The Magistrate's authority is primarily preventative in character rather than penal or punitive.

The time-consuming, troublesome, heavy, process of civil law and litigation was sought to be avoided by providing a simple, quick, limited relief. This is because compulsion is (to some extent) imposed upon those persons whose duty it is to support their dependents who are unable to support themselves.

No wife, child, or parent should be abandoned on the scrap heap of society to beg or to lure others to commit crimes against them or to commit crimes themselves. A contract that violates this responsibility and totally waives the right to support one's own wife and young children cannot be regarded as legal.

13. **Features of Section 125 Cr.P.C.**

Previously, while discussing legal terms that have been used in making up Section 125, some of the features that will be discussed below have already been referred to. Readers will therefore now be able to understand the features of the maintenance provision better.

14. **Need for sufficient means for maintenance**

The most important requirement is that a person cannot be ordered to pay maintenance to another person unless they themselves have 'adequate resources to support' the person who has the claim and neglects or refuses to do so. The person asserting that he lacks sufficient means to sustain has the burden of evidence. The fact that he is unemployed does not excuse him from the requirement. In the instance of **Hardev Singh And Anr. vs The State Of Punjab** reported in 1975) 3 SCC 731, the Apex Court held that if a person cannot pay such maintenance allowance because he is a monk, then it is his obligation to cast off the yellow robe and labour. The High Courts have been tougher in their interpretation. The social justice component and the protection of the society's weaker members, namely, women, children, and the elderly, are cited as the causes of this interpretation.

15. **Neglect and refusal to be maintained**

The term 'neglect' fundamentally refers to a disregard of responsibility that may be either unintentional or purposeful and is used to refer to a failure to maintain even when no such demand is made against the maintainer. Whereas, the 'refusal' to maintain occurs when there is a clearly stated purpose to not carry out his responsibility. This intention may be expressed or even suggested by the husband's behaviour. The claimant has the onus of establishing this. The requirement that the wife lives with her husband is initially necessary for her to be able to

claim maintenance, but if the Magistrate finds that she has a valid reason for doing so for instance, if her husband has taken in a new wife and if it is ritually permitted by their personal law, the condition may be removed from her claim.

16. **Quantum of maintenance**

Up until the Amendment Act No. 50 of 2001, the Magistrate was obligated to grant maintenance not to exceed Rs. 500. There isn't a cap on the maximum amount, instead, the Magistrate is free to decide the monthly rate in accordance with the circumstances of the case. The rate can occasionally be changed in accordance with Section 127, but it must be fixed, predictable, and not gradually growing. If both the wife and the child are suing the same individual, it is against the law to pay them both jointly, instead, each has a distinct claim that can be paid separately.

17. **Claimant of maintenance under Section 125 must be unable to maintain himself/herself:**

The incapacity of a woman to support herself is one of the requirements for claiming maintenance. She need not expressly request that she be allowed to care for herself. However, if the woman is healthy, educated, and still unable to support herself, she may still request maintenance, but the amount awarded to her will depend on these circumstances.

18. In Section 126 Cr.P.C., procedures for institution of any case under Section 125 Cr.P.C. have been prescribed, whereas in Section 127 Cr.P.C., alteration in allowance has been provided.

19. For deciding the present issue, it would be worthwhile to reproduce Section 128 Cr.P.C. wherein enforcement or execution of order of maintenance to be passed under Section 125 Cr.P.C., as the case may be, has been provided. For ready reference Section 128 Cr.P.C. reads as follows:

*"128. Enforcement of order of maintenance.--A copy of the order of [maintenance or interim maintenance and expenses of proceedings, 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; and such order may be forced 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]."*

20. Bearing that (provisions above Sections) in mind, let me state that a proceeding under Section 125 Cr.P.C. is quasi civil and quasi criminal. It is civil in nature, since, it decides the civil rights of the parties to claim maintenance. When the order is not obeyed by the person against whom the same has been made, then the Court is empowered to impose a punishment of imprisonment for every breach of the order for a term which may extend to one month or until payment is sooner is made. To that extent, it is criminal in nature. To put it comprehensively, the proceeding is quasi civil and quasi criminal in nature.

21. Where an order is passed directing to pay maintenance, the party in whose favour such an order has been passed has

got two options. The first one is the party can choose to approach the Court under Section 125 (3) Cr.P.C. requesting the Court to punish the defaulter by imposing appropriate imprisonment; the second one is to approach the Court under Section 128 of Cr.P.C.

22. A comparison of Sections 125 (3) and 128 of Cr.P.C. would keep things beyond any doubt that insofar as the proceeding under Section 125 (3) is concerned, the statute has prescribed a period of limitation of one year, whereas in respect of a proceeding under Section 128 of Cr.P.C., there is no limitation provided at all. It follows, therefore, by the terms of the statute, that, for initiating a proceeding for enforcing an order by invoking Section 128 of Cr.P.C., I find no provision providing for limitation as it is provided in respect of proceedings under Section 125(3) of Cr.P.C.

23. Chapter IX of the Code of Criminal Procedure hereinafter referred as the 'Code' in its Section 128 provides for enforcement of order of maintenance, but how was the order to be enforced has not been provided.

24. Section 128 Cr.P.C. only provides for furnishing of copy of the order. It also provides that such order could be enforced by any Magistrate at any place where the person against whom it was made may be, which only means that any Magistrate of the place where the person may be may enforce the order on being satisfied, about the identity of the parties and also that the dues had not been paid. As said before how was the due to be recovered i.e. the procedure was not provided.

25. I have no room to doubt that the High Court Article 226 of the Constitution of India in civil matters and under Section 482 Cr.P.C. in criminal matters has extraordinary power to examine the correctness or otherwise of any orders passed by civil courts, as the case may be. However, against any quasi judicial civil order or any quasi judicial criminal order, no writ petition under Article 226 of the Constitution of India or any application under Section 482 Cr.P.C. respectively will be maintainable. Against such order, only revision or petition under Article 227 of the Constitution of India will be maintainable.

26. The Hon'ble Apex Court in the case of **Radhey Shyam & Another Vs. Chhabi Nath & Others** reported in *(2015) 5 SCC 423* in paragraph no.18 has opined that challenge to judicial orders could lie by way of an appeal or revision or under Article 227 of the Constitution of India and not by way of a writ under Article 226 and 32 of the Constitution of India.

27. I may further refer to paragraph nos. 11 and 25 of the above judgement of the Hon'ble Apex Court, wherein it has been clarified that orders of the judicial courts like civil courts stand on different footing from the quasi-judicial orders of the authorities or tribunals or courts other than judicial/civil courts. In paragraph no.25, the Hon'ble Apex Court has further opined that the expression "inferior court" is not referable to the judicial courts.

28. For ready reference paragraph 25 of the above judgment reads as follows:

*"It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our constitutional scheme. There is no parallel system of King's Court in India and of all other courts having limited jurisdiction subject to supervision*

*of King's Court. Courts are set up under the Constitution or the laws. All courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of Tribunals or authorities or courts other than judicial courts. There are no precedents in India for High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to judicial courts, as rightly observed in the referring order in paras 26 and 27 quoted above."*

29. From bare perusal of the provisions of Sections 125 to 128 Cr.P.C. as also the judgment of the Hon'ble Apex Court in the case of **Radhey Shyam (Supra),** I am of the view that since the order passed by the Principal Judge, Family Court, granting interim maintenance to the applicants in a proceeding under Section 125 Cr.P.C. is a quasi judicial civil and criminal order, no application under Section 482 Cr.P.C. either for quashing the same or for enforcing the same, is maintainable.

30. Consequently, the present application filed by the applicants for enforcing the order passed by the Family Court granting interim maintenance allowance to them is **dismissed**. The proper remedy available to the applicants to approach the Family Court under Section 128 Cr.P.C. before the same court.

31. This judgment is also being written in Hindi as well as in Sanskrit languages and the copies of the same shall also be attached along with this judgment.

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**(2024) 7 ILRA 548**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 09.07.2024**

**BEFORE**

**THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.**

Application U/S 482. No. 11672 of 2024

**M/s Parthas Textiles & Anr. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Nikhil Mishra

**Counsel for the Opposite Parties:**
G.A.

**(A) Criminal Law - Indian Penal Code, 1860 - Section 420 – Cheating and dishonestly inducing delivery of property, The Code of criminal procedure, 1973 – Section 63 – Service of summons on corporate bodies and societies, Section 305 – Procedure When corporation or registered society is an accused - A company arraigned as accused in a complaint is served summons through its Principal Officer or Local Manager (Section 63 Cr.P.C.) - Company can then appoint a representative to appear in court, who will be examined on its behalf, the proceeding before him would be deemed to be the**

**proceeding in the presence of the accused (Section 305 Cr.P.C.) - Representative need not seek bail on behalf of company as the company can change its representative at any stage with court permission. (Para -22)**

**(B) The Negotiable instruments Act, 1981 - Section 138 – Dishonour of cheque, Section 141 – Offences by company - Under Section 142 N.I. Act or in Section 190 (1)(a) Cr.P.C. the Court takes cognizance against any offence, not the offender. (Para - 9)**

**(C) The Negotiable instruments Act, 1981 - Conjoint reading of Section 141 N.I. Act, Section 63 of Cr.P.C. and Section 305 Cr.P.C. - whenever a company is accused under Section 138 N.I. Act then summons has to be issued in the name of the company and service of the same can be effected by serving it on the Principal Officer or Local Manager of the Company. (Para -15)**

**(D) Bharatiya Nagrik Suraksha Sanhita, 2023 - Section 65 (Section 63 of Cr.P.C.) & Section 529 (Section 305 of Cr.P.C.) - BNSS repealed Section 63 of the Cr.P.C. regarding service of summons upon companies, corporations, and firms. However, Section 529 of the BNSS allows proceedings, trials, or applications pending before the commencement date to continue under the Cr.P.C. provision. Therefore, the court will proceed according to the procedure of Cr.P.C. under Sections 63 and 305 Cr.P.C.(Para - 26)**

Firm was arrayed as an accused - summons was issued to its partner (applicant no.2) personally - not a proper service for the firm - because partner was not impleaded as accused in the impugned complaint - hence present application. **(Para - 24)**

**HELD: -** Petition disposed of without hearing opposing party due to technical nature of issue. Summoning order as well as non-bailable warrant quashed. Court below is directed to pass a fresh summoning order. **(Para - 24)**

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

**List of Cases cited:**

1. Amarnath Prasad & ors. Vs St. of Bihar & anr., 1976 Cr.L.J. 1778 (Pat.)

2. Anil D. Ambani & anr. Vs St. of Bihar & anr., 2006(4) Pat LJR 571

3. Standard Chartered Bank & ors. Vs Directorate of Enforcement & ors., (2005) 4 SCC 530

4. Iridium India Telecom Vs Motorola Incorporated & ors., 2011 (1) SCC 74

5. Ram Narayan Sharma Vs St. of Assam, 2017 SCC Online Gau 1004

6. Puneet Gupta Vs St., 2013 SCC OnLine Del 208

7. Mannam Venkata Krishna Rao Vs St. of A.P. represented by Public

8. Prosecutor & ors., 2022 SCC OnLine AP 3027

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

1. Heard learned counsel for the applicants and Sri Rajeev Kumar Singh, learned AGA for the State.

2. Present application under Section 482 Cr.P.C. has been filed for quashing the summoning order dated 27.07.2023 as well as non-bailable warrant dated 08.02.2024, including the entire criminal proceedings of Case No.563 of 2023, under Section 138 Negotiable Instrument Act (hereinafter will be referred to N.I. Act) and Section 420 IPC in Police Station- Luxa, District- Varanasi pending in the Additional Court, Varanasi.

3. Contention of learned counsel for the applicants is that as per the complaint

itself, the cheque was issued on behalf of firm M/s Partha Textiles and the applicant No.2 is one of the partners of that firm but only the firm was impleaded as accused in the complaint. He further contended that in the complaint all the allegations were made against applicant no.1 (firm) itself, and no allegation was made against the present applicant, but the learned Magistrate issued a summons to the present applicant personally instead of issuing summons to the accused firm. It is further submitted that once the applicant no.2 was not impleaded as accused to vicariously liable him as a partner of the firm (applicant no.1), then issuance of summons against him in a personal capacity is absolutely erroneous.

4. In support of his contention, learned counsel for the applicants has relied upon the judgement of Patna High Court in **Amarnath Prasad and others vs State of Bihar and another; 1976 Cr.L.J. 1778 (Pat.),** in which the Single Judge of Patna High Court observed that if the firm is impleaded as a party, then the notice ought to be issued in the name of a firm, not in the name of a partner unless they are specifically made reliable. In another judgement of Patna High Court in **Anil D. Ambani and another vs State of Bihar and another; 2006(4) Pat LJR 571,** Single Judge of Patna High Court observed that when the prosecution is against a corporate body or juristic person, then summons ought to be issued to a juristic person, not in the name of the Director or Partner.

5. Learned counsel for the applicants also submitted that prosecution of a juristic person is not barred. It can be prosecuted, but only a fine can be imposed instead of punishing imprisonment. In support of his contention, he has also relied upon the judgement of Apex Court in the case of **Standard Chartered Bank and others vs Directorate of Enforcement and others (2005) 4 SCC 530.** He relied on paragraphs nos. 29, 30, 31, and 32, which are being quoted hereinbelow;

*29. The contention of the appellants is that when an offence is punishable with imprisonment and fine, the Court is not left with any discretion to impose any one of them and consequently the company being a juristic person cannot be prosecuted for the offence for which custodial sentence is the mandatory punishment. If the custodial sentence is the only punishment prescribed for the offence, this plea is acceptable, but when the custodial sentence and fine are the prescribed mode of punishment, the Court can impose the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out. It is an acceptable legal maxim that law does not compel a man to do that which cannot possibly be performed (impotentia excusat legem). This principle can be found in Bennion Statutory Interpretation, 4th Edn. at p. 969. All civilized systems of law import the principle that lex non cogit ad impossibilia; As Patterson, J. said "the law compels no impossibility". Bennion discussing about legal impossibility at states that: If an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility element." This Court applied the doctrine of impossibility of performance (lex non cogit ad impossibilia) in numerous cases (State of Rajasthan v. Shamsher Singh [1985 Supp SCC 416 : 1985 SCC (Cri) 421] and Special Reference No. 1 of 2002, In re [(2002) 8 SCC 237] ).*

*30. As the company cannot be sentenced to imprisonment, the Court has to resort to punishment of imposition of fine*

*which is also a prescribed punishment. As per the scheme of various enactments and also the Penal Code, 1860, mandatory custodial sentence is prescribed for graver offences. If the appellants plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences. The offences mentioned under Section 56(1) of the FERA Act, 1973, namely, those under Section 13; clause (a) of sub-section (1) of Section 18; Section 18-A; clause (a) of sub-section (1) of Section 19; sub-section (2) of Section 44, for which the minimum sentence of six months imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the country. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than Rs one lakh, and that they could be prosecuted only when the offences involve an amount or value less than Rs. one lakh.*

*31. As the company cannot be sentenced to imprisonment, the Court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the Court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the section so far as the juristic person is concerned. Of course, the Court cannot exercise the same discretion as regards a natural person. Then the Court would not be passing the sentence in accordance with law. As regards company, the Court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.*

*32. We hold that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment (sic and fine). We overrule the views expressed by the majority in Velliappa Textiles [(2003) 11 SCC 405 : 2004 SCC (Cri) 1214] on this point and answer the reference accordingly. Various other contentions have been urged in all appeals, including this appeal, they be posted for hearing before an appropriate Bench."*

6. Learned AGA submitted that as per Section 63 Cr.P.C. when the summons has been served on the Principal or Chief Executive Officer of the company or corporate body then it will be deemed sufficient service. Therefore, there is no

illegality in the impugned summoning order.

7. After hearing the submissions of learned counsel for the applicants as well as learned AGA, the sole question arises, if a cheque is issued on behalf of a registered firm, and on bouncing, the same, it failed to pay the cheque amount despite receiving the demand notice, then in the complaint filed under Section 138 N.I. Act against the firm, whether a summons is required to be issued to the firm or its partner.

8. From the perusal of the complaint, it is clear that only the firm namely, M/S Partha Textiles has been arraigned as accused through its partner Praveen Raj Rajendran and demand notice after bouncing the cheque was also sent to firm M/s Partha Textiles (applicant no.1). On bouncing the cheque issued on behalf of a registered firm, primary liability is of the firm, and its partner can also be liable vicarious, but in the present case, the partner (applicant no.2) was not implicated as accused along with the firm.

9. Under Section 142 N.I. Act or in Section 190 (1)(a) Cr.P.C. the Court takes cognizance against any offence, not the offender. But the summons is issued against the offender by the Court to inform him/it about the charges which he or it requires to be replied. The summons format has been given in Form 1 of the second schedule.

10. As per Section 141 of N.I. Act, if the offence under Section 138 N.I. Act is committed by a company/firm; then it shall be prosecuted, but Director/ Partner can also be vicariously liable for punishment along with the company if they are responsible for the conduct of the business of the company or offence has been committed with the consent or connivance of any Director/ Partner or other Officers of the company. Section 141 N.I. Act is being quoted hereinbelow;

*"141. Offences by companies.—(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*

*Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence. [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this chapter.*

*(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company, and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other Officer of the company, such Director, manager, secretary or other Officer shall also be deemed to be guilty of that offence and*

*shall be liable to be proceeded against and punished accordingly.*

*Explanation.—For the purposes of this section, — (a) 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.*

11. It is clear from Section 138 N.I. Act that if the offence is committed by the company/firm, it shall be prosecuted and punished accordingly. But the company, being a juristic person, cannot be awarded punishment of sentence but can be punished only with a fine, as observed in the case of Standard Chartered Bank and others (supra).

12. Chapter VI of the Cr.P.C. provides the process for compelling the appearance of the accused. As per Section 63 Cr.P.C, if the summons is issued to a corporate body or a registered society, then its service may be effected by serving the summons on its Secretary, Local Manager or other Principal Officer of the Corporation or by a letter through a registered post addressed to the Chief Officer of the Corporation. Section 63 of Cr.P.C. is being quoted hereinbelow;

*"63. Service of summons on corporate bodies and societies- Service of a summons on a corporation may be effected by serving it on the secretary, local manager or other principal Officer of the corporation, or by letter sent by registered post, addressed to the Chief Officer of the corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in the ordinary course of post. Explanation.—In this section, means an incorporated company or other body corporate and includes a society registered under the Societies Registration Act, 1860."*

13. From the perusal of Section 63 of Cr.P.C., it is clear that if the offence was committed by a company/firm, then a summons can be issued to the company or firm, but service of summons may be effected through its Local Manager or other Principal Officer of the company. Therefore, the service of summons on corporate bodies may be made at its registered office or by serving its Local Manager or other Principal Officer. Therefore, the issuance of summons to the body corporate is necessary, though service may be effected by any mode as mentioned in Section 63 of Cr.P.C.

14. When the summons is served on the corporate body, then Section 305 Cr.P.C. provides further procedure. Section 305 (2) of Cr.P.C. provides that the accused corporation may appoint a representative for inquiry or trial in a criminal proceeding against the body corporate. When the corporate body/society appoints a representative, then all the proceedings will be done in the presence of representative and representative will also be examined on behalf of the accused company. For ready reference, Section 305 Cr.P.C. is quoted hereinunder;

*305. Procedure when corporation or registered society is an accused.—(1) In this section, corporation means an incorporated company or other body corporate, and includes a society registered under the Societies registration Act, 1860 (21 of 1860).*

*(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of*

*the inquiry or trial, and such appointment need not be under the seal of the corporation.*

*(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.*

*(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.*

*(5) Where a statement in writing purporting to be signed by the Managing Director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.*

*(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.*

15. **Therefore, from the conjoint reading of Section 141 N.I. Act, Section 63 of Cr.P.C. and Section 305 Cr.P.C., it is explicit that whenever a company is accused under Section 138 N.I. Act then summons has to be issued in the name of the company and service of the same can be effected by serving it on the Principal Officer or Local Manager of the Company.**

16. Hon'ble Apex Court in the case of **Iridium India Telecom vs Motorola Incorporated and others; 2011 (1) SCC 74** observed that the corporation is virtually in the same position as any individual, and criminal liability of the corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affair. Paragraph nos. 61, 63 and 66 of the **Iridium India Telecom (supra)** case are being quoted hereinbelow;

*"61. A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in Lennard Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915 AC 705 : (1914-15) All ER Rep 280 (HL)] (AC at pp. 713, 714). So also, in criminal law, in cases where the law requires a guilty mind as a condition of a criminal*

*offence, the guilty mind of the directors or the managers will render the company themselves guilty.*

*63. From the above, it becomes evident that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of the company.*

*66. These observations leave no manner of doubt that a company/corporation cannot escape liability for a criminal offence merely because the punishment prescribed is that of imprisonment and fine. We are of the considered opinion that in view of the aforesaid judgment of this Court, the conclusion reached by the High Court that the respondent could not have the necessary mens rea is clearly erroneous."*

17. Guwahati High Court in the case of **Ram Narayan Sharma vs State of Assam; 2017 SCC Online Gau 1004** has also considered the issue of process against the corporate body and observed that in a criminal case, the Court can issue process against corporate body in the manner as provided under Section 63 Cr.P.C. Paragraph 13 of the **Ram Naresh Sharma (supra)** case is quoted as under;

*"13. It is a settled law, as on date, that a corporation can be prosecuted also for crimes requiring mens rea. In the case of Iridium India Telecom Ltd. v. Motorola Inc., (2011) 1 SCC 74, the Hon'ble Supreme Court has held that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences, including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The Hon'ble Supreme Court further held that mens rea is attributed to corporations on the principle of the alter ego company."*

18. Delhi High Court in the case of **Puneet Gupta vs State; 2013 SCC OnLine Del 208** again considered the issue of process against the corporate body and observed that the summons to the company can be issued through its Principal Officer, and if there is nobody to represent the company, then the Director could not be summoned to appear on behalf of the company itself. Paragraph 10 of the **Puneet Gupta (supra)** case is quoted as under;

*"10. Thus, it would be seen that a company can be represented through a representative appointed for this purpose. Sub-section (3) says that where a representative of a company appears, any requirement of this Code that anything shall be done in the presence of the accused, shall be construed as a*

*requirement that, that thing shall be done in presence of the representative. Sub-section(4) says that if the representative of the corporation does not appear, the requirement as referred in sub-section (3) shall not apply. Thus, simply because there was nobody to represent the company, the directors could not have been summoned to appear as accused. The right course to be adopted was to issue summons to the company through its principal Officer and it is for the company to decide as to through whom it is to be represented. Thus, simply on the ground that the company was not being represented, its 10 of 14 directors who are the Petitioners herein could not have been summoned to face prosecution. Moreover, Section 20A of the Act could not have been used by the learned MM to issue the summons to the two directors for the reason that it is only a manufacturer, distributor or a dealer of the sampled food article who has not been prosecuted earlier and where it transpires during the trial that the said manufacturer, distributor or dealer has not been prosecuted that the Court may take cognizance against him as if the prosecution had been instituted against him.*

19. The Andhra Pradesh High Court in the case of **Mannam Venkata Krishna Rao vs State of A.P. represented by Public Prosecutor and others; 2022 SCC OnLine AP 3027** again considered the issue and observed that Section 63 permits the issuance of summons to a company through its Principal Officer, then, after receiving a summons, it is for the company to appoint any representative to appear on behalf of the company. Para no. 7 and 8 of the **Mannam Venkata Krishna Rao (supra)** case are being quoted hereinunder;

*"7. The above provision permits service of summons on a company by serving the said summons on any of the principal officers of the company mentioned in the Section 63. However, the manner in which the company is to be represented before a court, after service of summons, is contained in section 305 of the criminal procedure code, which reads as follows:*

*305. Procedure when corporation or registered society is an accused. (1) In this section, corporation means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).*

*(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.*

*(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.*

*(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.*

*(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the*

*corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for this section is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.*

*(6) If a question arises as to whether any person appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.*

*8. A reading of the above provision would make it clear that, after receipt of the notice, it would be open to the company to decide whether the person named in the notice would continue to represent the company or not. It would also be open to the person named as the company's representative to decline to represent the company. In both situations, applications may be made before the trial Court under Section 305 Cr. P.C., to remove the name of the person who is arrayed as the accused company's representative. This view is fortified by the judgment of the Hon'ble High Court at Bombay, dated 14.01.2020, in Criminal Writ Petition No. 4942 of 2019, in the case of Sanjeev S. Malhotra v. the State of Maharashtra."*

20. It is also relevant to mention here that the corresponding provision to Section 63 of Cr.P.C. in Bhartiya Nagarik Suraksha Sanhita, 2023 (in short ' the BNSS') is Section 65. Section 65 of the BNSS also prescribes that summons of a company or corporation may be served through the Director apart from the Manager, Secretary and other Officers of the company. In Section 63 Cr.P.C. word "Director" was missing. Similarly, Section 65 of the BNSS also provides if the letter containing the summons for the company is sent through the registered post addressed to the Director, Manager or other Officer of the company or corporation in India that will also be deemed to be served but in Section 63 of Cr.P.C. summons sent through a letter by registered post addressed to Chief Officer of the Corporation in India was deemed to be served. Therefore, in place of the Officer of the Corporation in India as mentioned in Section 63 Cr.P.C., Director, Manager, Secretary or other Officer of the company or corporation in India has been replaced by Section 65 of the BNSS. Apart from this, in Section 63 of Cr.P.C. only company or other corporate body, including registered society, was mentioned, but in the corresponding Section of the BNSS, the firm or other associations of individuals are also mentioned. Section 65 of the BNSS is being quoted as under;

*"65(1) Service of summons on corporate bodies, firms, and socialise.- (1) Service of a summons on a company or corporation may be effected by serving it on the Director, Manager, Secretary or other Officer of the company or corporation, or by letter sent by registered post addressed to the Director, Manager, Secretary or other Officer of the company or corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in the ordinary course of post. Explanation.—In this section, "company" means a body corporate and "corporation" means an incorporated company or other body corporate registered under the Companies Act, 2013 or a society registered under the Societies Registration Act, 1860.*

*(2) Service of a summons on a firm or other association of individuals may be effected by serving it on any partner of such firm or association, or by*

*letter sent by registered post addressed to such partner, in which case the service shall be deemed to have been effected when the letter would arrive in the ordinary course of post."*

21. From the perusal of above Section 65 of the BNSS, it is clear that service of summons upon a company, corporation registered society, firm or other association of other individuals may be effected by serving on Director, Manager, Secretary or other Officer of the company or corporation in India or partner of the firm or association.

22. **From the above analysis, it is clear that if a company is arraigned as accused in a complaint, then summons ought to be issued to the company through its Principal Officer or Local Manager as mentioned in Section 63 Cr.P.C and after service of summons upon the company, as per Section 63 Cr.P.C., the company can appoint any of his representatives as per Section 305 Cr.P.C. and when the representative of the company appears before the court, the proceeding before him would be deemed to be the proceeding in the presence of the accused and representative will be examined on behalf of the company. Representative of the company is not required to seek bail on behalf of the company as the company can change its representative at any stage of proceeding with the permission of the Court concerned.**

23. Service of summons upon the company can be made as per the mode provided under Section 144 N.I. Act, which provides that service of summons can be made on accused by speed post or courier service approved by the Court, where he carries on business or personally works for gain. Therefore, there is no requirement to send a summons to the registered office of the company or firm. It can be served to its local manager, who carries on with the business of the corporate body.

24. In the present case, though the Firm (M/S Partha Textiles) was arrayed as an accused, but a summons was issued to its partner (applicant no.2) personally, which is not a proper service for the firm because the partner was not impleaded as accused in the impugned complaint. As the issue is purely technical, therefore, this petition is being finally disposed of without hearing the opposite party no.2.

25. In view of the above, the summoning order dated 27.07.2023 as well as non-bailable warrant dated 08.02.2024 issued against applicant no.2 is hereby quashed, and the Court below is directed to pass fresh summoning order in the light of the observation made hereinabove within one month from the date of receiving a copy of this order.

26. It is also apposite to mention that though on commencement of the BNSS, the provision of Cr.P.C. has been repealed and Section 65 of the BNSS has come into force in place of Section 63 of Cr.P.C. regarding service of summons upon a company, corporation and firm, but Section 529 of the BNSS provides, proceeding, trial or application pending before the date of commencement of the BNSS will continue as per the provision of Cr.P.C. Therefore, in the present case despite the repeal of Cr.P.C. by the BNSS, the court below will proceed in accordance with the procedure of Cr.P.C. as mentioned under Sections 63 and 305 Cr.P.C.

27. With the aforesaid observation, the present application is partly **allowed**.

28. Let a copy of this order be communicated to the Additional Court Varanasi.

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**(2024) 7 ILRA 559**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 09.07.2024**

**BEFORE**

**THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.**

Application U/S 482. No. 11772 of 2024

**Jagdish Prasad & Anr. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Amit Singh

**Counsel for the Opposite Parties:**
G.A.

**Criminal Law – Constitution of India, 1950 – Article 226 – Food Safety & Standards Act, 2006 - Sections 3(1) (i), 3(1)(zk), 3(1)(zz), 19, 59, 92 & 92(1) (h) - Food Safety & Standards (Food Products Standards and Food Additives) Regulation, 2011 – Regulation – 2.2.1(7), 2.2.2(2), 2.2.2(6), 2.2.2(7), 2.2.2(8), 2.2.2(9), 2.2.2(10), 2.3.4, 2.3.55 - Cigarette and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 - Sections 7, 10, 11, 14, 16 & 20 -** Application U/s 482 – challenging the summoning order as well as N/B Warrant – Applicants have valid license for manufacturing *Sugandhit supari* (betel nut) under the Act, 2006 – A sample of *supari* recovered from the applicants contained *tobacco* as an additive for organo leptic purpose which is violation of Act, 2006 – applicants taken plea that, as the *Supari* is a tobacco product, its sale and manufacturing will be covered by the COTPA Act, 2003 therefore proceedings under Act, 2006 is illegal – Court finds that, from the conjoint reading of provisions of both Act, 2006 & Regulation, 2011, betel nut or *Supari* is a primary food product, hence *Supari* would come within the category of food and not the tobacco - mixing of tobacco in any food item including the betel nut or *Supari* is prohibited as per the Regulation, 2011 and same would be punishable under the Act, 2006 - invocation of the COTPA Act, 2003 in the present case does not apply – resulting present application fails and having no merit – dismissed. (Para – 20, 23, 28, 30)

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

**List of Cases cited:**

1. Application U/s 482 No. 9147/2023 (Manish Gupta Vs State of UP & anr.),

2. St. of U.P. & anr. Vs Synthetics and Chemicals Ltd. & anr.(1991 Vol. 4 SCC 139),

3. Roger Shashoua & ors.Vs Mukesh Sharma & ors.(2017 vol. 14 SCC 722),

4. V. Kishan Rao Vs Nikhil Super Speciality Hospital & anr.(2010 vol. 5 SCC 513).

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

1. Heard learned counsel for the applicants and Sri Rajeev Kr. Singh, learned A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed for quashing the summoning order dated 10.09.2021 passed by Special Judge Food Safety & Standards Act/ Additional Sessions Judge, Court No.9, Jhansi in Sessions Case No.643 of 2021, under Section 26(2)(v, i & ii)/58, 59(iii), 52(1) Food Safety & Standards Act, 2006 (hereinafter referred to as 'Act, 2006'), Police Station Orai, District Jalaun as well as Non-bailable Warrant dated 27.10.2023 issued by Additional District Judge/FTC-IInd, Jhansi.

3. Facts giving rise to the present case are that applicant No.2 is the proprietor of a firm, named as M/s Balaji Traders Orai while applicant No.1 is the employee of the said firm of applicant No.2. The licence in Form - C under the Act, 2006 was also issued in the name of the firm of applicant No.2. In the above licence, applicant No.2 was mentioned as a person in charge of the operation of the firm and that licence is valid till 16.7.2024. An inspection was made by the Food Security Officer on 20.2.2020 in the manufacturing unit of applicant No.2 where the applicant No.1, who is an employee of the firm of applicant No.2, was present. In the presence of applicant No.1, 370 packets of *sugandhit supari* (Puja Brand) were found in the stock. Thereafter, four packets of the *sugandhit supari* were purchased from applicant No.1 by paying its price. On the spot, the format of Form 5-ka was prepared, out of which two samples were given to applicant No.1 and one sample was sent to the concerned laboratory for examination. It is claimed by the applicants that their firm is licence holder to manufacture pan masala and supari under the Act, 2006 which is valid up to 16.7.2024. On the basis of inspection of the Food Inspector on 20.2.2020, the sample of *sugandhit supari* (Puja Brand) was taken from the premises of the applicants and thereafter, on the basis of the report of the food analyst, the impugned complaint was filed. In the impugned complaint, it is mentioned that the sample of *sugandhit supari* contained tobacco. Therefore, the same is of sub standard quality and not fit for use. It was also mentioned in the report of food analyst that the sample of packets, containing supari, did not mention net quantity/net weight, date of manufacturing, batch number, manufacturer's complete address, FSSAI licence number etc. In the complaint, it is further mentioned that the sample of *sugandhit supari* as well as its packets, were prepared in violation of Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restriction of Sale) Regulations, 2011 as well as regulation Nos. 2.2.2(7), 2.2.2(9), 2.2.2(8), 2.2.2(10), 2.2.2(6), 2.2.1(7) and 2.2.2(2) of the Food Safety and Standards (Packaging and Labelling) Regulations, 2011. The learned Magistrate, after receiving the aforesaid complaint, summoned the applicants, which is under challenge.

4. The contention of learned counsel for the applicants is that *sugandhit supari* is a tobacco product, therefore, the proceeding under the Act, 2006 is absolutely erroneous. In support of his contention, learned counsel for the applicants has relied upon the judgement of coordinate Bench of this Court passed in ***Application u/s 482 No. 9147 of 2023 (Manish Gupta vs. State of U.P. and another)*** in which it is observed that the sample of a packet of baba supari is tobacco product and not a food item. It is further submitted that the tobacco product is not prohibited from selling, but it is regulated by Cigarette and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (hereinafter referred to as "COTPA, 2003'). It is lastly submitted that even if it is admitted that *sugandhit supari* is a food item, even then, applicants have a valid licence. Therefore, invoking the provision of the Act, 2006 on the ground that at the time of inspection, the applicants could not show the licence is also incorrect, hence erroneous.

5. Per contra, learned A.G.A. has submitted that *sugandhit supari* is a food

item. Therefore, there is no illegality in the impugned proceeding. It is further submitted that at the time of inspection, the applicants could not show the licence for the production of food item, therefore, the provision of the Act, 2006 was invoked.

6. Learned A.G.A. had filed counter affidavit which was formal in nature, therefore, learned counsel for the applicants did not file rejoinder affidavit on the ground that the same was formal in nature.

7. After hearing the rival submissions of learned counsel for the parties, a sole question arises whether the product in question i.e. *sugandhit supari* (betel nut) is a tobacco product or it comes within the definition of food.

8. Learned counsel for the applicants has submitted that as the supari is a tobacco product, its sale and manufacturing will be covered by the COTPA, 2003. Therefore, proceeding against him, under the Act, 2006, is illegal. For the determination of this question, it is necessary to discuss the object of the Act, 2006 as well as COTPA, 2003.

9. The object of the Act, 2006, is to lay down science-based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of the same and wholesome food for human consumption.

10. **The object of COTPA, 2003 is to provide effective measures for protecting citizens from involuntary exposure to cigarettes and other tobacco products and also to impose progressive restrictions on direct and indirect advertisement, promotion and sponsorship, concerning tobacco.** To achieve the aforesaid object, the COTPA, 2003 not only provides regulation of trade and commerce, production, supply and distribution of cigarettes and other tobacco products but also prohibits its advertisement and provides for displaying the warning on the packets of cigarette and other tobacco products.

11. From the objects of the above two Acts, it is clear that COTPA, 2003 provides regulation, production and supply of cigarettes and other tobacco products, whereas the Act, 2006 not only provides manufacturing, storage and sale of food but also provides a science-based standard for articles of food which are safe for human consumption. Therefore, if any article of food used for human consumption, is found sub standard, then the same is punishable. However, under the COTPA, 2003 any substandard tobacco product, even if used for human consumption, is not punishable under the COTPA, 2003. The COTPA, 2003 apart from regulating the production and providing specified warning on the package of cigarettes and other tobacco products, also provides a maximum permissible limit of nicotine and tar in tobacco products.

12. Section 14 of the COTPA, 2003 provides confiscation of package of cigarettes and other tobacco products, if same violates any of the provisions of the COTPA, 2003. Section 20 of the COTPA, 2023 also provides punishment on failure to give a specified warning of nicotine and tar contents. Therefore, if cigarette or any other tobacco product contains the ingredients of nicotine and tar beyond the prescribed limit, then same is punishable under Section 20 of COTPA, 2003. However, there is no provision in the

COTPA, 2003, providing punishment for having ingredients in tobacco products other than nicotine and tar, even though same may be injurious to health of any person. Sections 7, 10, 11, 14, 20 of the COTPA, 2003 are being quoted as under:-

***"7. Restrictions on trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products.–***

*(1) No person shall, directly or indirectly, produce, supply or distribute cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products produced, supplied or distributed by him bears thereon, or on its label 1[such specified warning including a pictorial warning as may be prescribed.]*

*(2) No person shall carry on trade or commerce in cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products sold, supplied or distributed by him bears thereon, or on its label, the specified warning.*

*(3) No person shall import cigarettes or any other tobacco products for distribution or supply for a valuable consideration or for sale in India unless every package of cigarettes or any other tobacco products so imported by him bears thereon, or on its label, the specified warning.*

*(4) The specified warning shall appear on not less than one of the largest panels of the package in which cigarettes or any other tobacco products have been packed for distribution, sale or supply for a valuable consideration.*

*(5) No person shall, directly or indirectly, produce, supply or distribute cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products produced, supplied or distributed by him indicates thereon, or on its label, the nicotine and tar contents on each cigarette or as the case may be on other tobacco products along with the maximum permissible limits thereof:*

*Provided that the nicotine and tar contents shall not exceed the maximum permissible quantity thereof as may be prescribed by rules made under this Act.*

***10. Size of letters and figures.–*** *No specified warning or indication of nicotine and tar contents in cigarettes and any other tobacco products shall be deemed to be in accordance with the provisions of this Act if the height of each letter or figure, or both the used on such warning and indication is less than the height as may be prescribed by rules made under this Act. 11. Testing laboratory for nicotine and tar contents.–For purposes of testing the nicotine and tar contents in cigarettes and any other tobacco products the Central Government shall by notification in the Official Gazette grant recognition to such testing laboratory as that Government may deem necessary.*

***11. Testing laboratory for nicotine and tar contents.–*** *For purposes of testing the nicotine and tar contents in cigarettes and any other tobacco products the Central Government shall by notification in the Official Gazette grant recognition to such testing laboratory as that Government may deem necessary.*

***14. Confiscation of package.–*** *Any package of cigarettes or any other tobacco products or any advertisement material of cigarettes or any other tobacco products, in respect of which any provision of this Act has been or is being contravened, shall be liable to be confiscated: Provided that, where it is established to the satisfaction of the court adjudging the confiscation that the person in whose possession, power or control any*

*such package of cigarettes orany other tobacco products is found is not responsible for the contravention of the provisions of this Act, the Court may, 10 instead of making an order for the confiscation of such package, make such other order authorised by this Act against the person guilty of the breach of the provisions of this Act as it may think fit.*

***20. Punishment for failure to give specified warning and nicotine and tar contents.–***

*(1) Any person who produces or manufactures cigarettes or tobacco products, which do not contain, either on the package or on their label, the specified warning and the nicotine and tar contents, shall in the case of first conviction be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both, and for the second or subsequent conviction, with imprisonment for a term which may extend to five years and with fine which may extend to ten thousand rupees.*

*(2) Any person who sells or distributes cigarettes or tobacco products which do not contain either on the package or on their label, the specified warning and the nicotine and tar contents shall in the case of first conviction be punishable with imprisonment for a term, which may extend to one year, or with fine which may extend to one thousand rupees, or with both, and, for the second or subsequent conviction, with imprisonment for a term which may extend to two years and with fine which may extend to three thousand rupees."*

13. Section 16 of the COTPA, 2003 further provides that confiscation of any tobacco product will not prevent the infliction of any punishment under any other law, which means if the production or sale of any substandard tobacco product is also prohibited in any other law, then prosecution under that law would not be barred despite the confiscation of tobacco product for violation of the COTPA, 2003. Section 16 of the COTPA, 2003 is quoted is under:-

***"16. Confiscation not to interfere with other punishments**.– No confiscation made, costs ordered tobe paid under this Act shall prevent the infliction of any punishment to which the person affected thereby is liable under the provisions of this Act or under any other law."*

14. From the perusal of Section 16, it is also clear that even though any product is a tobacco product but if it contains any ingredient other than nicotine and tar, which is injurious or dangerous for human consumption, then even if the same is not punishable under the COTPA, 2003, but the same could be punishable in any other law including the Act, 2006. In the present case, the question arises of whether the supari or betel nut is a tobacco product under the COTPA, 2003, or food under the Act, 2006.

15. Betel nut is a fruit of the areca palm (Areca Catechu) that grows in much of the tropical Pacific, South Asia, South-east Asia, and parts of East Africa. It is not to be confused with betel leaves that are often used to wrap it. The practice of betel nut chewing, often together with other herbs as a stimulant drug, dates back thousands of years, and continues to the present day in many other Asian countries. When chewed with additional tobacco in its preparation, there is even higher risk especially for oral and oropharyngeal cancers. In India, betel nut is used in pan

along with other ingredients like lime and kattha and there is a large scale use of betel nut for human consumption in India, as the betel nut is a primary product of the tree, namely, Areca palm.

16. The definition of 'food' has been given in Section 3(1)(j) of the Act, 2006 which provides any substance, whether processed or unprocessed, entitled for the human consumption and which includes primary food to the extent defined in Section 3(1)(zk). The definition of 'primary food' has also been given in Section 3(1)(zk) which provides any article of food which is produced from agriculture or horticulture, resulting from growing, raising, cultivation, picking and harvesting. For reference Sections 3(1)(j) and 3(1)(zk) of the Act, 2006 are being quoted as under:-

***"3(1)(j) "Food"*** *means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes* ***primary food*** *to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:*

*Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality;*

***(zk) "primary food"*** *means an article of food, being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman."*

17. Section 92 of the Act, 2006 gives power to the Food Safety and Standards Authority to make regulations with prior approval of the Central Government, providing standards and guidelines in relation to the articles of food meant for human consumption as well as providing limits of additive under Section 19 of the Act, 2006. In pursuance of the power under Section 92 of the Act, 2006, the Food Safety and Standards Authority of India, with prior approval of the Central Government, made the regulation named as the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011. This regulation has provided standards for food products. Regulation 2.3.55 provides standard of areca nuts or betel nuts (supari). This regulation also provides the food additives permissible in betel nut or supari as per Appendix-A. In Appendix A any seed or nut is not permitted to have any food additive. Regulation 2.3.55 is quoted as under:-

*"2.3.55 ARECANUTS OR BETELNUTS OR SUPARI*

***1. Description****: (a) "Arecanuts" or "Betelnuts" or "Supari" means nuts obtained from Areca Palm (Areca catechu L.).*

*(b) The product shall be dry, well matured, sound, clean, whole or cut, fully dehusked, uniform in colour, i.e., bright shining to dull red colour.*

*(c) It shall be free from synthetic colouring matter and shall be free from insect infestation, visible moulds, fissures and shrinkage and shall not be hollow.*

*(d) The product shall not have any off flavour, odour or other undesirable characteristics and shall also conform to the following standards, namely:*

| ***S.No.*** | ***Characteristics*** | ***Requirements*** |
|---|---|---|
| *1* | *Moisture % (Maximum)* | *7* |
| *2* | *Damaged Nuts % (by weight) (Maximum)* | |
| *a)* | *For whole nuts or supari (Damaged nuts include blemish or cracked nuts, broken nuts, nuts not fully dehusked and those the pith of which is black)* | *12* |
| *b)* | *For cut nuts or supari (Damaged nuts include blemish/cracked nuts, nuts not fully dehusked and those the pith of which is black)* | |
| *3* | *Damaged by moulds and insects % (by weight) (Maximum)* | *3* |

***2. Food additives****: The product may contain food additives permitted in Appendix A.*

***3. Contaminants, toxins and residues****: The product covered in this standard shall comply with the Food Safety and Standards (Contaminants, toxins and Residues) Regulations, 2011.*

***4. Food hygiene:***

*(a) The product shall be prepared and handled in accordance with the guidance provided in the Schedule 4 of the Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011 and any other such guidance provided from time to time under the provisions of the Food Safety and Standards Act, 2006 (34 of 2006).*

*(b) The product shall conform to the microbiological requirements given in Appendix B.*

***5. Packaging and labelling:*** *The product covered by this standard shall be labelled in accordance with the Food Safety and Standards (Packaging and Labelling) Regulations, 2011.*

***6. Method of analysis:*** *The product shall be analysed as provided in the relevant Food Safety and Standards Authority of India Manual of Method of Analysis of Food."*

18. As per Section 3(p) of the COTPA, 2003 tobacco products means products specified in the schedule whereas in the schedule of the COTPA, 2003 the following articles are mentioned as tobacco products:-

***"THE SCHEDULE***

*[See section 3(p)]*

*1. Cigarettes*

*2. Cigars*

*3. Cheroots*

*4. Beedis*

*5. Cigarette tobacco, pipe tobacco and hookah tobacco*

*6. Chewing tobacco*

*7. Snuff*

*8. Pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called).*

*9. Gutka*

*10. Tooth powder containing tobacco."*

19. From the perusal of the tobacco product, mentioned in item No.8, it is clear that pan masala or any chewing material having tobacco as one of its ingredients, is tobacco product. However, betel nut or supari is not the chewing material having tobacco as one of its ingredients.

20. **Therefore, from the conjoint reading of Section 3(1)(j) and 3(1)(zk) of the Act, 2006 as well as Regulation 2.3.55 of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, it is clear that betel nut or supari is a primary food product, hence would come within the category of food and not the tobacco product.**

21. Now, a question arises as to whether the use of tobacco in betel nuts makes them unsafe and prohibited under the Act, 2006. Section 92(1)(h) of the Act, 2006 authorises the Food Safety and Standards Authority of India, with prior approval of the Central Government, to make regulations regarding food additives in food products also. In the exercise of power under Section 92 of the Act, 2006 the Food Safety and Standards Authority of India framed Food Safety and Standards (Prohibition and Restriction of Sale) Regulations, 2011, Regulation 2.3.4 whereof is quoted as under:-

*"2.3.4: Product not to contain any substance which may be injurious to health: Tobacco and nicotine shall not be used as ingredients in any food products."*

22. Section 3(1)(zz) of the Act, 2006 provides the definition of 'unsafe food', which includes the addition of a substance directly or as an ingredient, which is not permitted. As the Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restriction of Sale) Regulations, 2011 provides prohibition of the addition of tobacco as an ingredient in food products, therefore, adding tobacco to any food product will be deemed to be unsafe food as per Section 3(1)(zz)(v) of the Act, 2006. Section 3(1)(zz)(v) of the Act, 2006 is being quoted as under:-

*"3(1)(zz) "unsafe food" means an article of food whose nature, substance or quality is so affected as to render it injurious to health:—*

*(v) by addition of a substance directly or as an ingredient which is not permitted; "*

23. **Therefore, from above analysis, it is clear that mixing of tobacco in any food item including the betel nut or supari is prohibited as per Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restriction of Sale) Regulations, 2011 and the same would be punishable under Section 59 of the Act, 2006.**

24. In the judgment of the co-ordinate Bench of this Court in ***Manish Gupta Vs. State of U.P. (Supra)***, relied upon by the learned counsel of the applicants, the co-ordinate Bench, while deciding that case, overlooked Sections 3(1)(zk) and 3(1)(zz) of the Act, 2006, Regulation 2.3.55 of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, Regulation 2.3.4 of the the Food Safety and Standards (Prohibition and Restriction of Sale) Regulations, 2011

and also Section 16 of the COTPA, 2003. Therefore, being contrary to the statutory provisions, the above judgment is per incuriam, hence, can not be relied upon.

25. In the case of ***State of U.P. and another vs. Synthetics and Chemicals Ltd. And another; (1991) 4 SCC 139,*** the Hon'ble Apex Court considered the issue of judgement passed in per incuriam. Paragraph Nos. 40 and 41 of ***Synthetics and Chemicals Ltd. (supra)*** is quoted as under:-

*"40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd. [(1944) 1 KB 718 : (1944) 2 All ER 293] ). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey [(1962) 2 SCR 558 : AIR 1962 SC 83] this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.*

*41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. [(1941) 1 KB 675, 677 : (1941) 2 All ER 11] the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. [(1989) 1 SCC 101] The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In B. Shama Rao v. Union Territory of Pondicherry [AIR 1967 SC 1480 : (1967) 2 SCR 650 : 20 STC 215] it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."*

26. Similarly, the Apex Court again considered the issue of judgement in per incuriam in the case of ***Roger Shashoua and others vs. Mukesh Sharma and others; (2017) 14 SCC 722*** and observed that a decision can be per incuriam if any provision in statute, rule or regulation was not brought to the notice of the Court. Paragraph No. 42 of the ***Roger Shashoua (surpa)*** is quoted as under:-

*"42. In Sundeep Kumar Bafna [Sundeep Kumar Bafna v. State of Maharashtra, (2014) 16 SCC 623 : (2015) 3 SCC (Cri) 558] , the Court referred to the Constitution Bench decision in Union of India v. Raghubir Singh [Union of India v. Raghubir Singh, (1989) 2 SCC 754] and Chandra Prakash v. State of U.P. [Chandra Prakash v. State of U.P., (2002) 4 SCC 234 : 2002 SCC (L&S) 496] and thereafter expressed its view thus: (Sundeep Kumar case [Sundeep Kumar Bafna v. State of Maharashtra, (2014) 16 SCC 623 : (2015) 3 SCC (Cri) 558] , SCC p. 642, para 19)*

*"19. It cannot be overemphasised 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 co-equal 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."*

*(emphasis in original)"*

27. Hon'ble Apex Court again in ***V. Kishan Rao vs. Nikhil Super Speciality Hospital and another; (2010) 5 SCC 513,*** observed that a decision ignoring the statutory provision is per incuriam, therefore, will not have binding effect. Paragraph No. 54 of the ***V. Kishan Rao (supra)*** is quoted as under:-

*"54. When a judgment is rendered by ignoring the provisions of the governing statute and earlier larger Bench decision on the point such decisions are rendered per incuriam. This concept of per incuriam has been explained in many decisions of this Court. Sabyasachi Mukharji, J. (as his Lordship then was) speaking for the majority in A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] explained the concept in the following words : (SCC p. 652, para 42)*

*"42. ... 'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."*

*Subsequently also in the Constitution Bench judgment of this Court in Punjab Land Development and Reclamation Corpn. Ltd. v. Labour Court*

*[(1990) 3 SCC 682 : 1991 SCC (L&S) 71] , similar views were expressed in para 40 at p. 705 of the report."*

28. In the present case, the license to the applicants of the firm was given under the Act, 2006 with the condition that they will conform to the Act, 2006 while manufacturing or producing the sugandhit supari, therefore, contention of counsel for the applicants that the provision of the Act, 2006 will not be applicable while manufacturing or producing sugandhit supari, is misconceived.

29. In the present case, a sample of supari, recovered from the manufacturing unit of the applicants, had tobacco as an additive for organo leptic purpose, which is in violation of the Act, 2006 as the betel nut or supari is a primary food as per Section 3(1)(zk) of the Act, 2006, therefore, same is offence under the Act 2006 and the proceeding under the Act, 2006 against the applicants is absolutely correct, and invocation of the COTPA, 2003 in the present case does not apply.

30. So far as the contention of learned counsel for the applicants that the applicants have valid licence for manufacturing supari (betel nut), even then, provisions of the Act, 2006 have been invoked against them, treating them as manufacturers of the product of supari without licence is concerned, same can be raised at the time of framing of charges.

31. In view of the above analysis, this Court finds that there is no illegality in the impugned proceeding. Therefore, present application fails, having no merit.

32. Accordingly, the application is **dismissed**.

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**(2024) 7 ILRA 569**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 01.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Application U/S 482. No. 15986 of 2024

**Akanksha Katiyar & Ors. ...Applicants**
**Versus**
**State of U.P. & Ors. ...Opposite Parties**

**Counsel for the Applicants:**
Sri Abhay Kumar, Sri Kumar Ankit Srivastava

**Counsel for the Opposite Parties:**
G.A., Sri Qazi Vakil Ahmad

**Criminal Law - Criminal Procedure Code, 1973 - Section - 482, - Indian Penal Code, 1860 - Section 498-A, 342, 457, 448, 503, 504 & 506 - Hindu Marriage Act, 1955 - Section - 13 - The Dowry Prohibition Act, 1961 - Section - 3/4:** - Application U/s 482 – against criminal proceedings which are result of a counter blast – on the basis of alleged occurrence toll place on date of incident it was the applicant -1 who lodged prompt FIR wherein after investigation charge sheet has been filed – whereas opposite party no. 4 has filed a belated FIR wherein major allegations with regards to section 457, 448 of IPC were not found and the chargesheet was filed only u/section 504, 506 IPC – court finds that, it is not in dispute that relation between parties are not cordial and criminal cases are pending between parties as well as the husband of applicant no. 1 has also filed an application u/section 13 of the H.M. Act, - in order to make out a case u/s section 504 and 506 OPC the ingredients of criminal intimidation has to be complied with i.e. threat caused by the applicant must be with intention 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 intitled to do – however, part of allegation that applicants have committed offence of lurking premisses by night and house trespass was not found to be provide - and the only allegation left is to raise abusive language and cause of threat – held, since ingredients of section 504, 506 IPC are absolutely missing as well as not only FIR was lodged after about 11 months, without any explanation and are lodged as counter blast and were initiated with motive for wreaking vengeance, therefore, in the light of law laid down in case of 'A.M. Mohan's the present criminal proceedings can be quashed in exercising inherent power of this court – hence, Application is allowed – impugned orders as well as entire proceedings of criminal case u/section 457, 448,506, IPC are quashed. (Para – 12, 13, 14, 15, 17, 19, 20)

**Application u/s 482 Allowed.** (E-11)

**List of Cases cited:**

1. A. M. Mohan Vs St. Represented by SHO & anr. (2024 SCC online SC 339),

2. Mohammad Wajid & anr.Vs St. of UP & ors.(2023 INSC 683).

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Applicant-1, Akanksha Katiyar, is daughter-in-law of Complainant, i.e., Opposite Party-4, whereas Applicants-2, 3 and 4 are close relatives of Applicant-1.

2. It is the case of applicants that Applicant-1 has earlier lodged a FIR dated 30.05.2022 being Case Crime No. 0091 of 2022 at Police Station Shivrajpur, District Kanpur Nagar against Opposite Party-4, against her husband and his close relatives for offence under Sections 498A, 504, 506 IPC and 3/4 Dowry Prohibition Act, 1961, alleging that she got married with son of Opposite Party-4 on 28.11.2019 and thereafter she was suffered cruelty with regard to demand of dowry and later on she was sent back to her parental house. Thereafter on persuasion in the month of November, 2020 she was allowed to live in a room at her matrimonial house but still she suffered cruelty at the hands of her husband, Opposite Party-4 and their relatives. In aforesaid FIR after investigation charge sheet has been filed against said persons.

3. Sri Kumar Ankit Srivastava, learned counsel for applicants submitted that Applicant-1 still suffered atrocities and on an occurrence occurred on 14.07.2022, when she was not allowed to enter in her matrimonial house and assaulted, another FIR dated 14.07.2022 being Case Crime No. 0500 of 2022 was lodged under Section 498A, 342, 504, 506 IPC wherein after investigation charge sheet has also been filed against persons of Complainant side.

4. Learned counsel further submitted that in above background, in order to put pressure on applicants, as a counter blast, Opposite Party-4, i.e., mother-in-law of Applicant-1 lodged FIR dated 10.06.2023, i.e., after about 11 months, against applicants being Case Crime No. 0198 of 2023, under Sections 457, 448 and 506 IPC giving a different version of alleged occurrence took place on 14.07.2022, on which Applicant-1 has already lodged FIR.

5. Learned counsel further submitted that investigation was conducted on aforesaid FIR lodged against applicants wherein also charge sheet was filed on 19.08.2023 but only under Section 504, 506 IPC on which Trial Court has took cognizance by means of impugned order dated 27.10.2023. The charge sheet and

summoning order is under challenge in present application.

6. Learned counsel for applicants submitted that present criminal proceedings are result of a counter blast. On basis of alleged occurrence took place on 14.07.2022 it was the Applicant-1, who lodged prompt FIR wherein after investigation charge sheet has been filed, whereas Opposite Party-4 has filed a belated FIR and as referred above, major allegations with regard to Sections 457, 448 IPC were not found and charge sheet was filed only under Sections 504, 506 IPC. Learned counsel further referred statements recorded during investigation that ingredients of offence under Sections 504, 506 IPC are not made out.

7. Per contra, learned AGA appearing for State and learned counsel for Complainant submitted that on basis of statements recorded during investigation and medical report, Investigating Officer has filed charge sheet under above referred offences and Trial Court concerned has rightly took cognizance, which does not require any interference. They also referred statements recorded during investigation.

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

9. Before adverting to rival submissions it would be relevant to refer few paragraph of a recent judgement passed by Supreme Court in **A.M. Mohan Vs. State Represented by SHO and another, 2024 SCC OnLine SC 339:-**

*"9. The law with regard to exercise of jurisdiction under Section 482 of Cr. P.C. to quash complaints and criminal proceedings has been succinctly summarized by this Court in the case of Indian Oil Corporation v. NEPC India Limited1 after considering the earlier precedents. It will be apposite to refer to the following observations of this Court in the said case, which read thus:*

*"12. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few—Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [(1988) 1 SCC 692 : 1988 SCC (Cri) 234], State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426], Rupan Deol Bajaj v. Kanwar Pal*

*Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059], Central*

*Bureau of Investigation v. Duncans Agro Industries Ltd. [(1996) 5 SCC 591 : 1996 SCC (Cri) 1045], State of Bihar v. Rajendra Agrawalla [(1996) 8 SCC 164 : 1996 SCC (Cri) 628], Rajesh Bajaj v. State NCT of Delhi [(1999) 3 SCC 259 : 1999 SCC (Cri) 401], Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [(2000) 3 SCC 269 : 2000 SCC (Cri) 615], Hridaya Ranjan Prasad Verma v. State of Bihar [(2000) 4 SCC 168 : 2000 SCC (Cri) 786], M. Krishnan v. Vijay Singh [(2001) 8 SCC 645 : 2002 SCC (Cri) 19] and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque [(2005) 1 SCC 122 : 2005 SCC (Cri) 283]. The principles, relevant to our purpose are:*

*(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused. For this purpose, the complaint*

*has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.*

*(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.*

*(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.*

*(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.*

*(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."*

10. In order to appreciate the rival submissions, it would be apposite to refer Sections 503, 504 and 506 IPC as under:

***"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 threat, commits criminal intimidation.*

***Explanation.**— A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.*

***504. Intentional insult with intent to provoke breach of the peace**.— Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

***"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."*

11. Relevant part of FIR and statements recorded during investigation are reproduced hereinafter:

**Relevant part of FIR**

***"प्रार्थिनी की बहू आकांक्षा अपने मायके वालो पिता मिलन कटियार, मां बबिता कटियार व भाई आकाश कटियार व अराजकतत्वो की मदद से दिनांक 14.07.2022 रात्रि 11 बजे हथौड़े, आरी एवम कटर आदि की मदद से प्रार्थिनी के मकान का गेट का ताला काटकर घर के अन्दर घुस गयी। आकांक्षा व उसके घरवाले दबंग किस्म के व्यक्ति हैं जिन्होने प्रार्थिनी के घर को हथियाने की कोई कसर नहीं छोड़ी है। सारी घटनाओ के सीसीटीवी साक्ष्य उपलब्ध हैं। जिसे विपक्षी उक्त लगे सीसीटीवी कैमरो को तोड़ने की हर समय धमकी देती है कि किसी दिन सारे सीसीटीवी कैमरो को तोड़कर सभी लोगो की हत्या करवा देंगे।*** *प्रार्थिनी व उसके परिवार को जेल भिजवाने का हर सम्भव प्रयास आकांक्षा कटियार द्वारा किया जा रहा है। उपरोक्त सभी वाद वर्तमान में इलाहाबाद उच्च न्यायालय में विचाराधीन है।* ***उपरोक्त आकांक्षा कटियार व उसके मां बाप, भाई से प्रार्थिनी व उसके पति व पुत्र को जानमाल का खतरा है। यह लोग प्रार्थिनी, उसके पति व पुत्र शुभम की हत्या भी करा सकते है*** *तथा मकान व सम्पत्ति पर कब्जा भी कर सकते हैं। अतः श्रीमान जी से विनम्र प्रार्थना है कि सम्पूर्ण प्रकरण की जांच किसी निष्पक्ष अधिकारी से कराकर दोषीजनो के विरुद्ध मुकदमा पंजीकृत किये जाने का आदेश सम्बन्धित थाने की पुलिस को देने की कृपा करें ताकि प्रार्थिनी व उसके पति व पुत्र को न्याय मिल सके।"*

**Relevant part of statement of Complainant**

***"प्रार्थिनी की बहू आकांक्षा अपने मायके वालो पिता मिलन कटियार, मां बबिता कटियार व भाई आकाश कटियार व अराजकतत्वो की मदद से दिनांक 14.07.2022 रात्रि 11 बजे हथौड़े, आरी एवम कटर आदि की मदद से प्रार्थिनी के मकान का गेट का ताला काटकर घर के अन्दर घुस गयी। आकांक्षा व उसके घरवाले दबंग किस्म के व्यक्ति है जिन्होंने प्रार्थिनी के घर को हथियाने की कोई कसर नहीं छोड़ी है। सारी घटनाओं के सीसीटीवी साक्ष्य उपलब्ध हैं। जिसे विपक्षी उक्त लगे सीसीटीवी कैमरों को तोड़ने की हर समय धमकी देती है कि किसी दिन सारे सीसीटीवी कैमरो को तोड़कर सभी लोगो की हत्या करवा देंगे। प्रार्थिनी व उसके परिवार***

***को जेल भिजवाने का हर सम्भव प्रयास आकांक्षा कटियार द्वारा किया जा रहा है।*** *उपरोक्त सभी वाद वर्तमान में इलाहाबाद उच्च न्यायालय में विचाराधीन है। उपरोक्त आकांक्षा कंटियार व उसके मां बाप, भाई से प्रार्थिनी व उसके पति व पुत्र को जानमाल का खतरा है। यह लोग प्रार्थिनी, उसके पति व पुत्र शुभम की हत्या भी करा सकते है तथा मकान व सम्पत्ति पर कब्जा भी कर सकते हैं। इस तरह वादिनी मुकदमा ने एफआईआर का समर्थन करते हुए अपने बयान अंकित कराये।"*

**Relevant part of statement of Husband of Complainant**

*"**दिनांक 14.07.22 को आकांक्षा घर से पेशी के लिए माननीय न्यायालय गई थी जब शाम को आई तो हम लोग दरवाजा बंद करके कहीं गए हुए थे तब आकांक्षा द्वारा दरवाजा तोडफोड कर अंदर कमरे में आई थी उस समय आकांक्षा के भाई आकाश कटियार, माता बबीता कटियार, पिता मिलन कटियार भी मौके पर मौजूद थे जब हम लोगों वापस आये तथा एतराज किया तो सभी लोगों ने मिलकर गाली गलौज व जान से मारने की धमकी देने लगे तथा कहने लगे कि मेरी लड़की यही रहेंगी यहां से तभी जाएगी जब तुम लोगों को मार देगी तब से आकांक्षा कटियार घर की दूसरी मंजिल पर रह रही हैं तथा आए दिन गाली गलौज व जान से मारने की धमकी दे रही है कि हम इस घर से कभी निकलेंगे नहीं। आकांक्षा के भाई आकाश कटियार माता बबीता कटियार तथा मिलन कटिहार आकांक्षा से मिलने के बहाने आते हैं तथा हम लोगों को गाली गलौज व जान से मारने की धमकी देते रहते हैं। इस प्रकार से अपना बयान दे रहे है।"***

**Relevant part of statement of Son of Complainant, i.e., Husband of Applicant-1**

*"दिनांक 14.07.22 को आकांक्षा घर से न्यायालय में मुकदमे के संबंध में गयी थी वापस जब घर आयी तो हम लोग घर पर नहीं थे तब आकांक्षा द्वारा दरवाजा को फादकर घर के अन्दर आ गयी थी तथा गेट में तोड़ फोड़ की गई थी। जब मेरे मम्मी पापा ने एतराज किया तब आकांक्षा कटियार द्वारा मम्मी पापा व मुझे गाली देते हुए जान माल की धमकी देने लगी थी। आकांक्षा के भाई आकाश कटियार माता बबीता कटियार व पिता मिलन कटियार भी मौके पर गाली गलौज तथा धमकी दे रहे थे आकांक्षा की मां बबीता कटियार पिता मिलन कटियार तथा भाई आकाश कटियार आए दिन मेरे घर पर आकांक्षा के मिलने के बहाने आते हैं तथा हम लोगों को गाली गलौज देते हुए जानमाल की धमकी देते रहते हैं श्रीमान जी मुझे उम्मीद है कि आकांक्षा अपने परिवार के साथ मिलकर कोई बड़ी घटना घटित कर सकती है तथा हम लोगों को जान माल का नुकसान हो सकता है।"*

*(Emphasis supplied)*

12. It is not in dispute that relation between parties are not cordial and criminal cases are pending between parties as well as husband of Applicant-1 has also filed an application under Section 13 of Hindu Marriage Act, 1955.

13. Before considering, whether it is a fit case to quash criminal proceedings, it would be relevant to mention some part of a recent judgment passed by Supreme Court in **Mohammad Wajid and another vs. State of U.P. and others, 2023 INSC 683** as under:

*"24. An offence under Section 503 has following essentials:-*

*1) Threatening a person with any injury;*

*(i) to his person, reputation or property; or*

*(ii) to the person, or reputation of any one in whom that person is interested.*

*2) The threat must be with intent;*

*(i) to cause alarm to that person; or*

*(ii) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat; or*

*(iii) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.*

*25. Section 504 of the IPC contemplates intentionally insulting a person and thereby provoking such person insulted to breach the peace or intentionally insulting a person knowing it to be likely that the person insulted may be provoked so as to cause a breach of the public peace or to commit any other offence. Mere abuse may not come within the purview of the section. But, the words of abuse in a particular case might amount to an intentional insult provoking the person insulted to commit a breach of the public peace or to commit any other offence.* ***If abusive language is used intentionally and is of such a nature as would in the ordinary course of events lead the person insulted to break the peace or to commit an offence under the law, the case is not taken away from the purview of the Section merely because the insulted person did not actually break the peace or commit any offence having exercised selfcontrol or having been subjected to abject terror by the offender. In judging whether particular abusive language is attracted by Section 504, IPC, the court has to find out what, in the ordinary circumstances, would be the effect of the abusive language used and not what the complainant actually did as a result of his peculiar idiosyncrasy or cool temperament or sense of discipline. It is the ordinary general nature of the abusive language that is the test for considering whether the abusive language is an intentional insult likely to provoke the person insulted to commit a breach of the peace and not the particular conduct or temperament of the complainant.***

*26. Mere abuse, discourtesy, rudeness or insolence, may not amount to an intentional insult within the meaning of Section 504, IPC if it does not have the necessary element of being likely to incite the person insulted to commit a breach of the peace of an offence and the other element of the accused intending to provoke the person insulted to commit a breach of the peace or knowing that the person insulted is likely to commit a breach of the peace. Each case of abusive language shall have to be decided in the light of the facts and circumstances of that*

*case and there cannot be a general proposition that no one commits an offence under Section 504, IPC if he merely uses abusive language against the complainant. In King Emperor v. Chunnibhai Dayabhai, (1902) 4 Bom LR 78, a Division Bench of the Bombay High Court pointed out that:-*

*"To constitute an offence under Section 504, I.P.C. it is sufficient if the insult is of a kind calculated to cause the other party to lose his temper and say or do something violent. Public peace can be broken by angry words as well as deeds."*

*27. A bare perusal of Section 506 of the IPC makes it clear that a part of it relates to criminal intimidation. Before an offence of criminal intimidation is made out, it must be established that the accused had an intention to cause alarm to the complainant."*

14. As referred above, it is not in dispute that there are matrimonial dispute between Applicant-1 and her husband and other relatives. Petition of divorce is also pending. Applicant-1 has filed a prompt FIR of alleged occurrence took place on 14.07.2022 against her husband, Opposite Party-4 and their relatives wherein after investigation charge sheet has been filed, whereas Opposite Party-4 has lodged FIR of the same occurrence giving a different version with a delay of almost 11 months. Initially FIR was filed under Sections 457, 448 and 506 IPC, however, after investigation allegation qua to offence under Sections 457 IPC (Lurking house trespass or house-breaking by night in order to commit offence punishable with imprisonment) and 448 IPC (Punishment for house trespass) were not found true and charge sheet was filed only under Sections 504, 506 IPC.

15. In order to consider rival submissions, whether ingredients of Sections 504, 506 IPC are satisfied or not, I have carefully perused the contents of statements recorded during investigation.

16. As referred above, statements of witnesses are verbatim that applicants after breaking lock of house entered inside and when Complainant side reached and it was objected, accused-applicants abused them and extended threat to cause loss to life and such act was repeated also.

17. As referred in **Mohammad Wajid (supra)** in order to make out a case under Section 506 IPC the ingredients of criminal intimidation as mentioned in Section 503 IPC has to be complied with, i.e., the threat caused by applicant must be 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. However, as referred above, part of allegation that applicants have committed offence of lurking premises by night and house trespass was not found to be proved. Therefore, the only allegation left is to raise abusive language and cause threat. However, statements are much short of ingredients that applicants had an intention to cause alarm to Complainant side. Nature of abusive language is not specific. Presence of Applicant-1 at the house was natural and there is no evidence that there was intent. As such ingredients of Section 503 IPC as punishable under Section 506 IPC are not made out.

18. So far as allegation under Section 504 IPC is concerned, as referred in **Mohammad Wajid (supra)** that mere abuse, discourtesy, rudeness or insolence, may not amount to an intentional insult within the meaning of Section 504 IPC if it does not have the necessary element of

being likely to incite the person insulted to commit a breach of the peace of an offence and as referred above even the nature of abusive language is not on record. There is no statement to the effect that alleged abusive language used by applicants was sufficient to insult the Complainant side to commit a breach of peace of an offence. As such, in the present case, even ingredients of Section 504 IPC are absolutely missing.

19. In aforesaid circumstances, since ingredients of Sections 504, 506 IPC are absolutely missing as well as not only FIR was lodged after about 11 months, without any explanation but on basis of above referred facts present proceedings are counter blast and were initiated with motive for wreaking vengeance, therefore, in the light of **A.M. Mohan (supra),** it is a fit case where in exercise of inherent power present criminal proceedings can be quashed.

20. In the result, application is allowed. Impugned charge sheet dated 19.08.2023, under Sections 504, 506 IPC, summoning/ cognizance order dated 27.10.2023 as well as entire proceedings of Criminal Case No. 148979 of 2023 (State vs. Akanksha Katiyar and others), arising out of Case Crime No. 198 of 2023, under Sections 457, 448, 506 IPC, Police Station Barra, District Kanpur Nagar, are hereby quashed.

21. Registrar (Compliance) to take steps.

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**(2024) 7 ILRA 577**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 25.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Application U/S 482. No. 16936 of 2024

**Praveen Kumar Singh & Ors. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Praveen Kumar Singh

**Counsel for the Opposite Parties:**
G.A.

**Criminal Law - Criminal Procedure Code, 1973 - Section - 482 - Indian Penal Code, 1860 - Sections 147, 148, 149, 308, 323, 504 & 506:** - Applications u/s 482 – during an inspection which was conducted by the Govt. officials in compliance of the direction issued by this court in a Civil Misc. Writ Petition, against village Pradhan in respect of a complaint moved by one of the applicants – allegedly, there were some obstructions were made and some struggle took place due to which inspection was not completed – resulted two respective FIRs were lodged – first was lodged by Applicant-1 against five named accused including Pradhan Pati (opposite party no. 2) – and second cross FIR was lodged by the said Pradhan Pati against the applicant & 2 others person – investigation – chargesheet – cognizance order – summoning order – proceeding which was initiated against the applicants the present application is filed - court finds that, according to version of both FIRs, alleged incidence took place in presence of nodal officer, who was inspecting Pond but respective investigation officers have not took endeavour even to record their St.ments to verify the allegations – since inspection was conducted in pursuance of an order passed by this Court, therefore it was an duty of St. to maintain peace and law & order – they have miserably failed to do so – further investigation officer was also failed to submit any medical examination report – held, it appears that cross version is false case and injury report of Pradhan Pati was also manipulated which is clearly evident from report of medical board – Pradhan Pati, is an influential person and investigation of present case was conducted

under his influence – hence, Application is allowed with a cost of Rs. 50,000/- imposed upon Pradhan Pati (complainant) for misleading and influencing the investigation and interrupting the inspection proceedings.(Para – 8, 9, 12, 15, 16)

**Application Allowed.** (E-11)

**List of Cases cited:**

1. Gaon Sabha Vs St. of UP & ors.(Neutral Citation No. 2023:AHC:224233),

2. Writ – C No. 5703/2023 decided on 20.02.2023 (Neutral Citation No. 2023:AHC:40007),

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Germane of this case is arising out of an order passed by this Court on 20.02.2023 in Praveen Kumar Singh vs. State of U.P. and others (Writ-C No. 5703 of 2023), Neutral Citation No. 2023:AHC:40007. For reference said order is reproduced hereinafter:

***"1. Petitioner has recently enrolled as an Advocate and being a bona fide citizen of village concerned he has filed complaint against existing Village Pradhan for irregularities committed and a detailed complaint was presented before District Magistrate concerned. Consequently, inquiry was initiated under concerned Rules.***

***2. Sri Praveen Kumar Singh, petitioner in person, submits that a notice was issued to contesting respondent, however, till date no reply has been submitted and as such inquiry has not been concluded.***

***3. Learned Standing Counsel appearing for State-Respondents, submits that since inquiry has been initiated, therefore, Inquiry Officer will take all endeavor to conclude inquiry expeditiously.***

***4. In view of above, without expressing any opinion on merit of the case, the writ petition is disposed with observation that District Magistrate concerned will look into the matter and take all appropriate steps for expeditious conclusion of inquiry by Inquiry Officer, in accordance with law."***

2. It appears that in pursuance of above order, Government Officials conducted inspection of concerned place, i.e., a Pond. Facts of the case further disclosed that allegedly some obstructions were made and some struggle took place due to which inspection was not completed. Facts further revealed that on basis of cross version, two FIRs were lodged. First being Case Crime No. 0139 of 2023 for offences under Sections 147, 148, 149, 308, 323, 504, 506 IPC was lodged by Applicant-1 against five named accused and accused no. 1 being Dharmendra Singh (Opposite Party No. 2 herein), who was claimed to be a Pradhanpati (his wife being an elected Gram Pradhan). Contents of FIR are reproduced hereinafter:

*"सेवा में, थानाध्यक्ष- शंकरगढ़ प्रयागराज, (उ०प्र०) विषयः- प्रथम सूचना रिपोर्ट दर्ज कराने के संदर्भ में। महोदय, निवेदन है कि प्रार्थी प्रवीण कुमार सिंह पुत्र श्री अच्छेलाल सिंह, निवासी ग्राम- पहाडी कला, थाना- शंकरगढ़, जिला प्रयागराज का निवासी है वर्तमान समय में मा० उच्च न्यायालय मे वकालत करता हूँ आज दिनांक 22.06.2023 को मा० उच्च*

*न्यायालय के रिट याचिका संख्या 5703/2023 के अनुक्रम समय करीब लगभग 6.35 PM (शाम) जिला कार्यक्रम अधिकारी (नोडल जांच अधिकारी) एवं अन्य अधिकारियों कर्मचारियो के साथ ग्राम पंचायत पहाडी कलां के मजरा बसदेवा में मनरेगा से बने पार्क का निरीक्षण/जाँच कर रहे थे उसी समय हमारे ग्राम के धर्मेन्द्र सिंह पुत्र स्व० छोटेलाल (प्रधान पति) एवं नारेन्द्र सिंह पुत्र स्व० छोटे लाल, पार्थ सिंह पुत्र धमेन्द सिंह, लाल प्रताप सिंह पुत्र चन्दमणि सिंह निवासी पहाडी कलां, विरेन्द्र पुत्र नर्वदा सिंह आदि 4 निवासी गण बसदेवा, थाना- शंकरगढ़ एक राय होकर लाठी, से मेरे सिर पर मारे जिससे मैं बेहोश होकर गिर पड़ा तथा मेरे चाचा श्री आत्मा प्रसाद सिंह को भी बुरी तरह लात घूसो से मारे पीटे, मेरे गांव के गुलाब सिंह पुत्र राजाराम सिंह व दल प्रताप सिंह पुत्र स्व० राम जियावन सिंह, विद्यासागर पुत्र स्व महावीर निवासी पहाडी कलां आदि कई लोगों द्वारा बीच बचाव किया गया जिससे हम दोनो की जान बची नही तो हम लोगों की हत्या कर दी जाती अभियुक्त गणों द्वारा बीच बचाव के उपरान्त गाली गलौज देते हुये जान से मारने की धमकी दी गयी कि अगर दुबारा जांच कराओगे तो जान से हाथ धो बैठोंगे इस घटना क्रम का तात्कालिक वीडियो भी बनाया है। हम लोगो की जान बची तो देखा कि मेरे चाचा आत्मा प्रसाद सिंह का मोबाईल व पर्स नहीं है इस बात की जच जरिये F.I.R दर्ज कर सर्विलांस से जच कराने की कृपा करे।"*

3. A cross version was also lodged at the instance of Dharmendra Singh, the so called Pradhanpati against applicant and two others being Case Crime No. 0140 of 2023 for offences under Sections 323, 504, 506 IPC and contents thereof is also mentioned hereinafter:

*"सेवा मे, श्रीमान थाना प्रभारी जी थाना शंकरगढ़ प्रयागराज उ.प्र. महोदय जी, निवेदन है कि प्रार्थी धर्मेन्द्र सिंह पुत्र स्व० श्री छोटेलाल सिंह ग्राम बसदेवा थाना शंकरगढ़ का स्थाई निवाशी है आज दिनांक 22/6/23 को समय लगभग शाम सात (7) बजे मेरे गांव मे विकाश कार्यो की जांच चल रही थी तभी आत्मा प्रसाद सिंह पुत्र श्री गोविन्द सिंह, प्रवीण सिंह पुत्र श्री अच्छेलाल सिंह, विद्यासागर विश्वकर्मा पुत्र महावीर जो स्थाई निवाशी पहाड़ी कला गाव के है वाद विवाद करने लगे जिनको मेरे द्वारा रोकने पर मुझसे हाथा। पाई करने लगे व मुझ मारे पीटे भी और मेरे माँ बहन की भद्दी भद्दी गाली देने लगे तथा मुझ जान से मारने की धमकी भी दे रहे थे। अतः श्रीमान जी से निवेदन है कि मेरी प्रथम सूचना रिपोट लिखकर उचित कार्यवाही करने की कृपा करे अति कृपा होगी।"*

4. Investigation was conducted in both cases and charge sheet was filed whereon cognizance was taken and

respective summoning orders were passed by concerned Trial Court.

5. Applicants have challenged charge sheet No. 162 of 2023, cognizance order dated 08.12.2023 and summoning order dated 29.01.2024, arising out of Case Crime No. 0140 of 2023 (State vs. Atma Prasad Singh and others), under Sections 323, 504, 506 IPC, Police Station Shankargarh, District Prayagraj, pending in the Court of Additional Chief Judicial Magistrate-15, Prayagraj.

6. Notice was issued alongwith Dasti summon. Certificate of Dasti summon is filed today which is taken on record that notice was served upon Opposite Party No. 2, however, none appeared on his behalf.

7. I have heard Sri Praveen Kumar Singh, Applicant-1, in person, for all applicants and learned AGA for State.

8. Court takes note that according to version of both FIRs, alleged occurrence took place in presence of Nodal Officer, who was inspecting Pond but respective Investigating Officers have not took endeavour even to record their statements to verify the allegations and have filed respective charge sheets.

9. Inspection was conducted in pursuance of an order passed by this Court, as referred above, therefore, it was the duty of State to maintain peace and law and order but appears that the same was not taken care of.

10. In Village Panchayats elections for Pradhan are held reserving some seats for Women candidates. It become a practice that though a Woman of concerned Village Panchayat was elected but show is run by her Husband only declaring themselves to be Pradhanpati and elected Pradhan become only a rubber stamp. This Court in the case of **Gaon Sabha vs. State of U.P. and others, Neutral Citation No. - 2023:AHC:224233** has deprecated such terminology and interference of work of a Panchayat at this instance and for reference relevant paragraphs of judgment are reproduced hereinafter:

*"1. The term 'Pradhanpati" is a very popular and widely used term in State of Uttar Pradesh. It is used for "the Husband" of a woman Pradhan. Despite being an unauthorized authority, "Pradhanpati" unauthorisedly, usually undertakes work of a woman Pradhan, i.e., his wife. There are many instances where a woman Pradhan only acts like a rubber stamp and for all practical purposes, all major decisions are taken by so called "Pradhanpati", and elected representative just acts like mute spectator. The present writ petition is a glaring example of such a situation.*

*2. xxxxx*

*3. In the capacity of Pradhan, petitioner has no power to delegate her rights, duties and obligations to her husband or any other person, arising out of her elected post. The pairokar, i.e., "Pradhanpati" has no business to interfere with the working of Gaon Sabha. If such act is permitted it will not only frustrate objective of women empowerment but also object of providing specific reservation to women to come forward and join main stream of politics and increase their participation in social, economic and cultural growth of nation.*

*4. The Court is aware that there are women Pradhans in State of Uttar Pradesh, who are exercising their power, rights and duties and legal obligations*

*effectively and are doing very good work for village concerned. However, the present case does not appear to be such.*

*5. In view of above, this writ petition is dismissed with cost of Rs. 5000/- each to be paid by petitioner-Karmjeet Kaur and her husband, Sukhdev Singh (Pairokar in present writ petition) by Demand Draft from their respective Bank accounts in favour of Registrar General of this Court within two weeks from today. In case of default, Registrar General is permitted to proceed in accordance with law.*

*6. A copy of this order be sent to District Magistrate, Bijnor so that Sri Sukhdev Singh shall be barred from entering in the office of Gaon Sabha concerned in the capacity of "Pradhanpati" as well as to act as a representative of Pradhan for rest of her present term of office, except as a common villager.*

*7. A copy of this order shall also be sent to State Election Commission so that it may consider to issue a Circular for all candidates for future elections, cautioning them to be careful in exercising their powers, functions and duties as a representative of village not as mere rubber stamp of her husband or relatives (in case of woman Pradhan), and it may include such declaration in their affidavit filed at the time of presenting their nomination paper.*

*8. A copy of this order shall also be sent to Principal Secretary, Panchayat Raj, Government of U.P., Lucknow to circulate it to all Gaon Sabha of State of Uttar Pradesh."*

11. It was the duty of State to comply the said order passed by this Court and to maintain peace and law and order, however, they have miserably failed to do so.

12. Sri Praveen Kumar Singh, appearing in person, has referred to injuries allegedly caused to Pradhanpati, i.e., complainant of present case. Medical examination was conducted after five days and though a fracture of nasal bone was shown but it does not co-relate with date of alleged occurrence. He also referred that a Medical Board was constituted which has given report being part of this application that Investigating Officer was failed to submit any medical examination report as well as complainant has also not submitted any report from hospital where he was referred. For reference said report of Medical Board is reproduced hereinafter:

*"उपरोक्त विषयक आपके पत्र संख्या-मु०चि०अ०/ आर०टी०आई०/2023-24/7892, दिनांक-16.12.2023 के साथ संलग्न श्री प्रवीण कुमार सिंह (एडवोकेट) पता-ग्राम पहाड़ीकला, पोस्ट नौडिया उपरहार शंकरगढ़ प्रयागराज का पत्र जो जनसूचना अधिकार अधिनियम 2005 के अन्तर्गत मांगी सूचना से सम्बन्धित है, के क्रम में अवगत कराना है कि श्री प्रवीण कुमार सिंह (एडवोकेट) द्वारा आई०जी०आर०एस० के माध्यम से दिये गये प्रार्थना पत्र दिनांक-11.08.2023 ने इस कार्यालय के पत्र संख्या-4390, दिनांक 18.08.2023 के चिकित्साधिकारियों का मेडिकल बोर्ड गठित करते हुए श्री धर्मेन्द्र कुमार सिंह के पुनः मेडिकल परीक्षण हेतु दिनांक-16.09.2023 की तिथि निर्धारित की गयीं थी। निर्धारित*

*तिथि पर श्री धर्मेन्द्र कुमार सिंह पुत्र स्व० छोटेलाल सिंह पता-ग्राम बसदेवा थाना शंकरगढ़ प्रयागराज को मेडिकल बोर्ड द्वारा तेज बहादुर सप्रू चिकित्सालय प्रयागराज एक्स-रे नोज के लिए सन्दर्भित किया गया था. परन्तु आज दिनांक-28.12.2023 तक श्री धर्मेन्द्र कुमार सिंह की एक्स-रे नोजरिपोर्ट अधोहस्ताक्षरी कार्यालय को अप्राप्त है एवं थानाध्यक्ष शंकरगढ़ प्रयागराज द्वारा भी अभी तक श्री धर्मेन्द्र कुमार सिह के पूर्व में हुए मेडिकल प्रपत्र उपलब्ध नहीं कराये गये है। जिस कारण बोर्ड की कार्यवाही पूर्ण नही हो सकी।"*

13. Sri Praveen Kumar also refers relevant paragraphs of application being paras no. 27, 28, 29, 30 and 31, which are reproduced hereinafter:

*"27. That the applicant no1 an Advocate, practising before the Hon'ble Court, and he has made application for stopping the embezzlement of Government Fund which are provided to the public interest, but the opposite party no. 2 has embezzled the very huge money of public fund, resulted the implication of fasely.*

*28. That earlier to the Present Pradhan of Village of opposite party no. 2 wife namely Jeet Luxmi Singh Patel the brother of opposite party no. 2 was also Pradhan of village, therefore, to save skin of Both Pradhanies Tenure, embezzlements, manipulation, the opposite party No.2 has falsely implicated to the petitioner.*

*29. That earlier to this episode stated above, the applicant no. 3 has also made application for stopping the embezzlement of Government Fund against the Pradhan, the muscles persons of opposite party no. 2 (Namely Lal Pratap, Bhanja(Son of real sister of Gram Pradhan, Mahendra Pal(Real Jeera) brother in-law, Manoj Kumar (Bhanja) son of real sister) have beaten the applicant no. 3 Vidya Sagar, for which he has lodged the first information report dated 21.08.2022 as case Crime No. 0230 of 2022, under Section 323, 504, 506 IPC PS Shankargarh, Prayagraj.*

*30. That the accused Lal Pratap Singh of Case Crime No. 230 of 2022 has a Criminal History in heinous crime implicated in several crimes.*

*31. That opposite party no. 2 is a habitual for usurping/ grabbing and embezzlement of Government fund provided for public welfare, no can speak even a single words against the opposite party no. 2, and there is no personal interest to make application 23.07.2022 made by the petitioner before the District Magistrate, Prayagraj."*

14. Learned AGA has tried to support charge sheet as well as summoning order, however, all the above referred submissions remained uncontroverted.

15. In aforesaid circumstances, taking note of above referred discussion, it appears that cross version is false case and injury report of Pradhanpati was also manipulated which is clearly evident from report of Medical Board, as referred above. It appears that complainant, i.e., Pradhanpati, is an influential person and investigation of present case was conducted under his influence. Investigating Officer has not recorded statements of Government Officials, who were allegedly present on spot for conducting inspection.

16. In view of above, the application is allowed. Impugned charge sheet No. 162 of 2023, cognizance order dated 08.12.2023 and summoning order dated 29.01.2024, arising out of Case Crime No. 0140 of 2023 (State vs. Atma Prasad Singh and others), under Sections 323, 504, 506 IPC, Police Station Shankargarh, District Prayagraj, pending in the Court of Additional Chief Judicial Magistrate-15, Prayagraj, are hereby quashed. A cost of Rs. 50,000/- is imposed on complainant, i.e., Pradhanpati for misleading and influencing the investigation and interrupting the inspection proceedings.

17. Registrar (Compliance) to take steps.

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**(2024) 7 ILRA 583**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 01.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Application U/S 482. No. 19062 of 2024

**Mohd. Ashraf & Ors. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Sri Syed Shahnawaz Shah

**Counsel for the Opposite Parties:**
G.A., Sri Mukesh Chandra Gupta, Sri Shubham Prakash Gupta

**Criminal Law-The Code of Criminal Procedure, 1973-Section 482- (Indian Penal Code-1860 Sections-498-A, 323, 504, 506)-Facts-trial Court took cognizance and summoned the applicants under Sections 498-A, 323, 504, 506 IPC and Section 3/4 of D.P. Act-**Marriage of applicant no.1 and complainant was solemnized about 5 years ago and despite making an averment that she has suffered repeated cruelty and there were repeated demand of dowry, detail of not a day month or year has been mentioned. Statement of complainant and witnesses appear to be similar without any specific allegation against any of applicants specifically in regard to relatives of applicant no.1 i.e. applicants no. 2 to 8-There is nothing about nature of abusive language or there was any element of being likely to incite the person insulted to commit breach of peace at least qua to applicants no. 2 to 8-Ingredients of referred offences are not made out against applicants no. 2 to 8. **(Para 14, 16 21 & 23)**

**Application partly allowed**. (E-15)

**List of Cases cited: -**

1. A.M. Mohan Vs St. Represented by SHO & anr., 2024 SCC OnLine SC 339

2.Kahkashan Kausar @ Sonam & ors. Vs St. of Bih. & ors., (2022) 6 SCC 599

3. Rajesh Sharma & ors. Vs St. of U.P. & anr., (2018) 10 SCC 472,

4. Arnesh Kumar Vs St. of Bih. & anr., (2014) 8 SCC 273,

5. Preeti Gupta & anr. Vs St. of Jhar. & anr., (2010) 7 SCC 667

6. Geeta Mehrotra & anr. Vs St. of U.P. & ors., (2012) 10 SCC 741

7. Priyanak Jaiswal Vs The St. of Jhar. & ors., 2024 INSC 357

8. Achin Gupta Vs St. of Har., 2024 0 INSC 369

9. Mohammad Wajid & anr. Vs St. of U.P. & ors., 2023 INSC 683

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Applicant no.1 before this Court is husband of opposite party no.2 whereas applicants no. 2 to 8 are his close relative including some women family members.

2. Opposite party No.2 got married with applicant no.1 on 30.03.2017 and it appears that there were some matrimonial dispute between them and thereafter in the year 2022, she left her matrimonial house allegedly either on her own will or by force and went to her parental house alone without her 2 sons.

3. In aforesaid circumstances, opposite party no.2/complainant has lodged an FIR on 25.02.2023 bearing FIR No. 0045/2023 against all applicants alleging that they have committed offence under Sections 498-A, 323, 504, 506 IPC and Section 3/4 of D.P. Act and for reference relevant part of FIR is quoted below :-

"निवेदन है कि प्रार्थनी का निकाह दिनांक 30.03.2017 को मौ० अशरफ पुत्र मौलाना अनवार निवासी ग्राम खजूरी थाना परिक्षितगढ़, जिला मेरठ के साथ हुआ था। जिसमें प्रार्थनी की बेबा माँ ने लगभग 10 लाख रूपये खर्च किये थे। लेकिन किये गये खर्चे से प्रार्थनी की पति मौ० अशरफ, ससुर अनवर, सास श्रीमति रशिदा, जेठ राशिद एवं कारी साजिद एवं जिठानी खदीजा एवं एव नन्द मूहम्मदी व नन्द मूहम्दी व छोटी नन्द उम्मेहानी व बड़ी नन्द मूहम्मदी खुश नहीं थे तथा निकाह के तुरन्त बाद से प्रार्थनी की ससुराल के उपरोक्त सभी लोगो ने प्रार्थनी से आय दिन 5 लाख रुपये नगद व एक बुलेरो कार की मांग करनी शुरु दी थी प्रार्थनी से आये दिन गाली गलोच व मारपीट करते थे और प्रार्थनी को जान से मारने की धमकी देते थे अपनी दहेज की मांग पूरी न होने के कारण अब से करीब 10 oct, 2022 को मेरा पति मौ० अशरफ मुझे मेरे घर पर छोड कर गया और दोनो बच्चे अपने साथ ले गये थे जब भी मै या मेरी मम्मी, यदि मेरे, परिवार वाले नासिर एव हाशिम ले जाने के लिए कहते है। तो मेरा पति कहता है। कि अगर तू मेरे यहाँ पर आयेगी तो हम तुझे जान से मार डालेगे अतः श्रीमान जी से कानूनी कार्यवाही करने की कृपा करे।"

4. On basis of above referred FIR, investigation was conducted and statement of complainant and other witnesses were recorded which are mentioned below :-

"बयान गवाह राहिना पत्नी स्व० आबिद नि० ग्राम अजराडा थाना मुंडाली जिला मेरठ उम्र करीब 55 वर्ष ने अपनी बेटी द्वारा लिखाई गयी एफआईआर का समर्थन करते हुये बताया कि मै ग्राम अजराडा थाना मुंडाली मेरठ की रहने वाली हूँ मैने मेरी लडकी कमरजह का निकाह करीब 5 वर्ष पूर्व ग्राम ग्राम खजूरी मे अशरफ पुत्र मौलाना अनवार निवासी ग्राम खजूरी थाना परिक्षितगढ, जिला मेरठ के साथ किया था। शादी के बाद कुछ दिन तक तो सब कुछ ठीक चलता रहा फिर उसके बाद मेरी लडकी के ससुराल वाले आये दिन अतिरिक्ति दहेज को लेकर

मारपीट व गाली गलौज करते रहते थे। मेरी लडकी के दो बच्चे है। मैने उसके ससुरालवालो को काफी समझाया लेकिन हर बार वो मेरी बेटी को मेरे घर पर छोड जाते और इस बार तो काफी समय से छोडकर गये है और तब से लेने नहीं आये है। और जब मेरी बेटी फोन पर अपने बच्चो को लेने की बात करती है तो इसको जान से मारने की धमकी देते है इसीलिए मेरी बेटी ने अपने ससुरालवालो के खिलाफ थाना मे रिपोर्ट देकर मुकदमा लिखाया था जो बात सही थी वह मैने आपको बता दी है। यही मेरा बयान है।

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नकल बयान पीडिता अन्तर्गत धारा 161 CrPC...... बयान अन्तर्गत धारा 161 सीआरपीसी व्यान पीडिता कमरजह पत्नी अशरफ नि० अजराडा थाना मुंडाली मेरठ सम्बन्धित मु0अ0स0 45/2023 धारा 498A/323/504/506 भादवि व 3/4 दहेज अधि० थाना मुण्डाली मेरठ बयान पीडिताः कमरजह पत्नी अशरफ नि० अजराडा थाना मुंडाली मेरठ ने पूछने पर बताया कि मेरा नाम कमरजह है। मेरी उम्र करीब 22 वर्ष है। मेरी शादी करीब 5 साल पहले अशरफ पुत्र मौलाना अनवार निवासी ग्राम खजूरी थाना परिक्षितगढ, जिला मेरठ के साथ हुई थी। कुछ दिन तक तो मेरी ससुराल वालों ने ठीक रखा लेकिन कुछ दिन बाद ही दहेज को लेकर मेरे साथ मारपीट व गाली गलौच करने लगे। इसी बीच मेरे दो बच्चे हुये। मेरे पति मौ० अशरफ, ससुर अनवर, सास श्रीमति रशिदा, जेठ राशिद एवं कारी साजिद एवं जिठानी खदीजा एव नन्द मूहम्मदी व नन्द मूहम्दी व छोटी नन्द उम्मेहानी व बडी नन्द मूहम्मदी मुझसे खुश नहीं थे। और मुझसे दहेज मागते थे। कई बार ये गुझे मारपीट करके मेरे घर छोड आते और मेरे घरवालों ने कई बार समझा बुझाकर मुझे मेरी ससुराल में भेज दिया। लेकिन हर बार की तरह इस बार भी इन लोगो ने मिलकर मेरे साथ मारपीट की और मुझे जान से मारने की धमकी दी और मुझे मेरे मायके छोड गये तब से न तो कोई लेने आया है और न ही मुझसे कोई फोन पर बात करता है। यह बयान मैं अपनी मर्जी से बिना किसी दबाव के दे रही हूँ।

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बयान गवाह- नासिर पुत्र औसाफ निवासी अजराडा थाना मुण्डाली मेरठ के द्वारा अपने बयान दर्ज कराते हुये बताया कि मेरी भांजी कमरजहाँ की शादी वर्ष 2017 में अशरफ पुत्र मौलाना अनवार निवासी खजूरी थाना परीक्षितगढ से हुई थी शादी में करीब 10 लाख रुपये खर्च किये गये थे लेकिन शादी के खर्च से 1. पति अशरफ पुत्र मौलाना अवार 2. रशीदा पत्नी अनवार 3. राशिद पुत्र अनवार 4. कारी साजिद 5. खदीजा 6. अनवार 7. मुहम्मदी 8. उम्मेहानी नि०गण ग्राम खजूरी थाना परीक्षितगढ़ मेरठ खुश नहीं थे तथा निकाह

के तुरन्त बाद से कमरजहाँ दहेज में 5 लाख रुपये नगद व एक बुलेरो कार की मांग करते तथा आये दिन गाली गलोच व मारपीट करते थे और जान से मारने की धमकी देते थे अपनी दहेज की मांग पूरी न होने के कारण मौ० अशरफ कमरजहाँ को घर पर छोड कर गया था और कमरजहाँ के दोनो बच्चे अपने साथ ले गये थे जब भी मैं तथा मेरा भाई हाशिम तथा मेरी बहन राहिना लोग कमरजहाँ को ले जाने के लिए कहते तो अशरफ कहता था कि अगर तू मेरे यहाँ पर आयेगी तो हम तुझे जान से मार डालूंगा। जिसके सम्बन्ध में कमरजहाँ ने मुकदमा लिखाया गया था यही मेरा बयान है।

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बयान गवाह .... हाशिम पुत्र औसाफ निवासी अजराडा थाना मुण्डाली मेरठ के द्वारा अपने बयान दर्ज कराते हुये बताया कि मेरी भांजी कमरजहाँ की शादी वर्ष 2017 में अशरफ पुत्र पुत्र मौलाना अनवार निवासी खजूरी थाना परीक्षितगढ से हुई थी शादी में करीब 10 लाख रुपये खर्च किये गये थे लेकिन शादी के खर्चे से 1. पति अशरफ पुत्र मौलाना अवार 2. रशीदा पत्नी अनवार 3. राशिद पुत्र अनवार 4. कारी साजिद 5. खदीजा 6. अनवार 7. मूहम्मदी 8. उम्मेहानी नि०गण ग्राम खजूरी थाना परीक्षितगढ़ मेरठ खुश नहीं थे तथा निकाह के तुरन्त बाद से कमरजहाँ दहेज में 5 लाख रुपये नगद व एक बुलेरो कार की मांग करते तथा आये दिन गाली गलोच व मारपीट करते थे और जान से मारने की धमकी देते थे अपनी दहेज की मांग पूरी न होने के कारण मौ० अशरफ कमरजहाँ को घर पर छोड कर गया था और कमरजहाँ के दोनो बच्चे अपने साथ ले गये थे जब भी मै तथा मेरा भाई नासिर तथा मेरी बहन राहिना लोग कमरजहाँ को ले जाने के लिए कहते तो अशरफ कहता था कि अगर तू मेरे यहाँ पर आयेगी तो हम तुझे जान से मार डालूंगा। जिसके सम्बन्ध में कमरजहाँ ने मुकदमा लिखाया गया था यही मेरा बयान है।"

5. After investigation, charge sheet was filed wherein trial Court took cognizance and summoned the applicants vide order dated 28.08.2023 under Sections 498-A, 323, 504, 506 IPC and Section 3/4 of D.P. Act.

6. Sri Syed Shahnawaz Shah, learned counsel for applicants has submitted that it is a counterblast criminal case. Behaviour of opposite party no.2/complainant was not good and she was not ready to live along with applicant no.1 and ultimately, applicant no.1 has filed a divorce petition bearing Suit No. 2729 of 2022 on 19.10.2022 and when notice was issued on it, as a counterblast, subsequently, FIR was lodged by opposite party no.2 on 25.02.2023 a creature of wrecking vengeance.

7. Learned counsel has further submitted that on basis of contents of statement recorded during investigation, there are omnibus allegations against

applicant no.1 and his family members i.e. other applicants. There is no specific averment of commission of offences referred above and it was filed only to harass applicant no.1 and his family members including women members.

8. Aforesaid submissions are opposed by Sri Shubham Prakash Gupta, learned counsel for opposite party no.2 that complainant and other witnesses have specifically stated about occurrence and on basis of their statements, all ingredients of above referred offences are made out.

9. Heard learned counsel for parties and perused the record.

10. Before adverting to rival submissions it would be relevant to refer few paragraph of a recent judgement passed by Supreme Court in **A.M. Mohan Vs. State Represented by SHO and another, 2024 SCC OnLine SC 339,** as under :-

*"9. The law with regard to exercise of jurisdiction under Section 482 of Cr. P.C. to quash complaints and criminal proceedings has been succinctly summarized by this Court in the case of Indian Oil Corporation v. NEPC India Limited1 after considering the earlier precedents. It will be apposite to refer to the following observations of this Court in the said case, which read thus:*

*"12. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few— Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [(1988) 1 SCC 692 : 1988 SCC (Cri) 234], State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426], Rupan Deol Bajaj v. Kanwar Pal Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059], Central Bureau of Investigation v. Duncans Agro Industries Ltd. [(1996) 5 SCC 591 : 1996 SCC (Cri) 1045], State of Bihar v. Rajendra Agrawalla [(1996) 8 SCC 164 : 1996 SCC (Cri) 628], Rajesh Bajaj v. State NCT of Delhi [(1999) 3 SCC 259 : 1999 SCC (Cri) 401], Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [(2000) 3 SCC 269 : 2000 SCC (Cri) 615], Hridaya Ranjan Prasad Verma v. State of Bihar [(2000) 4 SCC 168 : 2000 SCC (Cri) 786], M. Krishnan v. Vijay Singh [(2001) 8 SCC 645 : 2002 SCC (Cri) 19] and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque [(2005) 1 SCC 122 : 2005 SCC (Cri) 283]. The principles, relevant to our purpose are:*

*(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused. For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.*

*(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.*

*(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.*

*(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.*

*(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."*

11. Crux of argument of learned counsel for applicants is that since applicant no.1 has filed a divorce petition against her wife i.e. complainant, therefore, she has made a counterblast case in order to pressurize the applicants and lodged an FIR not only against applicant no.1 but his family members including women on basis of omnibus false allegations, whereas learned counsel for opposite parties have supported the investigation, charge sheet and summoning order.

12. At this stage, it would be apt to refer few paragraphs of a judgment of Supreme Court in **Kahkashan Kausar @ Sonam and others vs. State of Bihar and others, (2022) 6 SCC 599** wherein after considering various judgments of Supreme Court viz., **Rajesh Sharma and others vs. State of UP and another, (2018) 10 SCC 472, Arnesh Kumar vs. State of Bihar and another, (2014) 8 SCC 273, Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667 and Geeta Mehrotra and another vs. State of U.P. and others, (2012) 10 SCC 741** it was observed as follows:-

*"18. The above-mentioned decisions clearly demonstrate that this court has at numerous instances expressed concern over the misuse of section 498A IPC and the increased tendency of implicating relatives of the husband in matrimonial disputes, without analysing the long term ramifications of a trial on the complainant as well as the accused. It is further manifest from the said judgments that false implication by way of general omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of the process of law. Therefore, this court by way of its judgments has warned the courts from proceeding against the relatives and in-laws of the husband when no prima facie case is made out against them."*

[emphasis supplied]

13. In a recent judgment of Supreme Court in **Priyanak Jaiswal vs. The State of Jharkhand and others, 2024 INSC 357** it has been held as follows :-

*"13. We say so for reasons more than one. This Court in catena of Judgments has consistently held that at the time of examining the prayer for quashing of the criminal proceedings, the court exercising extra-ordinary jurisdiction can neither undertake to conduct a mini trial nor enter into appreciation of evidence of a particular case. The correctness or otherwise of the allegations made in the complaint cannot be examined on the touchstone of the probable defence that the accused may raise to stave off the prosecution and any such misadventure by the Courts resulting in proceedings being quashed would be set aside. This Court in the case of Akhil Sharda1 held to the following effect:*

*"28. Having gone through the impugned judgment and order passed by the High Court by which the High Court has set aside the criminal proceedings in exercise of powers under Section 482 Cr.P.C., it appears that the High Court has virtually conducted a mini trial, which as such is not permissible at this stage and while deciding the application under Section 482 Cr.P.C. As observed and held by this Court in a catena of decisions no mini trial can be conducted by the High Court in exercise of powers under Section 482 Cr.P.C. jurisdiction and at the stage of deciding the application under Section 482 Cr.P.C., the High Court cannot get into appreciation of evidence of the particular case being considered."*

14. In above background, I have carefully perused the contents of FIR and statement of complainant and witnesses recorded during investigation. Marriage of applicant no.1 and complainant was solemnized about 5 years ago and despite making an averment that she has suffered repeated cruelty and there were repeated demand of dowry, detail of not a day, month or year has been mentioned. Statement of complainant and witnesses appear to be similar without any specific allegation against any of applicants specifically in regard to relatives of applicant no.1 i.e. applicants no. 2 to 8.

15. Even nature of demand of dowry was not specified by the complainant in her statement and lacunae was filled by statements of other witnesses recorded at belated stage that there was a demand of Rs. 5,00,000/- and a Bolero Car, though there was a reference in the FIR.

16. As referred above, this Court has to scrutinize whether on basis of above referred submissions, allegations of demand of dowry, cruelty, intimidation and intentional insult are made out or not and for that this Court takes note of above referred observations made in Kahkashan Kausar (supra) that there is an increase tendency of implicating relatives of husband in matrimonial disputes and as referred above, allegations against applicants no. 2 to 8 (i.e. father, mother, unmarried sisters, brothers and their wives) of applicant no.1 are general and omnibus without any specific allegation, as such, ingredients of offences are absolutely not made out against applicant no.2 to 8. A reference is made to statement recorded during investigation that all applicants were not happy with dowry given at the time of marriage and soon after marriage, they repeatedly demanded dowry of Rs.5 lakh and Bolero and used to assault her also, however, no reference is given about any day, month or year of such act as marriage period was of 5 years, therefore, it could be considered to be a "general and omnibus allegations" as well as the allegations of assault are not supported by any medical

evidence, though allegations are of also repeated assault. General statement, without any reference to nature of cruelty would not cover offence under Section 498A I.P.C. mechanically.

17. So far as applicant no.1 is concerned, since allegations made by complainant/opposite party no.2 and other witnesses have some substance as they are specific on issue that he forcibly left complainant at her parental home and extended threat and at this stage, it could be said that they are general and omnibus against him, therefore, no case is made out for quashing charge sheet and summoning order against applicant no.1.

18. Court also takes note that FIR was lodged only after a divorce petition was filed by applicant no.1, still considering above referred statements recorded during investigation, Court is of the opinion that it is not a fit case to quash proceedings or charge sheet against applicant no.1.

19. It would be apposite to refer few paragraphs of **Achin Gupta vs. State of Haryana, 2024 0 INSC 369** wherein Supreme Court has referred that in matrimonial dispute, complaints are made mechanically :-

*"32. Many times, the parents including the close relatives of the wife make a mountain out of a mole. Instead of salvaging the situation and making all possible endeavours to save the marriage, their action either due to ignorance or on account of sheer hatred towards the husband and his family members, brings about complete destruction of marriage on trivial issues. The fi rst thing that comes in the mind of the wife, her parents and her relatives is thePolice, as if the Police is the panacea of all evil. No sooner the matter reaches up to the Police,then even if there are fair chances of reconciliation between the spouses, they would get destroyed. The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences are mundane matters and should not be exaggerated and blown out of proportion to destroy what is said to have been made in the heaven. <u>The Court must appreciate that all quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case, always keeping in view the physical and mental conditions of the parties, their character and social status. A very technical and hyper sensitive approach would prove to be disastrous for the very institution of the marriage</u>. In matrimonial disputes the main sufferers are the children. The spouses fight with such venom in their heart that they do not think even for a second that if the marriage would come to an end, then what will be the effect on their children. Divorce plays a very dubious role so far as the upbringing of the children is concerned. The only reason why we are saying so is that instead of handling the whole issue delicately, the initiation of criminal proceedings would bring about nothing but hatred for each other. There may be cases of genuine ill-treatment and harassment by the husband and his family members towards the wife. The degree of such ill-treatment or harassment may vary. However, the Police machinery should be resorted to as a measure of last resort and that too in a very genuine case of cruelty and harassment. The Police machinery cannot be utilised for the purpose of holding the husband at ransom so that he could be squeezed by the*

*wife at the instigation of her parents or relatives or friends. In all cases, where wife complains of harassment or ill-treatment, Section 498A of the IPC cannot be applied mechanically. No FIR is complete without Sections 506(2)and 323 of the IPC. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty."*

20. The Court also takes note of few paragraphs of **Mohammad Wajid and another vs. State of U.P. and others, 2023 INSC 683** in regard to offences under Sections 504 and 506 IPC which are as follows :-

*"23. Chapter XXII of the IPC relates to Criminal Intimidation, Insult and Annoyance. Section 503 reads thus:-*

*"Section 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 threat, commits criminal intimidation.*

*Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.*

*Illustration*

*A, for the purpose of inducing B to resist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation."*

*Section 504 reads thus:-*

*"Section 504. Intentional insult with intent to provoke breach of the peace.—Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

*Section 506 reads thus: -*

*"Section 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."*

***24. An offence under Section 503 has following essentials:-***

***1) Threatening a person with any injury;***

***(i) to his person, reputation or property; or***

***(ii) to the person, or reputation of any one in whom that person is interested.***

***2) The threat must be with intent;***

***(i) to cause alarm to that person; or***

***(ii) to cause that person to do any act which he is not legally bound to do***

***as the means of avoiding the execution of such threat; or***

***(iii) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.***

*25. Section 504 of the IPC contemplates intentionally insulting a person and thereby provoking such person insulted to breach the peace or intentionally insulting a person knowing it to be likely that the person insulted may be provoked so as to cause a breach of the public peace or to commit any other offence. Mere abuse may not come within the purview of the section. But, the words of abuse in a particular case might amount to an intentional insult provoking the person insulted to commit a breach of the public peace or to commit any other offence. If abusive language is used intentionally and is of such a nature as would in the ordinary course of events lead the person insulted to break the peace or to commit an offence under the law, the case is not taken away from the purview of the Section merely because the insulted person did not actually break the peace or commit any offence having exercised self control or having been subjected to abject terror by the offender. In judging whether particular abusive language is attracted by Section 504, IPC, the court has to find out what, in the ordinary circumstances, would be the effect of the abusive language used and not what the complainant actually did as a result of his peculiar idiosyncrasy or cool temperament or sense of discipline. It is the ordinary general nature of the abusive language that is the test for considering whether the abusive language is an intentional insult likely to provoke the person insulted to commit a breach of the peace and not the particular conduct or temperament of the complainant.*

***26. Mere abuse, discourtesy, rudeness or insolence, may not amount to an intentional insult within the meaning of Section 504, IPC if it does not have the necessary element of being likely to incite the person insulted to commit a breach of the peace of an offence and the other element of the accused intending to provoke the person insulted to commit a breach of the peace or knowing that the person insulted is likely to commit a breach of the peace. Each case of abusive language shall have to be decided in the light of the facts and circumstances of that case and there cannot be a general proposition that no one commits an offence under Section 504, IPC if he merely uses abusive language against the complainant. In King Emperor v. Chunnibhai Dayabhai, (1902) 4 Bom LR 78, a Division Bench of the Bombay High Court pointed out that:-***

*"To constitute an offence under Section 504, I.P.C. it is sufficient if the insult is of a kind calculated to cause the other party to lose his temper and say or do something violent. Public peace can be broken by angry words as well as deeds."*

*(Emphasis supplied)*

***27. A bare perusal of Section 506 of the IPC makes it clear that a part of it relates to criminal intimidation. Before an offence of criminal intimidation is made out, it must be established that the accused had an intention to cause alarm to the complainant."***

21. As referred above, statements recorded during investigation are short of above referred requirements for Sections 504 and 506 IPC at least against applicant Nos.2 to 8, though it may have substance against applicant No.1 as there is a specific narration qua to him in regard to offence of intimidation. There is nothing about nature

of abusive language or there was any element of being likely to incite the person insulted to commit breach of peace at least qua to applicants no. 2 to 8. Accordingly, in view of A.M. Mohan (supra), it is a fit case to exercise inherent powers under Section 482 Cr.P.C. as ingredients of referred offences are not made out against applicants no. 2 to 8.

22. Accordingly, charge sheet dated 23.03.2023 and entire proceedings in Criminal Case No. 130/2023 under Sections 498-A, 323, 504, 506 IPC and Section 3/4 of D.P. Act, arising out of Case Crime No. 45/2023, Police Station- Mundali, District- Meerut, pending before Judicial Magistrate-I, Meerut are hereby quashed qua to applicants nos. 2 to 8( Smt. Rasheeda, Rashid, Kari Sajid, Khadija, Maulana, Muhammadi, Ummehani). However, trial will proceed further against applicant no.1 only for above referred offences and till date if he has not surrendered, it is directed that he will surrender before trial Court within 4 weeks from today and in case any application for bail is filed, the same shall be considered expeditiously in accordance with law and taking note of judgment passed by Supreme Court in **Satender Kumar Antil vs. CBI, (2021) 10 SCC 773.**

23. Application is partly **allowed**.

24. Registrar (Compliance) to take steps.

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**(2024) 7 ILRA 593**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 09.07.2024**

**BEFORE**

**THE HON'BLE ANISH KUMAR GUPTA, J.**

Application U/S 482. No. 29862 of 2019

**Mohd. Mohsin ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Amit Daga, Vivek Kumar Singh

**Counsel for the Opposite Parties:**
G.A., Surya Pratap Singh Parmar

**Criminal Law – Application under Section 482 CrPC-** Proceedings under Section 138 NI Act- under challenge- cheque issued by the applicant dishonoured due to "insufficient funds"- cheque dishonoured for the reason being referred to the drawer- covered under Section 138 NI Act- documents sent through registered post- presumed to have been served after the expiry of 30 days- Section 27 of the General Clauses Act- Complaint has to be filed in the name of the payee of the cheque-not his power of attorney holder- no cause of action arose in favour of opposite party on the basis of presumption of notice- proceedings of criminal complaint quashed- application allowed. **(Paras 16, 17, 19, 20 and 21)**

**HELD:**
Thus, from the specific judgments in the cases of *Electronics Trade &Technology Development Corpn. Ltd., Secunderabad (supra), K.K. Sidharthan(supra)* and *Modi Cements Ltd. (supra),* the dishonour of cheque for the reasons 'referred to the drawer' is fully covered under the provision of Section 138 of N.I. Act, 1881. Therefore, the submission in this regard made by learned counsel for the applicant is not sustainable. (Para16)

So far as the other issue with regard to service of notice is concerned, theoffence under Section 138 of N.I. Act, 1881, shall be constituted only upon the service of legal notice on the drawer of the cheque and after expiry of 15 days from such service of notice. In the complaint, there is no averment with regard to the fact that when the notice has actually been served on the application. Therefore, in view of provisions of Section 27 of General Clauses Act, adocuments sent through the registered post shall be

presumed to have been served after the expiry of 30 days

**Application allowed.** (E-14)

**List of Cases cited:-**

1. Raj Kumar Khurana Vs St. of (NCT of Delhi) & anr., (2009) 6 SCC 72

2. Subodh S. Salaskar Vs Jayprakash M. Shah & anr., (2008) 13 SCC 689

3. A.C. Narayanan Vs St. of Mah. & anr., (2014) 11 SCC 790

4.Electronics Trade & Technology Development Corpn. Ltd., Secunderabad Vs Indian Technologists& Engineers (Electronics) (P) Ltd. & anr. (1996) 2 SCC 739

5.K.K. Sidharthan Vs T.P. Praveena Chandran & anr. (1996) 6 SCC 369

6. Modi Cements Ltd. Vs Kuchil Kumar Nandi (1998) 3 SCC 249

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

1. Heard Sri Amit Daga, learned counsel for the applicant, Sri Priyansh Mishra, Advocate holding brief of Sri Surya Pratap Singh Parmar, learned counsel appearing for opposite party No.2 and Sri Prem Prakash Tiwari, learned AGA for the State.

2. The instant application under Section 482 Cr.P.C. has been filed to quash the Criminal Complaint dated 14.1.2019 as well as entire proceedings of Criminal Complaint Case No.61 of 2019 (Nurul Bashar vs. Mohd.Mohsin) under Section 138 of Negotiable Instruments Act, 1881, Police Station-Bhadohi, District-Bhadohi, pending before the court of Chief Judicial Magistrate, Bhadohi at Gyanpur.

3. The brief facts of the case are that the firm M/s Evergreen Carpets is a registered proprietorship firm and is involved in the manufacturing, export and sale of carpets. The applicant herein is the proprietor of the firm M/s Universal Carpets and used to purchase the carpets from the M/s Evergreen Carpets. The firm M/s Evergreen Carpets and the firm M/s Universal Carpets, both are the sole proprietorship firms. In connection with the aforesaid business transaction between them the firm M/s Universal Carpets has purchased the carpets worth Rs.1,10,39,676/-. Against the aforesaid purchase the Universal Carpets paid Rs.71,00,000/- to M/s Evergreen Carpets and the balance of Rs.39,39,676/- was due against the Universal Carpets. When M/s Evergreen Carpets demanded the balance amount of Rs.39,39,676/-, a cheque no. 23944651 dated 20.9.2018 of Rs.12,00,000/- of Jammu and Kashmir Bank, Branch Bhadohi was issued by M/s Universal Carpets in favour of M/s Evergreen Carpets. The said cheque was presented for encashment by M/s Evergreen Carpets in its Bank, which was dishonored on 21.11.2018 for the reason 'insufficient funds'. However, when it was discussed with the proprietor of the M/s Universal Carpets he asked to present the said cheque after five days so that the same can be honoured. Relying upon the aforesaid assurance given by the M/s Universal Carpets, M/s Evergreen Carpets again presented the same cheque on 27.11.2018 which was again dishonored on 28.1.2018 for the reason 'insufficient funds'. Thereafter on 19.12.2018, a registered legal notice was issued demanding the cheque amount. Thereupon a complaint under section 138 of the N.I. Act has been filed on 14.1.2019 before the C.J.M. Bhadohi. In the complaint there was no assertion with regard to the fact that as to when the registered legal notice was

actually served on the M/s Universal Carpets. The said complaint dated 14.1.2019 has been filed by one Nurul Basar in his own name alleging in the opening paragraph of the said complaint that he is working in the firm M/s Evergreen Carpets as an Accountant and he has been authorized to file the complaint. Aggrieved by the aforesaid complaint lodged by the said Nurul Basar, who was the Accountant of M/s Evergreen Carpets, the instant application under Section 482 Cr.P.C. has been filed by the Proprietor of M/s Universal Carpets, namely, Mohd. Mohsin.

4. Learned counsel for the applicant has raised three broad submissions:

(i) In the instant case, cheque was dishonoured for the reason 'referred to the drawer'. Therefore, he submits that due to aforesaid reason for dishonour of cheque is not covered within the provisions of Section 138 of N.I. Act, 1881. Hence, no offence under Section 138 of N.I. Act is made out against the applicant.

(ii) Learned counsel for the applicant further submits that in the complaint under Section 138, it has been that the legal notice was issued on 19.12.2018 through registered post, however, there is no assertion in the complaint as well as in the statement of complainant recorded under Section 200 Cr.P.C. that when such notice was served on the applicant herein and if the Section 27 of the General Clauses Act, 1897 is considered, the said notice shall be presumed to have been served after the expiry of 30 days, therefore, in the instant complaint filed on 14.12019 is a premature complaint and as no offence will be made out unless the notice is served and after service of notice, 15 days period has expired.

(iii) It is further submitted that the instant complaint case has been lodged by the power of attorney holder of the payee of the cheque in his own name, therefore, the instant complaint is not maintainable for that reason also.

5. With regard to the first submission, learned counsel for the applicant has relied upon the judgment of Apex Court in ***Raj Kumar Khurana vs. State of (NCT of Delhi) and another,*** *(2009) 6 SCC 72.* With regard to the second submission, he has relied upon the judgment of Apex Court in ***Subodh S. Salaskar vs. Jayprakash M. Shah and another,*** *(2008) 13 SCC 689* and in support of the third submission, learned counsel for the applicant has relied upon the judgment of Apex Court in ***A.C. Narayanan vs. State of Maharashtra and another,*** *(2014) 11 SCC 790.*

6. In view of the aforesaid submissions and the judgments of the Apex Court, learned counsel for the applicant has prayed for quashing of the aforesaid complaint case against the applicant.

7. Per contra, learned counsel for the opposite party No.2 has submitted that once the cheque is issued by the drawer of the cheque and the same is dishonoured by the Bank, the offence under Section 138 of N.I. Act, 1881, is constituted. He further submits that since the notice was sent through the registered post, it has to be presumed to have been served in due course. Further, relying upon the judgment of A.C. Narayanan (supra), he has submitted that the power of attorney is authorized to file the complaint on behalf of its principal.

8. Having heard the rival submissions raised by learned counsel for the parties, this Court has carefully gone through the record of the case and from the record, it is reflected that in the instant case, the cheque was allegedly issued by the applicant on 20.9.2018 for an amount of Rs.12 lakhs, which was presented before the Bank and the same was dishonoured for the reason 'referred to the drawer' thereupon a legal notice dated 19.12.2018 was sent through the registered post on 19.12.2018 and when no payment was made in compliance of the aforesaid notice on 14.1.2019, the complaint case was filed.

9. With regard to the first submission advanced by learned counsel for the applicant, it would be relevant to refer the provisions of Section 138 of the N.I. Act, 1881, which reads as under:

***"138. Dishonour of cheque for insufficiency, etc. of funds in the account.*** *- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:*

*Provided that nothing contained in this section shall apply unless-*

*(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*

*(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*

*(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*

***Explanation.****- For the purposes of this section, debt of other liability means a legally enforceable debt or other liability."*

10. In view of the aforesaid provisions, the offence under Section 138 of N.I. Act, 1881, shall be attracted only when a cheque is returned by the Bank unpaid for the reasons;

(i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or

(ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

11. In Raj Kumar Khurana (supra), the Apex Court has held as under:

*"11. Section 138 of the Act moreover provides for a penal provision. A penal provision created by reason of a legal fiction must receive strict construction (See R. Kalyani v. Janak C.*

*Mehta and DCM Financial Services Ltd v. J.N. Sareen). Such a penal provision, enacted in terms of the legal fiction drawn would be attracted when a cheque is returned by the bank unpaid. Such non-payment may either be:*

*(i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or*

*(ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank.*

*Before a proceeding thereunder is initiated, all the legal requirements therefor must be complied with. The court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with.*

12. The parameters for invoking the provisions of Section 138 of the Act, thus, being limited, we are of the opinion that refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of Section 138 of the Act.

13. The court while exercising its jurisdiction for taking cognizance of an offence under Section 138 of the Act was required to consider only the allegations made in the complaint petition and the evidence of the complainant and his witnesses, if any. It could not have taken into consideration the result of the complaint petition filed by the respondent No. 2 or the closer report filed by the Superintendent of Police in the First Information Report lodged by the appellant against him."

12. So far as the controversy with regard to dishonour of the cheque for the reasons 'referred to the drawer' is concerned, it has been specifically dealt with by a Division Bench of the Supreme Court in the case of ***Electronics Trade & Technology Development Corpn. Ltd., Secunderabad Vs. Indian Technologists & Engineers (Electronics) (P) Ltd. and another (1996) 2 SCC 739*** wherein it has been categorically held by the Apex Court that if the cheques were dishonoured for the reasons (i) referred to the drawer; (ii) instructions for stoppage of payment and stamped; (iii) exceeds agreement, all those conditions are to be covered within the meaning of Section 138 of N.I. Act, 1881, the relevant paragraph 5 of the said judgment is reproduced below:

*"5. It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (l) in this case, "refer to the drawer" (2) "instructions for stoppage of payment" and stamped (3) "exceeds arrangement", it amounts to dishonour within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonour, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption of dishonest intention, subject to any other liability, stands satisfied."*

13. The aforesaid view has further been affirmed by a Division Bench of the Apex Court in the case of ***K.K. Sidharthan Vs. T.P. Praveena Chandran and another (1996) 6 SCC 369*** and held in paragraph 2 as under:

*"2……………….*

*This shows that Section 138 gets attracted in terms if cheque is dishonoured because of insufficient funds or where the amount exceeds the arrangement made with the bank. It has, however, been held by a Bench of this Court in Electronics Trade and Technology Development Corpn. Ltd. v. Indian Technologists and Engineers (Electronics (P) Ltd., that even if a cheque is dishonoured because of " stop payment" instruction to the bank, Section 138 would get attracted."*

14. The said view taken by the Apex Court in the case of Electronics Trade and Technology Development Corpn. Ltd. (supra) has further been upheld by a Three Judge Bench of the Apex Court in the case of ***Modi Cements Ltd. V. Kuchil Kumar Nandi (1998) 3 SCC 249*** and in paragraph 16 the Apex Court has held as under:

*"16. We see great force in the above submission because once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment it will not preclude an action under section 138 of the Act by the drawee or the holder of a cheque in due cours. The object of Chapter XVII, which is intituled as "OF PENALTIES IN CASE OF DISHONOUR OF CERTAIN CHEQUES FOR INSUFFICIENCY OF FUNDS IN THE ACCOUNTS" and contains Sections 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. It is for this reason we are of the considered view that the observations of this Court in Electronics Trade & Technology Development Corpn. Ltd. In paragraph 6 to the effect " suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted", do not fit in with the object and purpose for which the above chapter has been brought on the statute-book."*

15. The judgement of the Apex Court in the case of **Raj Kumar Khurana (supra)** which has been highly relied upon by the learned counsel for the applicant, in view of the previous binding precedent of the Apex Court and specifically which has been duly approved by the Three Judges Bench of the Apex Court in the case of Modi Cements (supra), in the considered opinion of this Court, the judgements relied upon by the learned counsel for the applicant is per in-curium, in view of the judgement of Three Judges Bench in the case of **Modi Cements (supra).**

16. Thus, from the specific judgments in the cases of ***Electronics Trade & Technology Development Corpn. Ltd., Secunderabad (supra), K.K. Sidharthan (supra)*** and ***Modi Cements Ltd. (supra),*** the dishonour of cheque for the reasons 'referred to the drawer' is fully covered under the provision of Section 138 of N.I. Act, 1881. Therefore, the submission in this regard made by learned counsel for the applicant is not sustainable.

17. So far as the other issue with regard to service of notice is concerned, the offence under Section 138 of N.I. Act, 1881, shall be constituted only upon the service of legal notice on the drawer of the cheque and after expiry of 15 days from such service of notice. In the complaint,

there is no averment with regard to the fact that when the notice has actually been served on the applicant herein. Therefore, in view of provisions of Section 27 of General Clauses Act, a documents sent through the registered post shall be presumed to have been served after the expiry of 30 days.

18. In ***Subodh S. Salaskar (supra),*** the Apex Court has held as under with regard to service of a document through post:

*"22. In terms of the provisions of the General Clauses Act, a notice must be deemed to have been served in the ordinary course subject to the fulfillment of the conditions laid down therein. Section 27 of the General Clauses Act reads as under:*

*"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, 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."*

*23. Thirty days' time 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 V, 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 a period of thirty days."*

19. In view thereof, in the instant case, legal notice was sent on 19.12.2018, therefore, for want of any specific averment and proof of service, if the presumption of service of notice in reasonable time is raised, it should be deemed to have been served at best within a period of 30 days, from the date of its post i.e. 17.1.2019. However, in the instant case, the complaint itself has been filed on 14th January, 2019. Thus, prima facie on 14.1.2019, no offence under Section 138 of N.I. Act, 1881, was attracted as after presumed service on 17.1.2019 still 15 days were required for response by applicant. The opposite party No.2 was still required to wait for another 15 days. Therefore, no offence under Section 138 of N.I. Act, 1881, was made out against the applicant on the relevant date when the complaint was filed.

20. Further, the complaint has been filed by the power of attorney holder in his own name. Though the payee of the cheque can maintain a complaint through the power of attorney holder, but such complaint ought to have been filed in the name of payee of the cheque as has also been held in the case of ***A.C. Narayanan (supra),*** which has been relied upon by both the parties. In paragraph 31 of the said judgment, the Apex Court has held as under:

*"31. In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. We also reiterate that where*

*the payee is a proprietary concern, the complaint can be filed:*

*(i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee";*

*(ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and*

*(iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor."*

21. Since in the instant case, the complaint has been filed by the power of attorney holder in his own name and not as the power of attorney holder of the payee of the cheque and further no offence under Section 138 of N.I. Act, 1881, is constituted in view of the failure of the applicant to make assertion with regard to service of notice and on the basis of presumption of service after expiry of 30 days of its sending through registered post, no cause of action has ever arisen to opposite party No.2 to maintain the instant complaint.

22. Therefore, for all the reasons recorded herein above, the instant application under Section 482 Cr.P.C. is **allowed** and the entire proceedings of Criminal Complaint Case No.61 of 2019 (Nurul Bashar vs. Mohd.Mohsin) under Section 138 of Negotiable Instruments Act, 1881, Police Station-Bhadohi, District-Bhadohi, pending before the court of Chief Judicial Magistrate, Bhadohi at Gyanpur, are hereby quashed.

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**(2024) 7 ILRA 600**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 09.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Application U/S 482. No. 47176 of 2023

**Saida** **...Applicant**
**Versus**
**State of U.P. & Ors. ...Opposite Parties**

**Counsel for the Applicant:**
Arvind Prabodh Dubey, Naushad Alam

**Counsel for the Opposite Parties:**
G.A.

**Criminal Law - Criminal Procedure Code, 1973 - Sections 156(3), 201, 202, 203, 204 & 482 - Indian Penal Code, 1860 - Sections –376-D, 452 & 506:** - Application U/s 482 – FIR – lodged by applicant against proposed accused – investigation – final report – accepted by trial court – controversy is in regard to an affidavit purportedly filed by applicant herself that she did not want to oppose final report – order by which the trial court accepted final report is passed on the basis of material available and not much being influenced by an alleged affidavit – against which a revisional is still pending – present case is arising out of an application filed by applicant u/section 156(3) Cr.P.C. that above purported affidavit of applicant was not sworn by her and she did not put her thumb impression against proposed accused – whom were imposted a woman declaring herself to be applicant who shorn that affidavit – instead of giving direction to lodge an FIR the learned CJM considered her application to be a complaint and directed for recording of St.ment of the complainant u/ section 202 Cr.P.C. – being aggrieved with the observation of trial court that all the facts are within the knowledge of applicant, therefore, no need to lodge FIR – court finds that, trial court has not appreciated contents of complaint in its correct perspective and failed to consider that contents of complaint and allegation show prima facie that a serious offence has been committed by proposed accused persons – as such, bare facts indicate that it requires police investigation

and for that learned Magistrate does not require to wait till stage of 202 Cr.P.C. – hence, application is allowed – direction issued to trial court to consider the application u/section 156(3) Cr.P.C. and concern SHO & Superintendent of Police are directed to lodge FIR and proceed further for investigation in accordance with law. (Para – 14, 15, 16, 27, 28)

**Application u/s 482 Allowed.** (E-11)

**List of Cases cited:**

1. Anju Chaudhary Vs St. of UP & anr.– 2013 6 SCC 384,

2. XYZ Vs St. of M. P. & ors.- 2023 9 SCC 705,

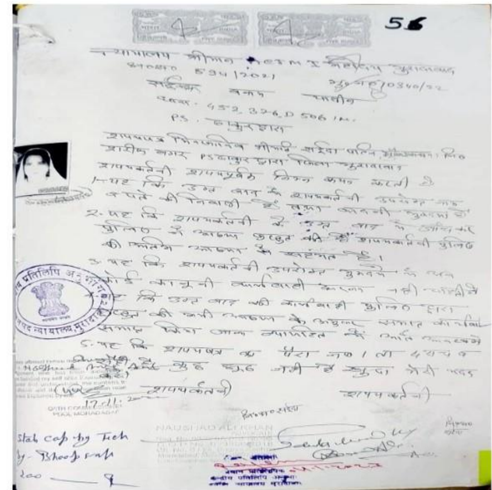
3. Mona Panwar Vs High Court of Judicature at Allahabad through Registrar General, 2011 3 SCC 496,

4. Lalita Kumari Vs Government of UP & ors.– 2013 14 SCR 713,

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Applicant before this Court is a woman who has filed an FIR bearing No. 0594 dated 10.10.2021 against opposite parties no. 2 to 4 for offence under Sections 452, 376-D, 506 IPC wherein after investigation, a final report being no. 01 dated 31.12.2021 was submitted.

2. It is alleged by applicant that no notice was issued to her on final report and opposite parties no. 2 to 4 put an imposter of applicant and filed an affidavit putting her forged thumb impression along with forged photograph that she does not want to file any protest petition and final report may be accepted. A scanned copy of same is pasted hereinafter :-



3. It is further case of applicant that trial Court on basis of above referred forged affidavit has accepted the final report dated 18.11.2022. For reference, said order is quoted below :-

"18.11.2022-

पत्रावली पेश हुई। वादिनी मुकदमा श्रीमती सईदा उपस्थित। वादिनी मुकदमा द्वारा प्रार्थना पत्र प्रस्तुत कर कथन किया गया है कि प्रार्थनी उक्त वाद में वादिनी है तथा उक्त बाद में थाना प्रेषित एफ०आर० पर कोई आपत्ति नहीं है तथा न ही उक्त वाद में कोई अग्रिम कार्यवाही नहीं चाहती है। अतः प्रस्तुत अन्तिम आख्या को स्वीकार किये जाने की प्रार्थना की गयी है।

सुना एवं पत्रावली का अवलोकन किया।

प्रार्थनी/वादिनी सईदा द्वारा परिवाद यासीन आदि के विरुद्ध, थाना ठाकुरद्वारा, जिला मुरादाबाद में पंजीकृत कराया गया है। विपक्षीगण व वादिनी

मुकदमा में मोबाइल की चोरी को लेकर विवाद हुआ था, जिसके संबंध में 107/116 दं०प्र०सं० की कार्यवाही की गयी थी। पत्रावली में संलग्न साक्षीगण/ शपथकर्ताओं के शपथ पत्र में वादिनी की पुत्री शबीना द्वारा भी धारा 156 (3) दं०प्र०सं० के माध्यम से घटना दिनांक 19.08.2022 में प्राथमिकी दर्ज कराने हेतु प्रार्थना पत्र प्रेषित किया, जिसका उल्लेख वादिनी ने अपनी तहरीर में नहीं लिखा, इसलिए वादिनी द्वारा झूठी प्राथमिकी लिखायी है। स्वतंत्र साक्षी व पीडिता के बयान 161 व 164 दं०प्र०सं० में विरोधाभास है। साथ ही डॉ० निर्मला ओझा की मेडिकल रिपोर्ट में पीडिता/वादिनी के शरीर पर कोई मृत या जीवित स्पर्म नहीं मिला। विवेचक/उपनिरीक्षक के द्वारा विवेचनोपरान्त अन्तिम आख्या सं0-198/2021, दि० 31.12.2021 न्यायालय में स्वीकृत किये जाने हेतु प्रेषित की गयी है। वादिनी द्वारा अंतिम आख्या स्वीकृत किये जाने की प्रार्थना की गई है। विवेचक द्वारा की गई विवेचना में कोई त्रुटि नहीं है। तदनुसार प्रार्थना पत्र भय शपथ पत्र के प्रकाश में अन्तिम आख्या सं0-198/2021, दि० 31.12.2021 स्वीकार किये जाने योग्य है।"

4. Sri Arvind Prabodh Dubey, learned counsel for applicant has submitted that aforesaid order has been challenged by way of filing a criminal revision bearing No. 402/2022 which is pending before Chief Judicial Magistrate, Moradabad and grounds taken therein are quoted below :-

"1. यह कि निगरानीकर्ता उपरोक्त मुकदमें की वादनी है।

2. यह कि निगरानीकर्ता ने उपरोक्त मुकदमें की प्रथम सूचना रिपोर्ट सही तथ्यों पर लिखायी थी, व सही मुल्जिमानो के विरूद्ध लिखायी थी, परन्तु विवेचक ने त्रुटिपूर्ण विवेचना करते हुए पारदर्शी तरीके से अपनी डयूटी को अन्जाम नहीं दिया है, और विरूद्ध कानून एफ० आर० प्रेषित कर दी है।

3. यह कि विवेचक द्वारा 'प्रेषित अन्तिम रिपोर्ट किसी कानूनी रूपसे पोषणीय नहीं है।

4. यह कि अवर न्यायालयका दायित्व था कि न्यायालय में अन्तिम रिपोर्ट प्राप्त होने के पश्चात वादी को नोटिस देना चाहिये था, क्योकि कानून के प्रावधान के अनुसार यह आवश्यक है।

5. यह कि अवर न्यायालय ने वादनी / निगरानीकर्ता को कोई नोटिस अन्तिम रिपोर्ट प्राप्त होने के पश्चात जारी नही किया।

6. यह कि अवर न्यायालय का दायित्व था कि वादी की ओर से यदि, अन्तिम रिपोर्ट स्वीकार हेतु आया था, तो उसका भली भांति प्रकार से सत्यापन आवश्यक था।

7. यह कि प्रस्तुत मामले में मुल्जिमान द्वारा असल (वास्तविक वादनी)/ निगरानीकर्ता की जगह स्वंय अपनी तरफ से फर्जी वादनी श्रीमती सईदा

को बनाकर अदालत में प्रार्थनापत्र व शपथपत्रं देकर अन्तिम रिपोर्ट स्वीकार करने की प्रार्थना की गयी।

8. यह कि अन्तिम रिपोर्ट स्वीकार करने के प्रार्थनापत्र के साथ संलग्न शपथपत्र पर जो फोटो लगा है, वो वादनी / निगरानीकर्ता का नही है, और ना ही उन पर वादनी/निगरानीकर्ता के अंगूठे है।

9. यह कि अवर न्यायालय ने इन फर्जी प्रपत्रो की कोई जांच / सत्यापन नही कराया और नाही मौखिक साक्ष्य प्राप्त किया।

10. यह कि मुकदमें के मुल्जिमान ने जानबूझकर षडयंत्र रचकर, कूटरचित दस्तावेज तैयार करके सोची समझी स्कीम के तहत न्यायालय को धोखा देकर फर्जी तरीके से अन्तिम रिपोर्ट तैयार करा ली है, जो कि एक बहुत अत्यन्त गम्भीर विषय है, और किसी भी कानूनी के तहत वैध नही है।

11. यह कि मुल्जिमान के इस कृत्य से व अवर न्यायालय के आदेश से प्रार्थनी / निगरानीकर्ता की सख्त हकतल्फी हुयी है, जिससे मुल्जिमान को अनुचित लाभ मिला है।

12. यह न्यायहित मे व कानून की दृष्टि से अवर न्यायालय का आदेश दिनांक-18/11/2022 हर सूरत में खारिज किये जाने योग्य है।"

5. Learned counsel has further submitted that since opposite parties no. 2 to 4 have prepared a forged document i.e. an affidavit putting forged thumb impression and a photograph of applicant and submitted before trial Court, as such, they have committed an offence and therefore, she filed an application under Section 156(3) Cr.P.C. against present opposite parties no. 2 to 4 and 1 other named as well as an unknown women with a prayer that an FIR be lodged and investigation be conducted against them for committing offence of cheating, forgery, etc. For reference, said application is quoted below :-

"प्रार्थना पत्र अन्तर्गत धारा 156 (3) सी० आर० पी० सी०

संबंधित थाना सिविल लाइन्स मुरादाबाद

श्रीमान जी,

निवेदन है कि प्रार्थिनी शाम शरीफ नगर, थाना ठाकुरद्वारा, जिला मुरादाबाद की निवासी है। प्रार्थिनी के गाँव के ही इफ्तेखार पुत्र निसार, कलीम पुत्र अजीज, यासीन पुत्र शकूर ने दिनांक 18-08-2021 की रात को प्रार्थनी के घर में घुसकर तमंचे की नोक पर गैंगरेप किया और इफ्तेखार के भाई इल्यास ने रिपोर्ट दर्ज न कराने के लिए धमकाया था। जिसके सम्बंध में उच्चाधिकारी के आदेश पर प्रार्थिनी की रिपोर्ट दिनांक 10-10-2021 को अ०स० 594/2021 धारा 376डी, 452, 506 थाना ठाकुरद्वारा में दर्ज हुई थी। मुल्जिमानो ने अपने प्रभाव का इस्तेमाल कर प्रार्थिनी के मुकदमे में फाईनल रिपोर्ट

लगवा दी थी। विवेचक महोदय ने प्रार्थनी के मुकदमे 310स0-594/2021 में फाईनल रिपोर्ट सं० 198/2021 माननीय न्यायालय ए० सी० जे० एम० प्रथम मुरादाबाद में दाखिल कर दी थी।

प्रार्थिनी के पास माननीय न्यायालय ए० सी० जे० एम० प्रथम मुरादाबाद से मुकदमे के सम्बंध में कभी भी कोई सम्मन सूचना या नोटिस प्राप्त नही हुआ है। प्रार्थिनी को अधिवक्ता के माध्यम से मुकदमे की नकल प्राप्त करने पर ज्ञात हुआ कि मुल्जिमान इफ्तेखार, कलीम, यासीन, इल्यास ने सोची समझी स्कीम व षडयंत्र के तहत प्रार्थिनी के स्थान पर किसी अन्य महिला को न्यायालय श्रीमान ए० सी० जे० एम० प्रथन मुरादाबाद में पेश करके और कुट रचित प्रार्थना पत्र और शपथपत्र दाखिल कर न्यायालय को धोखा देकर प्रार्थनी के मुकदमे की फाइनल रिपोर्ट सं0 198/2021 को स्वीकार करा लिया है। मुल्जिमानो द्वारा न्यायालय में प्रस्तुत शपथपत्र एवं प्रार्थना पत्र पर प्रार्थनी के अंगूठा निशान नहीं है और न ही प्रार्थनी का फोटो है और प्रार्थनी कभी न्यायालय में हाजिर नहीं हुई है। मुल्जिमानो के द्वारा षड्यन्त्र के तहत कूट रचित दस्तावेजो के आधार पर फर्जी तरीके से प्रार्थिनी के मुकदमे की फाइनल रिपोर्ट स्वीकार करा लिए जाने से प्रार्थनी को असीम हानि हुई है और प्रार्थनी बहुत अधिक परेशान है।

प्रार्थनी के साथ मुल्जिमानो के द्वारा फर्जीवाड़ा करने पर प्रार्थनी ने अपनी रिपोर्ट दर्ज कराने के लिए दिनांकः 02-02-2022 को थाना सिविल लाईन्स मुरादाबाद में प्रार्थना पत्र दिया। थाना सिविल लाईन्स मुरादाबाद द्वारा रिपोर्ट दर्ज नही करने पर प्रार्थनी ने दिनांक 27.02.2023 को एक प्रार्थना पत्र रजि० डाक द्वारा श्रीमान एस०एस०पी० महोदय मुरादाबाद व एक प्रार्थना पत्र डी० आई० जी० महोदय परिक्षेत्र मुरादाबाद को दिया परन्तु प्रार्थनी की आज तक रिपोर्ट दर्ज नही हुई है। प्रार्थनी अब श्रीमान जी के न्यायालय की शरण में आयी। प्रार्थनी के साथ घोर अन्याय और अपराध हुआ है। जोकि संज्ञेय अपराध की श्रेणी में आता है। मुल्जिमानो के विरूध्द प्रार्थनी की रिपोर्ट दर्ज किया जाना न्यायहित में आवश्यक है।

अतः श्रीमान जी से प्रार्थनी है कि थाना प्रभारी सिविल लाईन्स मुरादाबाद को प्रार्थनी की रिपोर्ट दर्ज कर विवेचना कराने के आदेश पारित करने की कृपा करें। श्रीमान जी की अति कृपा होगी।"

6. Aforesaid application was considered by Chief Judicial Magistrate, Moradabad and it was disposed of by an order impugned dated 31.03.2023 whereby instead of giving a direction to lodge an FIR, the application was considered to be a complaint and matter was put for recording statement of the complainant under Section 200 Cr.P.C. Relevant part of impugned order is quoted below :-

"6. प्रार्थना पत्र के वर्णित कथनों से स्पष्ट है कि प्रार्थिनी को संदर्भित घटना के समस्त तथ्यों की जानकारी है एवं उसने अपने प्रार्थना पत्र में कथित घटना के समस्त तथ्यों एवं गवाहों का विस्तृत उल्लेख किया है। अभिलेख न्यायालय से सम्बन्धित है। अतः इस स्तर पर पुलिस द्वारा विवेचना कराये जाने की आवश्यकता प्रतीत नहीं होती है।"

7. Learned counsel has submitted that applicant is aggrieved by aforesaid order wherein observations of trial Court are that all facts are within knowledge of applicant/complainant, therefore, there is no need to lodge FIR.

8. Learned counsel has further submitted that said observation is contrary to contents of application as it is a case where opposite parties no. 2 to 4 along with other persons have put an imposter of applicant and prepared a forged affidavit that she does not want to protest final report. Applicant always wanted to lodge an FIR against proposed accused persons and contents of application was for same cause.

9. Learned counsel has next submitted that an offence has been committed in pleadings before Court and all original documents are seized of with trial Court, therefore, applicant could not submit any evidence to it rather it was a fit case where FIR ought to have been lodged and investigation ought to have been carried out.

10. Learned counsel has referred a judgment passed by Supreme Court in case of **Anju Chaudhary vs. State of U.P. and another (2013) 6 SCC 384** and relevant paragraphs 13 and 14 are quoted below :-

*"13. A copy of the information so recorded under Section 154(1) has to be given to the informant free of cost. In the event of refusal to record such information, the complainant can take recourse to the remedy available to him under Section 154(3). Thus, there is an obligation on the part of a police officer to register the information received by him of commission of a cognizable offence. The two-fold obligation upon such officer is that (a) he should receive such information and (b) record the same as prescribed. The language of the section imposes such imperative obligation upon the officer. An investigating officer, an officer-in-charge of a police station can be directed to conduct an investigation in the area under his jurisdiction by the order of a Magistrate under Section 156(3) of the Code who is competent to take cognizance under Section 190. Upon such order, the investigating officer shall conduct investigation in accordance with the provisions of Section 156 of the Code. The specified Magistrate, in terms of Section 190 of the Code, is entitled to take cognizance upon receiving a complaint of facts which constitute such offence; upon a police report of such facts; upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.*

*14. On the plain construction of the language and scheme of Sections 154, 156 and 190 of the Code, it cannot be construed or suggested that there can be more than one FIR about an occurrence. However, the opening words of Section 154 suggest that every information relating to commission of a cognizable offence shall*

*be reduced to writing by the officer in-charge of a Police Station. This implies that there has to be the first information report about an incident which constitutes a cognizable offence. The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of Section 173(2) of the Code. It will, thus, be appropriate to follow the settled principle that there cannot be two FIRs registered for the same offence. However, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered. The most important aspect is to examine the inbuilt safeguards provided by the legislature in the very language of Section 154 of the Code. These safeguards can be safely deduced from the principle akin to double jeopardy, rule of fair investigation and further to prevent abuse of power by the investigating authority of the police. Therefore, second FIR for the same incident cannot be registered. Of course, the Investigating Agency has no determinative right. It is only a right to investigate in accordance with the provisions of the Code. The filing of report upon completion of investigation, either for cancellation or alleging commission of an offence, is a matter which once filed before the court of competent jurisdiction attains a kind of finality as far as police is concerned, may be in a given case, subject to the right of further investigation but wherever the investigation has been completed and a person is found to be prima facie guilty of committing an offence or otherwise, reexamination by the investigating agency on its own should not be permitted merely by registering another FIR with regard to the same offence. If such protection is not given to a suspect, then possibility of abuse of investigating powers by the Police cannot be ruled out. It is with this intention in mind that such interpretation should be given to Section 154 of the Code, as it would not only further the object of law but even that of just and fair investigation. More so, in the backdrop of the settled canons of criminal jurisprudence, re-investigation or de novo investigation is beyond the competence of not only the investigating agency but even that of the learned Magistrate. The courts have taken this view primarily for the reason that it would be opposed to the scheme of the Code and more particularly Section 167(2) of the Code. [Ref. Rita Nag v. State of West Bengal [(2009) 9 SCC 129] and Vinay Tyagi v. Irshad Ali @ Deepak & Ors. (SLP (Crl) No.9185-9186 of 2009 of the same date).”*

11. Aforesaid submissions are opposed by Sri Mithilesh Kumar, learned AGA for State, S/Sri Sheshadri Trivedi, Mukesh Tiwari and Chandra Pal Singh, learned Advocates appearing for opposite parties no. 2 to 4 and they have submitted that reasons assigned in impugned order that present case does not require any lodgement of FIR are legally sustainable and there is no illegality in considering the applicant filed under Section 156(3) as a complaint.

12. Learned counsel for opposite parties have further submitted that still learned Magistrate still has power under Section 201 Cr.P.C. to direct for investigation if facts so warrant. Applicant is not being prejudiced by impugned order. By referring the order whereby final report was accepted, learned counsel have submitted that order was passed on merit

and not only on basis of contents of affidavit.

13. Heard learned counsel for parties and perused the record.

14. In above factual and legal background, few facts which are not much under dispute are that an FIR lodged by applicant against proposed accused was investigated, however, final report was submitted which was accepted by an order dated 16.11.2022. Controversy is in regard to an affidavit purportedly filed by applicant herself that she did not want to oppose final report.

15. From bare perusal of above referred order dated 18.11.2022, it would be clearly evident that trial Court has passed the order accepting the final report on basis of material available and not much being influenced by affidavit purportedly filed by applicant. Said order dated 18.11.2022 is now being challenged by complainant/applicant before Revisional Court which is still pending.

16. Present case is arising out of an application filed by applicant under Section 156(3) Cr.P.C. that above referred purported affidavit of applicant was not sworn by her. She did not put her thumb impression. Proposed accused have imposted a woman declaring herself to be applicant who sworn the affidavit and as such an offence have committed by proposed accused persons.

17. As referred above, application was considered, however, instead of directing for lodgement of FIR, learned Magistrate opined that it could be considered as a complaint case. It is argument of learned counsel for applicant that aforesaid approach was incorrect and it was a fit case where lodgement of FIR was necessary as a thorough police investigation is required.

18. However, said submission is opposed by learned counsel for opposite parties that no prejudice is caused to applicant by impugned order and she could still record her statement and witnesses and trial Court will pass an appropriate order either under Section 203 or 204 Cr.P.C., as the case may be. Trial Court could direct investigation at the stage of Section 201 Cr.P.C.

19. Before further considering the rival submissions, few paragraphs of judgment passed by Supreme Court in **XYZ vs. State of Madhya Pradesh and others, (2023) 9 SCC 705** are quoted below :-

*"18. Second, we deal with the issue of the discretion granted to a Magistrate vis-à-vis the exercise of powers under Section 156(3)CrPC. On this issue, the High Court has held that the JMFC was not under an obligation to direct the police to register the FIR and the use of the expression "may" in Section 156(3)CrPC indicated that the JMFC had the discretion to direct the complainant to examine witnesses under Sections 200 and 202CrPC, instead of directing an investigation under Section 156(3).*

*19. A Division Bench of this Court in Sakiri Vasu v. State of U.P. [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440] expounded upon the Magistrate's powers under Section 156(3)CrPC. In this decision, the Court noted : (SCC pp. 412-15, paras 11, 13, 15 17 & 26)*

*11. In this connection we would like to state that if a person has a grievance*

*that the police station is not registering his FIR under Section 154CrPC, then he can approach the Superintendent of Police under Section 154(3)CrPC by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3)CrPC before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.*

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*13. The same view was taken by this Court in Dilawar Singh v. State (NCT of Delhi) [Dilawar Singh v. State (NCT of Delhi), (2007) 12 SCC 641 : (2008) 3 SCC (Cri) 330] . We would further clarify that even if an FIR has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156(3)CrPC, and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order(s) as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156(3)CrPC.*

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*15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.*

***

***17. In our opinion Section 156(3)CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3)CrPC, though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.***

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*26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section 154(3)CrPC or other police officer referred to in Section 36CrPC. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156(3)CrPC instead of rushing to the High Court by way of a writ petition or a petition under Section 482CrPC. Moreover, he has a further remedy of filing a criminal complaint under Section 200CrPC. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?"*

*(emphasis supplied)*

20. It is clear from the above extract that the Magistrate has wide

*powers under Section 156(3) which ought to be exercised towards meeting the ends of justice. A two-Judge Bench of this Court in Srinivas Gundluri v. Sepco Electric Power Construction Corpn. [Srinivas Gundluri v. Sepco Electric Power Construction Corpn., (2010) 8 SCC 206 : (2010) 3 SCC (Cri) 652] , further clarified the powers of a Magistrate and held that whenever a cognizable offence is made out on the bare reading of complaint, the Magistrate may direct police to investigate : (SCC pp. 218-19, para 23)*

*"23. To make it clear and in respect of doubt raised by Mr Singhvi to proceed under Section 156(3) of the Code, what is required is a bare reading of the complaint and if it discloses a cognizable offence, then the Magistrate instead of applying his mind to the complaint for deciding whether or not there is sufficient ground for proceeding, may direct the police for investigation. In the case on hand, the learned Single Judge [Srinivas Gundluri v. Sepco Electric Power Construction Corpn., 2009 SCC OnLine Chh 308] and the Division Bench [Srinivas Gundhuri v. Sepco Electric Power Construction Corpn., WA No. 281 of 2009, order dated 1-4-2010 (Chh)] of the High Court rightly pointed out that the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding and, therefore, we are of the view that the Magistrate has not committed any illegality in directing the police for investigation. In the facts and circumstances, it cannot be said that while directing the police to register FIR, the Magistrate has committed any illegality. As a matter of fact, even after receipt of such report, the Magistrate under Section 190(1)(b) may or may not take cognizance of offence. In other words, he is not bound to take cognizance upon submission of the police report by the investigating officer, hence, by directing the police to file charge-sheet or final report and to hold investigation with a particular result cannot be construed that the Magistrate has exceeded his power as provided in sub-section (3) of Section 156.""*

20. It would also be appropriate to mention few paragraphs of judgment passed by Supreme Court in case of **Mona Panwar vs. High Court of Judicature at Allahabad through Registrar General, (2011) 3 SCC 496** which has been relied upon by learned Magistrate in impugned order.

***"18. When the complaint was presented before the appellant, the appellant had mainly two options available to her. One was to pass an order as contemplated by Section 156(3) of the Code and the second one was to direct examination of the complainant upon oath and the witnesses present, if any, as mentioned in Section 200 and proceed further with the matter as provided by Section 202 of the Code. An order made under sub-section (3) of Section 156 of the Code is in the nature of a peremptory reminder or intimation to the police to exercise its plenary power of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with the final report either under Section 169 or submission of charge-sheet under Section 173 of the Code. A Magistrate can under Section 190 of the Code before taking cognizance ask for investigation by the police under Section 156(3) of the Code. The Magistrate can also issue warrant for production, before***

***taking cognizance. If after cognizance has been taken and the Magistrate wants any investigation, it will be under Section 202 of the Code.***

*19. The phrase "taking cognizance of" means cognizance of an offence and not of the offender. 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. Before the Magistrate can be said to have taken cognizance of an offence under Section 190(1)(b) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that section. However, when the Magistrate had applied his mind only for ordering an investigation under Section 156(3) of the Code or issued a warrant for the purposes of investigation, he cannot be said to have taken cognizance of an offence.*

*20. Taking cognizance is a different thing from initiation of the proceedings. One of the objects of examination of the complainant and his witnesses as mentioned in Section 200 of the Code is to ascertain whether there is prima facie case against the person accused of the offence in the complaint and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such person. Such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding further."*

21. Applicant in application u/s 156 (3) Cr.P.C. has alleged that proposed accused persons have imposted a woman in place of applicant and executed an affidavit that she has no objection to final report. Complainant has also alleged that photograph put on affidavit was not of her nor she has put her left thumb impression. Proposed accused have committed a forgery and prepared a forged document and placed before learned Magistrate and as such a serious offence was committed before Court. As such it is required thorough police investigation. For reference, relevant part of application is quoted below :-

"प्रार्थिनी को अधिवक्ता के माध्यम से मुकदमे की नकल प्राप्त करने पर ज्ञात हुआ कि मुल्जिमान इफ्तेखार, कलीम, यासीन, इल्यास ने सोची समझी स्कीम व षडयंत्र के तहत प्रार्थिनी के स्थान पर किसी अन्य महिला को न्यायालय श्रीमान ए० सी० जे० एम० प्रथन मुरादाबाद में पेश करके और कुट रचित प्रार्थना पत्र और शपथपत्र दाखिल कर न्यायालय को धोखा देकर प्रार्थनी के मुकदमे की फाइनल रिपोर्ट सं0 198/2021 को स्वीकार करा लिया है। मुल्जिमानो द्वारा न्यायालय में प्रस्तुत शपथपत्र एवं प्रार्थना पत्र पर प्रार्थनी के अंगूठा निशान नहीं है और न ही प्रार्थनी का फोटो है और प्रार्थनी कभी न्यायालय में हाजिर नहीं हुई है। मुल्जिमानो के द्वारा षड्यन्त्र के तहत कूट रचित दस्तावेजो के

आधार पर फर्जी तरीके से प्रार्थिनी के मुकदमे की फाइनल रिपोर्ट स्वीकार करा लिए जाने से प्रार्थनी को असीम हानि हुई है और प्रार्थनी बहुत अधिक परेशान है।"

22. Attempt of complainant to lodge FIR by filing an application before Superintendent of Police was failed though in view of judgment of **Lalita Kumari vs. Government of U.P. and others, 2013 (14) SCR 713,** since it was a cognizable offence, police ought to have lodged an FIR.

23. Trial Court has placed reliance on **Mona Panwar (supra)** and has referred the same, however, it has been observed therein that on an application filed under Section 156(3) Cr.P.C., Magistrate could either direct to lodge FIR or could direct to register as a complaint mainly to ascertain that whether there is a prima facie case against accused persons on basis of contents of complaint or not.

24. Aforesaid observations were made since appellant before Supreme Court was a Judicial Magistrate and she has passed an order to treat application filed before her as a complaint case and this Court in a judgment wherein the order was under challenge passed some remarks.

25. There is no dispute that Magistrate has discretion to pass direction for lodgement of FIR on an application under Section 156 (3) Cr.P.C. or treated as a complaint as well as Magistrate has also a discretion while proceeding to call investigation report from police.

26. Facts in present case are different since the applicant has made specific allegation of forgery committed by accused persons. They have imposted a woman declaring her to be the applicant and not only put a forged photograph but her thumb impression also and such an affidavit was filed before Court. Therefore, from the facts as narrated in complaint, it is indicated that proposed accused have committed serious offence that they have allegedly tried to mislead the Court by putting forged documents.

27. In this regard, observations of Supreme Court in XYZ (supra) would be relevant that in such cases where contents of application filed under Section 156(3) Cr.P.C. not only disclosed that a cognizable offence was committed but bare facts of complaint clearly indicate that there is a need for thorough police investigation, then the discretion granted in Section 156 (3) Cr.P.C. can only be read as it being the Magistrate duty to order the police to investigate. Further, trial Court has not appreciated contents of complaint in its correct perspective and failed to consider that contents of complaint and allegation show prima facie that a serious offence has been committed by proposed accused persons that they have allegedly committed a forgery and prepared a forged affidavit which was filed before the Court. As such, bare facts indicate that it requires police investigation and for that learned Magistrate does not require to wait till stage of 202 Cr.P.C. and it ought to have been exercised his discretion to direct for police investigation.

28. Outcome of above discussion is that this application is **allowed** and impugned order dated 31.03.2023 passed by Chief Judicial Magistrate in Criminal Misc. Case No. 522/2023 (Saida vs. Iftekar and others), Police Station- Thakurdwara,

District- Moradabad is set aside and it is directed that application under Section 156(3) Cr.P.C. filed by applicant be considered and concerned SHO and Superintendent of Police, Moradabad are directed to lodge FIR on basis of contents made in application and proceed further for investigation in accordance with law.

29. A copy of this order be sent to concerned Magistrate as well as concerned Superintendent of Police for compliance.

30. Registrar (Compliance) to take steps.

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**(2024) 7 ILRA 612**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.07.2024**

**BEFORE**

**THE HON'BLE MANJIVE SHUKLA, J.**

Writ C No. 3791 of 2020

**M/s Lotus Boulevard Espacia Apartment Owners Association & Ors. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Nikhil Kumar, Prashant Kanha

**Counsel for the Respondents:**
Anshul Kumar Singhal, C.S.C., Kaushalendra Nath Singh, Raghav Dev Garg

**Civil Law-(The Societies Registration Act, 1860-Section 12-D(c)) (The Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) (Amendment) Act, 2016-Section-14(2)) (The U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010-Section-14(2))-** The sole ground for cancellation of the registration of Respondent No. 1 is that the occupancy of the flats of the building was less than 60% therefore, in view of the provisions made in the Act, 2016, the registration of Petitioner No. 1 could not have been done-The registration of Petitioner No. 1 has been done as per Section 14(2) of the Act of 2010 but the said registration has been cancelled relying on the amended Section 14(2) in terms of the Act, 2016 whereas the Act, 2016 itself has not come into force till date, as till date notification contemplated under Section 1(2) of the Act, 2016 has not been issued. Result impugned order quashed. **(Para 12, 13, 14 & 16)**

**Writ petition allowed**. (E-15)

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard learned counsel appearing for the petitioners, learned Standing Counsel appearing for Respondents No. 1, 3 & 4 and Mr. Kaushlendra Nath Singh, learned counsel appearing for Respondent No. 2.

2. This Court vide order dated 23.04.2024 issued fresh notice to Respondent No. 6 and direction was given to serve the notice on Respondent No. 6 through 'dasti'. The affidavit of service has been filed by the petitioners indicating therein that notice of the writ petition has been served on Respondent No. 6, but none has appeared on its behalf.

3. Petitioners through this writ petition have assailed the order dated 15.01.2020 passed by the Deputy Registrar, Firms, Societies and Chits, Moradabad whereby, he in exercise of his powers under Section 12-D(c) of the Societies Registration Act, 1860, has cancelled the registration of M/s Lotus Boulevard Espacia Apartment Owners Association (Registration No. GBN/00836/2019-2020).

4. Facts of the case, in brief, are that the residents of Towers No. 31 to 38

constructed by Respondent No. 6 on Plot No. GH-02, Sector 100, Noida organized meeting of the general body on 23.12.2018 and in the said meeting, the Board of Management of the Apartment Owners Association (A.O.A.) was elected and model bye-laws were adopted. The elected Board of Management of the A.O.A. requested the Respondent No. 2 to grant no objection certificate for the registration of the A.O.A. and in response thereof, Respondent No. 2 granted no objection certificate on 21.02.2019. Thereafter requisite papers were presented before the Respondent No. 4 for registration of the A.O.A. in the name of M/s Lotus Boulevard Espacia Apartment Owners Association, Plot No. GH-02, Sector 100, Noida. The Towers No. 32-36 were complete having occupancy of 320 flats/families.

5. The Respondent No. 4 after being satisfied with the documents produced before him, registered the Society on 29.04.2019 in the name of M/s Lotus Boulevard Espacia Apartment Owners Association, A.O.A. Office, Lotus Boulevard Especia, Plot No. GH-02, Sector-100, Noida, Gautam Buddha Nagar, 201301 bearing Registration No. GBN/00836/2019-2020.

6. Later on a complaint was filed by Respondent No. 6 before Respondent No. 4, that as per provisions made in the Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) (Amendment) Act, 2016, minimum 60% occupancy of the apartments of the building is required for registration of the Apartment Owners Association (A.O.A.) and since at the time of registration of Petitioner No. 1, only 322 flats out of total 606 flats were occupied which comes to less than 60% occupancy therefore, the registration of Petitioner No. 1 could not have been done. In the complaint, it was further mentioned that since the registration of Petitioner No. 1 has been obtained by misleading and concealing material facts from Respondent No. 4 therefore, the said registration is liable to be cancelled. The Respondent No. 4 after hearing all the concerned parties has passed order dated 15.01.2020 whereby registration of Petitioner No. 1 has been cancelled under Section 12-D(c) of the Societies Registration Act, 1860 on the ground that as per Section 14(2) of the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 as amended in the year 2016, minimum 60% occupancy of the flats is necessary for registration of the A.O.A. and since on the date of registration of Petitioner No. 1, occupancy was less than 60% therefore, its registration could not have been done.

7. Learned counsel appearing for the petitioners has argued that Section 14(2) of the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 (hereinafter referred to as 'the Act of 2010') provides that the A.O.A. can be registered on 33% occupancy of the flats of the building. He further argues that later on State Legislature enacted the Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) (Amendment) Act, 2016 (hereinafter to be referred as "the Act of 2016") whereby Section 14(2) of the Act of 2010 was sought to be substituted by new Section 14(2) and thereby it was provided that for registration of Apartment Owners Association, occupancy of the 60% flats of the building is necessary but in Section 1(2) of the Act of 2016, it has been provided that the Act of 2016 shall come into force

on such date as the State Government may by notification in the official gazette appoint and since till date, the notification, as required under Section 1(2) of the Act of 2016 has not been published in the official gazette, therefore, the amended section 14(2) has not come into force, as such, the cancellation of the registration of Petitioner No. 1 on the basis of the amended Section 14(2) is unsustainable.

8. On the other hand, learned Standing Counsel has opposed the writ petition but has admitted that the notification in the official gazette, as required under Section 1(2) of the Act of 2016, has not been published in the official gazette till date.

9. I have heard learned counsel appearing for the petitioners and learned Standing Counsel appearing for the State respondents.

10. I find that U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 was enacted in the year 2010. The Section 14(2) of the Act of 2010 reads as under:

*"14(2) It shall be the joint responsibility of the promoter and the apartment owners to form an Association. The promoter shall get the Association registered when such number of apartments have been handed over to the owners which is necessary to form an association or 33% of apartments, whichever is more, by way of sale, transfer or possession, provided the building has been completed along with all infrastructure services and completion certificate obtained from the local authority."*

11. This Court finds that under Section 14(2) of the Act of 2010, only 33% occupancy of the flats of the building is required for formation and registration of the Apartment Owners Association. This Court further finds that later on the State Legislature passed the Act of 2016 whereby certain amendments were sought to be incorporated in the Act of 2010. By the Act of 2016, Section 14(2) of the Act of 2010 was sought to be substituted by new Section 14(2) which provides that for formation and registration of the Apartment Owners Association, 60% occupancy of the flats of the building is necessary. Section 1(2) of the Act, 2016 further provides that the Act of 2016 shall come into force on such date as the State Government may by notification in that official gazette appoint. For ready reference, Section 1 and Section 8 of the Act, 2016 are extracted as under:

***"Section 1 (1)*** *This Act may be called the Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) (Amendment) Act, 2016.*

*(2) It shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint."*

***Section 8****. In Section 14 of the principal Act,*

*(a) for sub-section (2), the following sub-section shall be substituted, namely:-*

*"(2) It shall be the joint responsibility of the promoter and the apartment owners to form an Association. The promoter shall get the Association registered when such numbers of apartments have been handed over to the owners which are necessary to form an association or sixty per cent of apartments, whichever is more, by way of sale, transfer or possession provided the building has been completed along with all infrastructure services and completion*

*certificate obtained from the concerned local authority:*

*Provided that in case of an independent area or an independent commercial area the promoter may from a separate Association for its management, if required.".*

*(b) In sub-section (5) after the existing proviso, the following proviso shall be inserted, namely:-*

*"Provided further that the amount collected by the promoter towards interest free maintenance security shall also be transferred to the Association at the time of handing over of the common areas and facilities."*

12. It is apparent from the impugned order dated 15.01.2020 that the sole ground for cancellation of the registration of Respondent No. 1 is that the occupancy of the flats of the building was less than 60% therefore, in view of the provisions made in the Act, 2016, the registration of Petitioner No. 1 could not have been done.

13. The Court finds that Section 1(2) of the Act, 2016 categorically provides that the Act, 2016 shall come into force on such date as the State Government may by notification in the official gazette appoint but till date, the State Government has not notified the date with effect from which the Act, 2016 will come into force. The aforesaid inference has been drawn by the Court as State respondents in their Counter-Affidavit have not given any detail of such notification and even further in spite of various opportunities granted by this Court, the State respondents have not produced any such notification.

14. Once this Court finds that the Act of 2016 itself did not come into force as till date, the State Government has not issued notification as contemplated under Section 1(2) of the Act, 2016, the amendments sought to be incorporated by the Act, 2016 in the Act, 2010 have not become effective. The registration of Petitioner No. 1 has been done as per Section 14(2) of the Act of 2010 but the said registration has been cancelled relying on the amended Section 14(2) in terms of the Act, 2016 whereas the Act, 2016 itself has not come into force till date, as till date notification contemplated under Section 1(2) of the Act, 2016 has not been issued.

15. In view of the aforesaid reasons, the impugned order dated 15.01.2020 passed by Respondent No. 4 cannot sustain in the eyes of law.

16. Accordingly, this writ petition is ***allowed***. The order dated 15.01.2020 passed by Respondent No. 4 is hereby quashed.

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**(2024) 7 ILRA 615**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.07.2024**

**BEFORE**

**THE HON'BLE MANOJ KUMAR GUPTA, J.**
**THE HON'BLE MANISH KUMAR NIGAM, J.**

Writ C No. 16025 of 2024

**Mohammad Shahid & Ors. ...Petitioners**
**Versus**
**Union of India & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Shiv Kant Mishra

**Counsel for the Respondents:**
A.S.G.I., C.S.C., Sri Rajesh Kumar Jaiswal

**A. (Civil Law-The National Highways Act, 1956-Section 3-H)-** The State Government will deposit the compensation amount before taking possession is not a provision enabling the Central Government to delay payment of the

compensation amount and contend that the compensation would be paid as and when possession is taken**. (Para 15)**

B. Rule 3 of the National Highways (Manner of Depositing the Amount by the Central Government; Making Requisite Funds Available to the Competent Authority for Acquisition of Land) Rules, 2019-Mandates the executing agency would make available requisite funds to the competent authority as determined under Section 3-G of the Act within 15 days of the raising of demand by the competent authority. Office Memorandum of the Central Government dated 23rd November 2023, on which reliance is being placed, is not applicable in respect of the compensation amount, which NHAI is liable to deposit under any award given under the provisions of the National Highways Act in respect of acquisitions in progress at the time of its issuance. The Office Memorandum would only apply to new projects of acquisition and works and contracts and not to the compensation amount under an existing award. The plea on basis of which NHAI is refusing to accord financial approval to the amount awarded as compensation is not sustainable in law**. (Para 16, 18)**

**Writ Petition allowed.** (E-15)

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Manish Kumar Nigam, J.)

1. The prayer made in the instant petition is for a direction to the respondents to pay compensation to the petitioners in pursuance of award of the Competent Authority, Bareilly dated 06.07.2023 in respect of land bearing Gata no.156 area 0.6053 hectare of revenue Village- Sarniya, Tehsil and District- Bareilly and also interest on the compensation amount.

2. The case of the petitioners is that their land aforesaid was notified for acquisition on 28.01.2022 under Section 3-A of the National Highways Act, 1956 (for short 'the Act') followed by notification under Section 3-D of the Act dated 13.09.2022. An award was declared by the competent authority on 06.07.2023. The value of land determined is Rs.3,02,65,000/- and of super structure as Rs.2,95,64,257/-. Thus, the petitioner has become entitled to a sum of Rs.5,98,29,257/- plus solatium and other statutory benefits. The total sum would be Rs.12,48,72,386/-. The competent authority addressed a communication to the Project Director, NHAI on 17.07.2023 for making available the requisite amount to facilitate payment of the compensation amount to the affected persons. The Project Director, in turn, sent a communication dated 19.10.2023 to the higher authorities seeking financial approval. It seems that the higher authorities of NHAI did not accord financial approval and as a result whereof the compensation amount has not been paid to the petitioners so far.

3. The competent authority in its instructions supplied through learned Standing Counsel took the stand that the amount has not been made available to him by NHAI and, therefore, compensation has not been paid.

4. The Project Director, NHAI has filed his affidavit on behalf of respondent no.5 (NHAI) and therein it is not disputed that the subject land of the petitioner was acquired under the provisions of National Highways Act, 1956. However, the stand taken is that the Ministry of Road Transport and Highways through Office Memorandum dated 23.11.2023 placed ban on incurring additional expense/liability under Bharatmala Pariyojana and, therefore, the compensation amount has not been approved nor transmitted to the

account of competent authority for payment. Copy of the Office Memorandum dated 23.11.2023 has been brought on record as Annexure CA-2 and it reads as follows:

"F. No. RW/G-20011/08/2023-W&A
Government of India
Ministry of Road Transport & Highways
Transport Bhawan, 1, Parliament Street,
New Delhi-11001
New Delhi 23rd November, 2023

OFFICE MEMORANDUM

Sub: Non-creation of any liability under Bharatmala Pariyojana Phase-I.

I am directed to inform that during the meeting held on 10.11.2023 under the chairmanship of Secretary, Expenditure on Pre-Budget discussion for deciding Revised Estimate of 2023-24 and Budgetary Estimate of 2024-25, it was clarified that no new liability is to be created under Bharatmala Pariyojana Phase-I until the revised CCA approval is obtained. This has been further reiterated vide Secretary, Expenditure D.O. letter dated 16.11.2023 in which it has been categorically mentioned that

"(i) No new works are approved and no contracts are awarded under Bharatmala under any phase until CCEA approval is received (ii) No Expenditure is incurred beyond the level of 20% above the amount approved by the CCEA in 2017, except for (a) inevitable payments such as contractually payable amounts under ongoing contracts, (b) expenditure under Vivad Se Vishwas 1 & 2 schemes (which have been separately sanctioned by the Government)".

2. Accordingly, all concerned are requested to strictly adhere to the above direction of the Secretary, Expenditure and no additional liabilities are to be created including liabilities on land acquisition and pre-construction activities under Bharatmala Pariyojana without approval of the Competent Authority.

(Kamal Parkash)
Under Secretary to the Govt. of India
Telphone: 011-23710454
Planningmorth@gmail.com"

5. Reliance has been placed on Section 3-H of the Act to contend that the petitioners would be entitled to compensation only when possession of the acquired land is taken from them. Since, NHAI, at present, is not taking possession, therefore, there is no question of compensation amount being paid to the petitioners.

6. Learned counsel for the petitioner submits that once the respondents had issued notification under Section 3-D of the Act and as a result whereof the land had vested in the Central Government, it is not open to it to refuse to pay compensation on the ground that it does not intend to take possession and the amount would be paid as and when possession is taken.

7. We have considered the rival submissions and perused the material placed on record.

8. Sub-section (2) of Section 3-D of the Act unequivocally lays down that on publication of the declaration under Section 3-D(1), the land shall vest absolutely in the Central Government free from all encumbrances.

9. Section 3-E stipulates that where any land is vested in the Central Government under sub-section (2) of Section 3-D and the amount determined by the competent authority under Section 3-G

with respect to the said land has been deposited under sub-section (1) of Section 3-H, the competent authority may by notice in writing, direct the owner as well as any other person, who may be in possession of such land, to surrender or deliver possession thereof within sixty days of service of notice. In case any person refuses to deliver possession, the competent authority can use such force as is required to enforce surrender of the land. Section 3-F confers power in the Central Government to enter and do other act necessary upon the land for carrying out the building, maintenance, management or operation of a national highway or part thereof or any other work connected therewith.

10. Section 3-F is extracted below for ready reference:

"**3-F. Right to enter into the land where land has vested in the Central Government.--**Where the land has vested in the Central Government under section 3-D, it shall be lawful for any person authorised by the Central Government in this behalf, to enter and do other act necessary upon the land for carrying out the building, maintenance, management or operation of a national highway or a part thereof, or any other work connected therewith."

11. Section 3-G invests the competent authority with power to determine compensation.

12. Section 3-H stipulates as follows:

"**3-H. Deposit and payment of amount.--**(1) The amount determined under section 3-G 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 before taking possession of the land."

13. It is evident from the scheme of the Act that the title in the land vests in the Central Government free from all encumbrances upon publication of the declaration under Section 3-D(1) of the Act. Thereafter, the Central Government is conferred with power to enter and do other act necessary upon the land for carrying out the building, maintenance, management or operation of a national highway or a part thereof or any other work connected therewith.

14. The consequence of vesting is that the real owner is divested of his title in the land and he cannot deal with it in any manner. At the same time, as noted above, although, actual physical possession of such land could be taken only after the compensation amount is deposited by the Central Government with the Competent Authority but it gets power to enter upon the land to carry out necessary act for building, maintenance, management and operation of a national highway.

15. Section 3-H(1), which mandates that the State Government will deposit the compensation amount before taking possession is not a provision enabling the Central Government to delay payment of the compensation amount and contend that the compensation would be paid as and when possession is taken. Rather the said provision is for the benefit of the tenure holders, whose lands had been acquired under the provisions of the Act. It is a safeguard against taking over of possession of the land without payment of compensation. The said provision cannot be interpreted to confer power on the

Central Government to delay payment of compensation to the affected persons, who have been divested of their title.

16. The said conclusion also stands fortified by Rule 3 of the National Highways (Manner of Depositing the Amount by the Central Government; Making Requisite Funds Available to the Competent Authority for Acquisition of Land) Rules, 2019, which mandates that the executing agency (NHAI herein) would make available requisite funds to the competent authority as determined under Section 3-G of the Act within fifteen days of the raising of demand by the competent authority. The competent authority on receipt of the amount would disburse the same to the land owners or the persons interested therein by electronically crediting the said amount into their respective bank accounts. Relevant part of Rule 3 is extracted below:

"3. The manner of making requisite funds available to the competent authority shall be as follows:-

(i) Subject to provisions of the Act, the executing agency authorised by the Central Government in this behalf, shall open and maintain an account with one or more Scheduled Commercial Banks for remittance of the amount for land acquisition across the country, with arrangements for access to such account by the competent authority for specific jurisdiction as per authorisation of limits by the executing agency. The Executing Agency shall, on the demand raised by the competent authority before announcement of the award, issue requisite authorisation limits in favour of the competent authority for withdrawal of amount from such account as per requirements from time to time for disbursement to the landowners or persons interested therein through an electronic banking mechanism as per extant Reserve Bank of India regulations and the said authorisation limits, revolving in nature, shall entitle the competent authority to withdraw money from such account as per requirements, without any further reference to the land acquiring agency, for disbursement to the landowners or persons interested therein, as follows:-

(a) The amount determined under section 3-G of the Act within fifteen days of the raising of demand by the competent authority, and

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...........................................

(iv) The competent authority shall, in turn, disburse the compensation amount to the landowners or the persons interested therein preferably by electronically crediting the said amount into their respective bank accounts."

17. As such, the stand taken by NHAI in its counter affidavit for declining to pay compensation is manifestly against the scheme of the Act and is, accordingly, rejected.

18. The Office Memorandum of the Central Government on which reliance is being placed, is not applicable in respect of the compensation amount, which NHAI is liable to deposit under any award given under the provisions of the National Highways Act in respect of acquisitions in progress at the time of its issuance. The Office Memorandum would only apply to new projects of acquisition and works and contracts and not to the compensation amount under an existing award. Therefore, even, the aforesaid plea on basis of which NHAI is refusing to accord financial approval to the amount awarded as

compensation is not sustainable in law and is thereby rejected.

19. The writ petition is **allowed**.

20. A *mandamus* is issued to NHAI to make available compensation amount to the competent authority for being paid to the petitioner and other affected persons in accordance with law within a period of four weeks from the date of communication of the instant order.

21. No order as to costs.

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**(2024) 7 ILRA 620**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.07.2024**

**BEFORE**

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

Writ C No. 18084 of 2022
And
Writ C No. 18087 of 2022

**Ranjeet Singh ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Subodh Kumar

**Counsel for the Respondents:**
C.S.C.

**A. Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 -** An adult son and a 'mother', both of whom are tenure-holders, would not constitute a family. Under Section 3(7) of the Act, 'family' in relation to a tenure-holder means the tenure-holder himself or herself, their spouse (excluding a judicially separated spouse), minor sons, and minor daughters (excluding married daughters). Under Section 3(17) of the Act, a 'tenure-holder' is defined as a person who holds a holding but does not include: (a) a woman whose husband is a tenure-holder, or (b) a minor child whose father or mother is a tenure-holder. A conjoint reading of the definition of 'family' concerning a tenure-holder and the definition of a 'tenure-holder' under Sections 3(7) and 3(17) of the Act makes it clear that an adult son, as defined under Section 3(11-A) of the Act, and a 'mother', both tenure-holders, would not constitute a family under Section 3(7) (Para 19).

**B. Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, Section 169 -** ***compulsory registration of a will*** **- Section 169 of the Act of 1950 amended by U.P. Act No. 27 of 2004, w.e.f. 23.08.2004.** Prior to amendment S. 169 required that all Wills must be in writing and attested by two persons. Prior to the amendment, there was no requirement for registration. *Issue* : If a Will that was executed prior to the amendment by U.P. Act No.27 of 2004 without registration and perfectly valid, but by time succession opened out with the death of the testator, the requirement of registration had been introduced, would be valid or not ? *Held: A Will that was validly executed, would not be rendered invalid for non-registration because succession opened out after the U.P. Act No.27 of 2004 had come into operation*. The provisions of sub-Section (3) of Section 169 of the Act of 1950, to the extent that they require compulsory registration of a will, have been declared ultra vires and void in *Pramila Tiwari v. Anil Kumar Mishra and others*, 2024 SCC OnLine All 1588 **(Para 25, 26, 28).**

**C.** Ranjeet Singh and his mother, Smt. Surjeet Kaur, were independent tenure-holders with agricultural holdings. Ranjeet Singh had 6.970 hectares of land, while Smt. Surjeet Kaur had 1.855 hectares. Surjeet Kaur bequeathed her holding of 1.855 hectares to her three married granddaughters via an unregistered Will dated 14.07.2004. Prescribed Authority found that Surjeet Kaur's Will, made to her granddaughters, was an attempt to circumvent the ceiling limits of the Act. *Held :*Ranjeet Singh and his mother, Smt. Surjeet Kaur were not a family for the purpose of application of ceiling to their holdings by clubbing them. Their holdings would have to be separately reckoned for the purpose of the Act. Ranjeet Singh had a total

holding of 6.970 hectares whereas Surjeet Kaur had a holding of 1.855 hectares. There was no need or motive to escape the clutches of the Act by resort to a devise of Smt. Surjeet Kaur's agricultural holding in her granddaughters' favour. The finding of the Authorities below that the Will was executed by Smt. Surjeet Kaur to escape the clutches of the Act, is entirely ill-founded**. (Para 17)**

**Writ Petition allowed.** (E-5)

**List of Cases cited : -**

1. St. of U.P. Vs Special Addl. Distt. & Sessions Judge, Farrukhabad & ors., 1984 All LJ 560

2. Gyanendra Kumar Vs St. of U.P. & ors., 2007 (10) ADJ 279

3. Jahan Singh Vs St. of U.P. & ors., 2017 SCC OnLine All 3368

4. Pramila Tiwari Vs Anil Kumar Mishra & ors., 2024 SCC OnLine All 1588

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

1. By this judgment, we propose to decide the present writ petition and connected Writ-C No.18087 of 2022 for reason that both the writ petitions relate to the same land, declared surplus under the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 in proceedings, taken by the State against the same parties. And, of course, there are common questions of fact and law involved in both causes.

2. Since Writ-C No.18084 of 2022 was heard as the leading case, we propose to notice facts from the records of the said case.

3. This writ petition is directed against an order passed by the Prescribed Authority-Ceiling/ Additional Collector (Finance and Revenue), Pilibhit dated September the 16th, 2014 passed in Case No.5 of 2008-09, under Section 10(2) of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 (for short, 'the Act'), declaring land surplus under the Act in the petitioner's hands to the extent of 1.525 hectares. Also, under challenge is an appellate order passed by the Additional Commissioner (Administration), Bareilly Division, Bareilly dated 19th May, 2022, dismissing the petitioner's appeal under Section 13 of the Act and affirming the order passed by the Prescribed Authority, last mentioned.

4. The facts giving rise to this petition are these:

Ranjeet Singh and his mother, Smt. Surjeet Kaur were two tenure-holders, who had agricultural holdings. Whereas Ranjeet Singh had a total of 6.970 hectares of land, his mother, Smt. Surjeet Kaur had a holding of 1.855 hectares. These holdings were bhumidhari with transferable rights and situate in the revenue villages of Baharua and Tondarpur Saharai, Pargana Pilibhit, Tehsil Sadar, District Pilibhit. As it appears, both the mother and son were independent tenure-holders and while in possession of their respective holdings, no proceedings for determination of surplus under the Act were drawn against them. It is, in fact, the petitioner's case that Ranjeet Singh and his mother, Surjeet Kaur were independent tenure-holders in their own right, who held land independent of each other within the permissible ceiling limits.

5. The genesis of the lis commenced when Ranjeet Singh's mother, Surjeet Kaur bequeathed her entire holding of 1.855 hectares to her three granddaughters, all married women, to wit, Smt. Gurjeet Kaur wife of Kuldeep Singh, Smt. Rajwant Kaur

wife of Jaswant Singh and Smt. Lakhvar Kaur wife of Gurdev Singh, all daughters of Ranjeet Singh. This bequest was made by means of an unregistered Will dated 14.07.2004. Smt. Surjeet Kaur, the testatrix, died on 16.01.2005. The three legatees under the will, to wit, Smt. Gurjeet Kaur, Smt. Rajwant Kaur and Smt. Lakhvar Kaur made an application, seeking mutation of their names, on the basis of the last mentioned Will as succession opened out in terms thereof.

6. The Naib Tehsildar, Nuria, District Pilibhit, before whom the mutation matter came up on the basis of the will, granted it vide order dated 18.05.2005. The record would show that after registration of the case on the Naib Tehsildar's file, proceedings were duly advertised in order to put to notice any one, who might hold interest in the property, subject matter of mutation and wish to object. There was no objection. Treating the mutation matter, therefore, as 'non-contentious', the Naib Tehsildar granted it after recording necessary evidence. This resulted in expunction of the name of Smt. Surjeet Kaur and mutation in favour of Smt. Gurjeet Kaur, Smt. Rajwant Kaur and Smt. Lakhvar Kaur.

7. On the 18th of August, 2006, the Halqa Lekhpal for Tondarpur made an application to the Tehsildar, Tehsil Sadar, District Pilibhit pointing out that the mutation order passed by the Naib Tehsildar, last mentioned, on 18.05.2005 was one founded on an unregistered will, and, therefore, entirely illegal. He said that on the date the succession opened out, an unregistered Will relating to agricultural land was not admissible. He, therefore, prayed that the mutation case be restored to file and determined afresh on merits. The Tehsildar, entertaining the Lekhpal's restoration application, called for papers of the decided matter from the record room, put parties to notice and after hearing them, by an order dated 22.09.2006, allowed the restoration application, restoring the mutation case. The Tehsildar held that the legatees were not entitled under the unregistered Will dated 14.07.2004 in view of the amendment to Section 169 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (for short, 'the Act of 1950) w.e.f. 23.08.2004, which made bequest of tenure land by a bhumidhar compulsorily registerable. The Tehsildar, therefore, held in favour of the State with a finding that on the date of demise of the testatrix, the provisions of Section 169 of the Act of 1950 stood amended, mandating a Will relating to tenure land compulsorily registerable. The Tehsildar vide order dated 22.12.2008, therefore, held that Smt. Gurjeet Kaur, Smt. Rajwant Kaur and Smt. Lakhvar Kaur were not entitled to be mutated on the basis of the unregistered will, and, Smt. Surjeet Kaur's holding would devolve by intestate succession under Section 171 of the Act of 1950 upon Ranjeet Singh, her son. He directed mutation in favour of Ranjeet Singh, expunging the names of the legatees. The Tehsildar forwarded a copy of his order to the Naib Tehsildar with a remark that the total holding now in the hands of Ranjeet Singh be inquired into to find out if it exceeds the ceiling limit under the Act. It was added that if it was above the ceiling limit, the matter be placed before the Ceiling Authority.

8. In the meantime, in a related development, the order of the Tehsildar dated 22.12.2008, declining mutation, was challenged by the legatees, Gurjeet Kaur and others in appeal carried to the Sub-

Divisional Officer, Sadar, Pilibhit under Section 210 of the Land Revenue Act. The appeal aforesaid, that was registered as Appeal No.14 of 2008-09 on the file of the Sub-Divisional Officer, Sadar, Pilibhit, was dismissed vide order dated 02.07.2009. The legatees did not relent. They carried the matter in revision to the Commissioner, Bareilly Division, Bareilly. The Additional Commissioner (Administration), Bareilly Division, Bareilly, before whom Revision No.83 of 2010 came up, allowed the same, set aside the orders impugned passed by the two Mutation Authorities below and granted mutation in favour of the legatees. In reaching his conclusions, the Additional Commissioner, who allowed the revision, thought that the Will in this case being one dated 14.07.2004, that is to say, before the Amending Act, amending the provisions of Section 169 of the Act came into force, would continue to be governed by the unamended law, which never required registration.

9. The Revisional Court held that the amendment had no retrospective application and the fact that Surjeet Kaur died after the Amending Act came into force, would be of no consequence, inasmuch as the bequest was made while the law was still unamended. Mutation being granted in favour of the legatees, it was duly carried out in the revenue records and the Additional Commissioner's order was never challenged by the State by invoking appellate or review procedures. While the Mutation Authority accepted the testamentary disposition, the Tehsildar, the Lekhpal and the Additional District Magistrate made internal reports dated 31.01.2009, 04.02.2009 and 25.03.2009, on the basis of which the Prescribed Authority under the Act issued two separate notices, both dated 30.04.2009, one to Ranjeet Singh and the other to Rajwant Kaur. The notice to Rajwant Kaur related to some property, she had purchased independently. Another set of three notices, all dated 11.07.2011, were issued to the three daughters of Ranjeet Singh, to wit, the three legatees under the Will, under Section 10(2) of the Act, clubbing the entire holdings of Ranjeet Singh and Smt. Surjeet Kaur, bequeathed to her three granddaughters, proposing to declare a surplus. On the 9th of July, 2009 and 6th of October, 2009, objections were filed by both sets of tenure-holders, that is to say, Ranjeet Singh on one hand and the other by the three legatees. It appears that at the hearing of the matter before the Prescribed Authority, Ranjeet Singh alone produced evidence, but the legatees, after putting in their objections, did not participate. The Prescribed Authority, before whom the matter was registered as Case No.5 of 2008-09, proceeded to frame the following issues (translated into English from Hindi):

*"1- Whether the land in dispute is irrigated, if yes, its effect?*

*2- Whether the deceased tenure-holder, Surjeet Kaur had bequeathed her holding on 14.07.2004 in favour of Smt. Gurjeet Kaur, Smt. Rajwant Kaur and Smt. Lakhvar Kaur, if yes, its effect?*

*3- Whether Smt. Gurjeet Kaur, Smt. Rajwant Kaur and Smt. Lakhvar Kaur are bhumidhar of the late Smt. Surjeet Kaur's holding on the basis of her will, if yes, its effect?*

*4- Whether the notice issued under the Ceiling Act is liable to be revoked, if yes, its effect?"*

10. Issue No.1 was answered in the manner that the land in dispute is irrigated, holding in favour of the State. The second issue was also answered in favour of the

State in the affirmative with the Prescribed Authority holding that the Will was executed on 14.07.2004, when the Act was in force w.e.f. 24.01.1971, which rendered the Will bad being in violation of the Act. It was further held that the testatrix, Smt. Surjeet Kaur had a son Ranjeet Singh and the fact that in his lifetime a Will was executed by Smt. Surjeet Kaur, would show that the testamentary disposition was one made in order to evade the consequences of 'ceiling' under the Act. The third issue was also decided in the State's favour, holding that the Will being one made on 14.07.2004, after the Act had come into effect on 24.01.1971, clearly showed that in the presence of Surjeet Kaur's son i.e. Ranjeet Singh, the testamentary disposition was made in order to escape the consequences of ceiling under the Act. Issue No.4 was also decided in the State's favour, holding that the entire land held by Ranjeet Singh, that is to say, his own together with that inherited from his mother, Smt. Surjeet Kaur, would add to a total area of 8.825 hectares irrigated land. Ranjeet Singh had the right to retain within ceiling limits under the Act up to a total area of 7.300 hectares with the area of 1.525 hectares being surplus land, which would vest in the State.

11. The Prescribed Authority, therefore, declared the following the land surplus in Ranjeet Singh's hands:

| tenure-holder's name | Village | Gata No. | Additional declared irrigated land |
|---|---|---|---|
| Ranjeet Singh s/o Suvendra Singh | Tondarpur Saharai, Pargana & District Pilibhit | 73 | 1.339 hect. - Village Baharua |
| | | 105 | 0.186 hect. - Village Tondarpur Saharai |

12. Two appeals were carried from the order of the Prescribed Authority, impugned dated 16.09.2014 under Section 13 of the Act to the Commissioner of the Division. Appeal No. C20141200001222 was preferred by Ranjeet Singh whereas that preferred by the three legatees, Rajwant Kaur and others, was numbered as Appeal No. C20141200001239. An interim stay pending appeal was granted by the Additional Commissioner (Administration), Bareilly Division, Bareilly vide order dated 14.10.2014. Later on, the appeal was not decided for a long time and the interim order came to an end, threatening the petitioner's possession. Accordingly, the petitioner moved Writ-C No.22123 of 2021, where this Court, while disposing of the writ petition, directed expedited hearing of the petitioner's appeal by the Appellate Authority and further ordered that for a period of three months or till disposal of the appeal, whichever is earlier, the interim order granted on 13.10.2014 shall continue. The Additional Commissioner (Administration), Bareilly Division, Bareilly, before whom both the appeals came up for hearing on 19.05.2022, proceeded to dismiss the appeal and affirmed the Prescribed Authority.

13. Aggrieved, the petitioner has instituted the present writ petition under Article 226 of the Constitution.

14. On 05.07.2022, when this petition came up for admission, a notice of motion was issued and an interim injunction granted, directing parties to maintain status quo as on date as to title, nature and possession. The writ petition preferred by the legatees, by an order of the same date,

was connected to the present writ petition, and an interim order passed in identical terms.

15. A counter affidavit was filed effectively on behalf of respondent No.2 on 29th November, 2022, to which a rejoinder was also filed. On 05.01.2024, when this writ petition came up for admission before the Court, the parties having exchanged affidavits, it was admitted to hearing, which proceeded forthwith. Judgment was reserved.

16. Heard Mr. Udit Chandra, learned Counsel for the petitioner and Mr. Kunal Ravi Singh, learned Chief Standing Counsel along with Ms. Monika Arya, learned Additional Chief Standing Counsel on behalf of the State.

17. Upon hearing learned Counsel for the parties, we are of opinion that the finding of the Authorities below that the Will was executed by Smt. Surjeet Kaur to escape the clutches of the Act, is entirely ill-founded. The land that Smt. Surjeet Kaur held or whatever was Ranjeet Singh's holding before Surjeet Kaur's demise, was apparently well within the ceiling. It would have been a device to escape clutches of the Act, if it was a case that the land in dispute in the hands of Ranjeet Singh and his mother was to be clubbed and regarded as one unit for the purpose of applying the prescribed ceiling under the Act. This is certainly not the case. Under Section 3(7) of the Act, 'family' is defined in the following terms:

***"3. Definition.–*** *In this Act, unless the context otherwise requires–*

*.......*

*(7) "family" in relation to a tenure-holder, means himself or herself and his wife or her husband, as the case may be (other than a judicially separate wife or husband), minor sons and minor daughters (other than married daughters);*

18. Likewise, under Section 3(17) of the Act, a 'tenure-holder' is defined as follows:

*"(17) "tenure-holder" means a person who is the holder of a holding, but except in Chapter III does not include–*

*(a) a woman whose husband is a tenure-holder;*

*(b) a minor child whose father or mother is a tenure-holder;"*

19. A conjoint reading of the definition of 'family' in reference to a tenure-holder and the definition of a 'tenure-holder' under Section 3(7) and 3(17) of the Act would spare little doubt that an adult son, as defined under Section 3(11-A) of the Act and a 'mother', both of whom are tenure-holders, would not constitute a family under Section 3(7). In this case, therefore, while Ranjeet Singh and his mother, Smt. Surjeet Kaur were alive, they were not a family for the purpose of application of ceiling to their holdings by clubbing them. Their holdings would have to be separately reckoned for the purpose of the Act and when so done, Ranjeet Singh had a total holding of 6.970 hectares whereas Surjeet Kaur had a holding of 1.855 hectares. Therefore, there is nothing to infer that during her lifetime, Smt. Surjeet Kaur, or her son, had any need or motive to escape the clutches of the Act by resort to a devise of Smt. Surjeet Kaur's agricultural holding in her granddaughters' favour.

20. It has also been emphasized during the hearing by Mr. Udit Chandra that there

were no proceedings under the Act pending either against Smt. Surjeet Kaur or Ranjeet Singh at the time when she executed the Will in her granddaughters' favour. This also would show that the Will was not executed for any extraneous purpose, or so speak, escape clutches of the Act.

21. In support of the contention that an adult's son's holdings and those of his mother, who also is a tenure-holder, are not to be clubbed for the purpose of determining ceiling under the Act, reference may be made to **State of U.P. v. Special Addl. Distt. & Sessions Judge, Farrukhabad and others, 1984 All LJ 560.** The facts in **Special Addl. Distt. & Sessions Judge, Farrukhabad (supra)** can best be appreciated by a reference to paragraph No.5 of the report, where these have been succinctly set out in the following words:

*"5. The controversy is a short one. Aditya Narain Singh's father Roop Singh was possessed of landed property including some Sir and Khudkasht. He died in 1950 leaving behind his son Aditya Narain and his widow Smt. Davendra Kumari, who is respondent No. 4 in this petition. A contention was raised before the Prescribed Authority that in the Sir and Khudkasht which was left by the late Sri Roop Singh, his widow Davendra Kumari had an equal share along with her son Aditya Narain Singh. This contention was based on Hindu Women's Right to Property Act, 1937 as amended by the U.P. Act No. 11 of 1942. This contention was rejected by the Prescribed Authority. But was accepted by the appellate court."*

22. In answering the issue whether the property of an adult son and a mother could be clubbed together under the Act, in the aforesaid authority, it was held by M.P. Mehrotra, J.:

*"6. Learned Chief Standing Counsel contended that the mother's share should have been clubbed with the share of her son Aditya Narain, who was treated as a tenure-holder. He invited my attention to the definition of 'family' in S. 3(7) and to the definition of 'tenure-holder' in S. 3(17) of the Act. In my view, this contention is not tenable. Learned counsel emphasized that in S. 3(17) the expression used in cl. (a) is 'woman' and not the 'wife'. In my view, this is really not decisive because the further phraseology used is "a woman whose husband is a tenure-holder". This makes it clear that by the expression 'woman' what is meant is the wife of the tenure-holder-husband. In S. 3(7) the definition of the family is such that the mother of a tenure-holder is not a member of the family. The clubbing which takes place under S. 5(3) of the Act is with reference to the family. Therefore, the contention that the mother's share also should have been clubbed with the tenure-holder sons' share is not acceptable. The appellate court's judgment, in my view, suffers from no error of law, much less an apparent error of law. There is no want of jurisdiction in the said judgment."*

23. **Special Addl. Distt. & Sessions Judge, Farrukhabad** was followed by this Court in **Gyanendra Kumar v. State of U.P. and others, 2007 (10) ADJ 279**. These authorities clearly fortify the view that we have taken.

24. So far as the right of Smt. Surjeet Kaur to execute a Will in her granddaughters' favour is concerned, there was absolutely no restriction imposed by the Act forbearing her from doing so,

inasmuch as her holding was well within the ceiling limit when she made the bequest.

25. The only other issue that survives for consideration is: If the will, that was executed by Smt. Surjeet Kaur in favour of her granddaughters, was valid in law, though unregistered? Prior to the amendment to Section 169 of the Act of 1950 by U.P. Act No.27 of 2004 w.e.f. 23.08.2004, all that was required by sub-Section (3) of Section 169 was that the Will 'be in writing', and 'attested by two persons'. There was no requirement of registration. This was brought about by U.P. Act No.27 of 2004. Now, the Will here is dated 14.07.2004, that is to say, well before 23.08.2004, when U.P. Act No.27 of 2004 made registration compulsory. To this Court's understanding, the Will when it was made was a valid document and within the powers of the testatrix to execute it. On the day it was executed, it did not require registration. The amendment is without cavil, prospective in operation and so far as the Will goes, it was a concluded document on the day it was executed. It was valid by the law as then in force.

26. The fact that it was a Will not a deed, and, therefore, of no value or even imbued with life so long as the author was living, would make no difference to the validity of the testament that would be galvanized to life after the testatrix's demise. The question if on the date the testatrix, as is the case here, died, U.P. Act No.27 of 2004 had come into operation, would be of no consequence to the validity of the will. There has been some confusion on the issue if a Will that was executed prior to the amendment by U.P. Act No.27 of 2004 without registration and perfectly valid, but by time succession opened out with the death of the testator, the requirement of registration had been introduced, would be valid or not. We do not think that by any principle a Will that was validly executed, would be rendered invalid for non-registration because succession opened out after the U.P. Act No.27 of 2004 had come into operation. The reason is that execution of a Will is one thing and opening out of succession completely different. As already said a Will is not a deed. It is a letter from the deceased that alters the mode of succession under the law. The law requiring execution of wills, in a particular mode, is about how that testament is to be executed. Once executed, it remains the way it has been made to be given effect to by the executors after the testator's demise. Of course, the testator may change his Will more than once every day, every hour, or as much frequently as he can withstand the ordeal. It is the last Will and testament, according to which succession would open out after the testator's demise. All that the law requires is that the Will or testament must be executed in accordance with law, whatever statute prescribes it. It is in that sense that this Court remarked that execution of a Will is quite different from the opening of rights under it. Section 169(3) of the Act of 1950 speaks only about the execution of the Will with an added requirement as to registration, which need not be there in case of other wills.

27. Therefore, if on the date when the Will here was executed, the provisions of Section 169(3) as these then stood did not require registration, it does not matter at all that when succession actually opened out, registration had become imperative. We are of opinion that the remarks of Sunita Agarwal, J. in **Jahan Singh v. State of U.P. and others, 2017 SCC OnLine All**

**3368** in paragraph Nos.26, 27 and 28 of the report, when read as a whole, do not at all intend to say that a Will validly executed before the Amending Act came into force, would become invalid, if on the date succession opened out, the amendment requiring registration had come into force. There is no doubt some confusion because of the observations in paragraph No.27, but that is amply clarified by the remarks in paragraph No.26 and the last sentence in paragraph No.27, which says that in case of non-registration, *"genuineness of the Will, therefore, becomes doubtful".* If the learned Judge had intended to say that an unregistered Will executed before the enforcement of U.P. Act No.27 of 2004, where succession opened out, after the amendment would be invalid for want of registration, it would not have been remarked that the genuineness of the Will is doubtful. Genuineness relates to probity of the document and not its admissibility for want of registration.

28. The question of the amendment being prospective or retrospective, in any case, has now become an academic issue, because a Division Bench of this Court in **Pramila Tiwari v. Anil Kumar Mishra and others, 2024 SCC OnLine All 1588** has held it void. The provisions of sub-Section (3) of Section 169 of the Act of 1950, to the extent that these provide for compulsory registration of a will, have been declared ultra vires and void in **Pramila Tiwari** (supra) in terms of the following order:

*"36. In view of the above exposition of law and in view of what we have discussed above in this judgment, we hold sub-Section (3) of Section 169 of Act of 1950, in so far as it requires a Will to be compulsorily registered, to be repugnant to Section 17 read with Section 40 of the Indian Registration Act, 1908 and hence we hold the amendment of Section 169(3) of the U.P.Z.A.L.R. Act to that extent void.*

*37. Thus, our answer, to the question framed, is that sub-Section (3) of Section 169 having been declared as void to the extent it provides for registration of Will, the Wills in State of Uttar Pradesh are not required to be registered and a Will for its non registration will not be void whether before or after the U.P. Amendment Act, 2004."*

29. Thus, the provision of sub-Section (3) of Section 169 of the Act, providing for the compulsorily registration of a Will relating to agricultural tenure, stands erased from the statute book and regarded never to have been enacted. Therefore, reliance placed by the Authorities below upon provisions of sub-Section (3) of Section 169 requiring compulsory registration of the Will executed by Smt. Surjeet Kaur, and on that basis, holding her property to be inherited by her son, Ranjeet Singh and not the legatees under the will, to wit, her granddaughters, has to be held manifestly illegal. The Will has not been regarded by any one not duly proved nor any one has raised the issue. Therefore, in terms of Smt. Surjeet Kaur's will, her holdings must be held to have passed on to her granddaughters, to wit, Smt. Gurjeet Kaur, Smt. Rajwant Kaur and Smt. Lakhvar Kaur. If the holdings of Smt. Surjeet Kaur have passed on to the legatees under her Will and not to her son Ranjeet Singh by succession, as held by the Authorities below, Ranjeet Singh, would have his holdings well within the ceiling limit of 7.300 hectares, assuming that all of it is irrigated land. The inescapable consequence, therefore, is that the

impugned orders cannot be sustained and must be quashed.

30. In the result, both the writ petitions succeed and are **allowed**. The impugned orders dated 16.09.2014 passed by the Prescribed Authority-Ceiling/ Additional Collector (Finance and Revenue), Pilibhit and the order dated 19.05.2022 passed by the Additional Commissioner (Administration), Bareilly Division, Bareilly are hereby **quashed**.

31. Costs easy.

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**(2024) 7 ILRA 629**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 19.07.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE MANJIVE SHUKLA, J.**

Writ C No. 20223 OF 2024

**A.K. Construction Company ...Petitioner**
**Versus**
**Union of India & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Anoop Trivedi, Sr. Advocate, Sri Devansh Mishra, Sri Vibhu Rai

**Counsel for the Respondents:**
Sri Mahendra Pratap

**A. Contract Law – Blacklisting – Termination of Contract - Jurisdiction - Maintainability - Show cause notice should not be pre-meditative in nature and a writ petition would be maintainable against such a show cause notice.** (Para 5, 9)

**A show cause notice cannot be read hypertechnically, and it is to be read reasonably. And the person who is subject to it must get the impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence.** (Para 11, 12)

A writ court refrains from interfering with such notices unless they appear to be issued without jurisdiction. However, there is an exception to the general rule. When a show cause notice is issued with clear pre-meditation, suggesting that the authority has already made up its mind regarding the outcome, a writ petition can be justified. This is because a subsequent hearing in such cases is unlikely to be impartial or productive. Once a decision is effectively pre-determined, further hearings do not serve their intended purpose. This approach ensures that the principles of natural justice and fair hearing are upheld. (Para 10)

**(1) It is a common principle of law that unless an accusation is made in the show cause notice, a finding with respect to the same cannot be recorded on the same in the final order.** The principle behind the same is that a person who is accused of a particular act must be given a chance to defend himself for the same. The authority cannot be allowed to change the goal post while passing the order. (Para 23)

There was a charge in the show cause notice that the employee of the petitioner had taken money, whereas the finding in the impugned order is that an unauthorised person who was not an employee of the petitioner had taken money in the precinct of the fee plaza. The offence that emerges from the impugned order now is that the petitioner allowed unauthorised people to be present in the precinct of the fee plaza. There are similar findings w.r.t. other allegations made in the show cause notice in the impugned order. (Para 22, 24)

**(2) The incidents mentioned did not take place in the same month, and therefore, the application of Clause 35(2) r/w Clause 20 of the terms and conditions appear to be illegal as Clause 20 requires more than three defaults in the same month.** The show cause notice, is pre-determined and the impugned order travels beyond the scope of the said show cause notice. (Para 25)

**B. A quasi-judicial authority must record reasons in support of its conclusions. Insistence on reason is a requirement for both judicial accountability and transparency.** The ongoing judicial trend in all countries committed to the rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. Reasons in support of decisions must be cogent, clear, and succinct. Therefore, for the development of law, the requirement of giving reasons for the decision is of the essence and is virtually a part of 'due process'. (Para 12)

**The inherent power to blacklist a contractor is vested in the entity awarding the contract, typically the State or its instrumentalities. This authority does not necessarily require explicit statutory authorisation but must conform to fairness and reasonableness.** (Para 13, 14)

**(1) Principle of proportionality,** dictates that **any decision to blacklist must be reasonable, fair, and commensurate with the gravity of the alleged offense or breach.** This doctrine ensures that the punishment or action taken is appropriate and proportional to the severity of the misconduct.

In the present case, the punishment of debarment has been imposed in a very casual manner without taking into consideration the fact that the penalty had already been imposed (for a sum of Rs. 8,00,000/- for the various infractions that took place earlier) on the petitioner and without any further illegality committed by the petitioner, the petitioner was burdened with the ban amounting to **double jeopardy** (that appears to be harsh on the face of the present facts). This casual manner obviously has resulted in an arbitrary action and cannot be sustained in the eyes of the law. (Para 24, 25)

**(2) General principles of natural justice, which include *Audi Alteram Partem* (hear the other side), *Nemo Judex in Causa Sua* (no one can be a judge in their own case), and the right to a reasoned decision.** In quasi-judicial proceedings, actions by State authorities must comply with these principles to ensure fairness in the process. Further, natural justice requires that decisions are made impartially and based on sound reasoning, upholding the rights of the parties involved.

**Before blacklisting a contractor, the entity must provide a fair hearing, allowing the contractor to present their case and defend against the allegations or reasons for blacklisting.**

In the present case, upon perusal of the show cause notice, the reply given by the petitioner, and the impugned order, there seems to be a major lacuna in the impugned order w.r.t. addressing all the points and the submissions that have been raised by the petitioner in their reply. The nature of the show cause notice also indicates a pre-meditated mind. (Para 19)

Specific proof has been provided by the petitioner, including C.C.T.V. footage, documents in relation to Maafinama (given by the persons who had filed the F.I.R. against the petitioner company) that have not been taken into account by the authority while coming to the final decision. (Para 7)

**(3) Principles of non-arbitrariness and non-discrimination,** which are essential to ensure equality before the law. **Actions by State authorities, including blacklisting decisions, must pass the test of reasonableness under Article 14 of the Indian Constitution.** This principle would prevent arbitrary State actions and ensures that decisions are made based on lawful and relevant grounds, promoting fairness and equality.

**(4) Rule of law,** which requires that every action of the State or its instrumentalities must be informed by reason and comply with legal standards. Decisions must be based on lawful and relevant grounds of public interest, ensuring that the exercise of power is justified and appropriate. (Para 14, 17, 18)

**C. Scope of extraordinary writ jurisdiction -** Though while presiding over the extraordinary writ jurisdiction, and Court cannot enter into the facets of contract law. Nevertheless, even **though the fact that the entire controversy herein is contractual in**

**nature, as seen from the Supreme Court judgements, the writ court is duty bound to step in when the State acts in a whimsical, arbitrary and capricious manner.** (Para 25)

Present order passed by the authority concerned suffers from the vice of violation of principles of natural justice as well as it fails on the altar of proportionality.

**Writ petition allowed. Directions to issue fresh show cause notice**. (E-4)

**Precedent followed:**

1. Gp. Capt. Rajib Lochan Dey Vs U.O.I., 2007 SCC OnLine Cal 308 (Para 5)

2. Siemens Limited Vs Stt. of Mah. & ors., 2006 (12) SCC 33 (Para 5)

3. Oryx Fisheries Pvt. Ltd. Vs U.O.I. & ors., (2010) 13 SCC 427 (Para 5)

4. M/s Kulja Industries Ltd. Vs Chief Gen. Manager W.T. Proj. BSNL & ors., Civil Appeal No. 8944 of 2013 (Para 6)

5. K.I. Shephard Vs U.O.i., (1987) 4 SCC 431 (Para 10)

6. Erusian Equipment & Chemicals Ltd. Vs St. of W.B., (1975) 1 SCC 70 (Para 14)

7. Radha Krishna Agarwal & ors. Vs St.of Bihar & ors. (1977) 3 SCC 457 (Para 14)

**Present petition assails order dated 31.05.2024, passed by the Chief General Manager, Commercial Operations, National Highway Authority of India.**

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

1. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Devansh Mishra and Sri Vibhu Rai, learned counsel appearing for the petitioner and Sri Mahendra Pratap, learned counsel for the National Highway Authority of India (hereinafter referred to as the "NHAI").

2. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is assailing the order dated March 31, 2024, passed by the Chief General Manager, Commercial Operations, National Highway Authority of India (being the Respondent No. 3). This order was passed pursuant to the show cause notice issued upon the petitioner dated May 24, 2024, to which the petitioner had given a reply on May 27, 2024.

3. By the impugned order, the petitioner's contract with the NHAI for running the Kaithi Fee Plaza was terminated, and the petitioner was debarred from the list of pre-qualified bidders for a period of six months.

4. Sri Anoop Trivedi, learned Senior Advocate for the petitioner, has submitted that on a bare perusal of the impugned show cause notice, it is clear that the said show cause notice reeks of pre-meditation and is a fait accompli by itself. He further submits that a detailed reply was submitted by the petitioner explaining each and every point that has been raised in the show cause notice. However, he submits that the authorities have blatantly erred in law in not considering the said reply of the petitioner and have passed the impugned orders in gross violation of the principles of natural justice.

5. Sri Anoop Trivedi has brought to our notice certain clauses of the show cause notice and the reply given to the same by the petitioner which have not found any mention in the impugned order. Finally, the

petitioner submitted that the quantum of damages/the termination and debarment that has been issued as a penalty upon the petitioner is against the principle of proportionality and also amounts to double jeopardy. This submission is based on the fact that the petitioner had already paid the penalty of Rs. 8,00,000/- for the technical breaches committed by it. He submits that after having paid the penalty, being shouldered with the entire burden of termination of contract and debarment for the period of six months, is a punishment that is way out of proportion. To buttress his arguments, Sri Anoop Trivedi relied on the Calcutta High Court judgment in **Gp. Capt. Rajib Lochan Dey -v- Union of India reported in 2007 SCC OnLine Cal 308,** which, in fact, dealt with the same Clause 35 that is used in the present contract. He further relied on the Supreme Court Judgment of **Siemens Limited -v- State of Maharashtra and Others,** reported in 2006 (12) SCC 33 and the case of **Oryx Fisheries Private Limited -v- Union of India and Others, reported in (2010) 13 SCC 427** to emphasise on the point that a show cause notice should not be pre-meditated in nature and a writ petition would be maintainable against such a show cause notice.

6. Sri Anoop Trivedi, learned Senior Advocate for the petitioner, further relied on the Apex Court judgment in the case of **M/s Kulja Industries Limited -v- Chief Gen. Manager W.T. Proj. BSNL & Ors. (Civil Appeal No. 8944 of 2013).** He relied on the above judgment to give support to his argument that in cases of blacklisting, the threshold for such action would be high and only based on proper scrutiny. This judgement also lays down the principle that even though the right of the petitioner may be in the nature of contractual right, the manner, the method and the motive behind the decision of the authority, whether or not contractual in nature, is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. This judgment further clarifies that the decision taken by the authority must abide by the principle of Audi alteram partem before the decision culminates to a decision of blacklisting of a person.

7. The last submission of the learned counsel for the petitioner is with regard to the various incidents that have been alleged in the show cause notice. Specific proof has been provided by the petitioner, including C.C.T.V. footage, documents in relation to Maafinama (given by the persons who had filed the F.I.R. against the petitioner company) that have not been taken into account by the authority while coming to the final decision.

8. Sri Mahendra Pratap, learned counsel for the NHAI, has highlighted several events that resulted in the issue of the show cause notice. He further submits that some of the events were extremely glaring infractions and were required to be punished. He further submits that even though the penalty had been imposed upon the petitioner, the same would not suffice as the consequences of the various malpractices of the petitioner needed to be addressed by the authority concerned. According to him, that is the reason as to why, apart from the penalty, termination of the contract was mandatory, coupled with the ban on the petitioner organization for six months.

9. Before proceeding with a further examination of the present case it would be

apposite to analyse and examine the judgements cited before this court. The Supreme Court, in the case of **Siemens Limited (supra),** was accosted with an issue wherein the show cause notice issued to the appellant was pre-meditated in nature. The Supreme Court held that in such cases, the making of the show cause notice becomes a mere formality as the authority had pre-determined the appellant's liability. The Supreme Court further held that such writ petitions would be maintainable before the High Court. The relevant paragraphs are provided below:

*9. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been, without jurisdiction as has been held by this Court in some decisions including State of U.P. v. Brahm Datt Sharma, Special Director v. Mohd. Ghulam Ghouse and Union of India v. Kunisetty Satyanarayana, but the question herein has to be considered from a different angle viz. when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. (See, K.I. Shephard v. Union of India) It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice.*

*11. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter-affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show-cause notice. The writ petition, in our opinion, was maintainable.*

10. The above paragraphs explain the legal principle regarding the jurisdiction of writ courts in India when addressing show cause notices. Typically, a writ court refrains from interfering with such notices unless they appear to be issued without jurisdiction. However, the above case highlights an exception to the general rule. When a show cause notice is issued with clear pre-meditation, suggesting that the authority has already made up its mind regarding the outcome, a writ petition can be justified. This is because a subsequent hearing in such cases is unlikely to be impartial or productive. This perspective has been supported by the Supreme Court in the case of ***K.I. Shephard -v- Union of India, reported in (1987) 4 SCC 431,*** which acknowledges that once a decision is effectively pre-determined, further hearings do not serve their intended purpose. It is evident that the authority had already concluded the appellant's liability, as indicated by the counter-affidavit and the show-cause notice. Therefore, the court deemed the writ petition maintainable to prevent an ineffective hearing process. This approach ensures that the principles of natural justice and fair hearing are upheld.

11. Similarly, in **Oryx Fisheries Pvt. Limited (supra),** the Supreme Court dealing with a similar issue held as follows:

*31. It is of course true that the show-cause notice cannot be read*

*hypertechnically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show-cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show-cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show-cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.*

*32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show-cause notice.*

*33. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi-judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it.*

12. From the above judgment, the rationale that emerges is that a show cause notice cannot be read hypertechnically, and it is to be read reasonably. But the person who is subject to it must get the impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. A quasi-judicial authority must record reasons in support of its conclusions. The ongoing judicial trend in all countries committed to the rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. Insistence on reason is a requirement for both judicial accountability and transparency. Reasons in support of decisions must be cogent, clear, and succinct. Therefore, for the development of law, the requirement of giving reasons for the decision is of the essence and is virtually a part of 'due process'.

13. In **Kulja Industries Limited (supra),** the respondent BSNL had blacklisted Kulja Industries Limited citing fraudulent billing practices despite repayment of excess funds. The High Court upheld this decision emphasising that repayment did not negate the misconduct of the appellant. The Supreme Court laid down the principle with regard to the power of a Government or Public Authority to blacklist contractors. The relevant paragraphs are extracted below:

*17. That apart the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because "blacklisting" simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints*

*whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with Erusian Equipment & Chemicals Ltd. v. State of W.B. [(1975) 1 SCC 70] where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed: (SCC p. 75, para 20)*

*"20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."*

*18. Subsequent decisions of this Court in M/s Southern Painters v. Fertilizers & Chemicals Travancore Ltd. and Anr. [1994 Supp (2) SCC 699 : AIR 1994 SC 1277] ; Patel Engineering Ltd. v. Union of India [(2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445] ; B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [(2006) 11 SCC 548] ; Joseph Vilangandan v. Executive Engineer (PWD) [(1978) 3 SCC 36] among others have followed the ratio of that decision and applied the principle of audi alteram partem to the process that may eventually culminate in the blacklisting of a contractor.*

*19. Even the second facet of the scrutiny which the blacklisting order must suffer is no longer res integra. The decisions of this Court in Radhakrishna Agarwal v. State of Bihar [(1977) 3 SCC 457 : (1977) 3 SCR 249] ; E.P. Royappa v. State of T.N. [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] ; Maneka Gandhi v. Union of India [(1978) 1 SCC 248] ; Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 : 1981 SCC (L&S) 258] ; Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] and Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay [(1989) 3 SCC 751] have ruled against arbitrariness and discrimination in every matter that is subject to judicial review before a writ court exercising powers under Article 226 or Article 32 of the Constitution. It is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that*

*is committed to the rule of law. We do not consider it necessary to burden this judgment by a copious reference to the decisions on the subject. A reference to the following passage from the decision of this Court in M/s Mahabir Auto Stores & Ors. v. Indian Oil Corporation Ltd., [(1990) 3 SCC 752] should, in our view, suffice: (SCC pp. 760-61, para 12)*

*"11. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radhakrishna Agarwal v. State of Bihar [(1977) 3 SCC 457 : (1977) 3 SCR 249] . ... In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. ... It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."*

14. Upon a perusal of the relevant paragraphs above, it is evident that the judgement brings forward several critical principles concerning the judicial scrutiny of decisions to blacklist contractors by governmental or public authorities. First, the inherent power to blacklist a contractor is vested in the entity awarding the contract, typically the State or its instrumentalities. This authority does not necessarily require explicit statutory authorisation but must conform to fairness and reasonableness. It is also to be noted that any governmental or public authority's decision to blacklist a contractor is open to judicial review, ensuring adherence to natural justice principles, particularly *audi alteram partem* and the doctrine of proportionality. This means courts can examine such decisions to ensure they are just and balanced. Further, before blacklisting a contractor, the entity must provide a fair hearing, allowing the contractor to present their case and defend against the allegations or reasons for blacklisting. The decision to blacklist must also be reasonable, fair, and proportionate to the gravity of the alleged offence or breach, avoiding arbitrariness or discrimination. Additionally, actions by State authorities, including blacklisting decisions, must pass the reasonableness test under Article 14 of the Indian Constitution,

which ensures equality before the law and prevents arbitrary State actions. Furthermore, precedents and legal standards established in prior judicial decisions, such as ***Erusian Equipment & Chemicals Ltd. -v- State of W.B., reported in (1975) 1 SCC 70*** and subsequent cases like ***Radha krishna Agarwal and Ors. -v- State of Bihar & Ors., reported in (1977) 3 SCC 457,*** shed light on the legal framework guiding the judicial review of blacklisting decisions. These principles collectively aim to ensure that the power to blacklist is exercised judiciously, upholding fairness, reasonableness, and proportionality while safeguarding contractors' rights to a fair hearing and defense.

15. The judgement delivered by Justice Dipankar Datta (as he then was) in the judgement of the Calcutta High Court in **Gp. Capt. Rajib Lochan Dey's case (supra)** dealt with the same clause as is prevalent in the terms and conditions between the parties in the present lis.

16. Upon consideration of the various aspects, the Calcutta High Court held the importance of compliance with the principles of natural justice. Relevant paragraphs are delineated below:

*29. Accordingly, this Court would proceed to consider the controversy raised herein on merits overruling the primary objection of Mr. Basak. However, this Court is not oblivious of the other objections relating to maintainability of the writ petition raised by Mr. Basak which shall be dealt with at a later stage of this judgement.*

*30. The inequality of bargaining power of the NHAI and the petitioner admits of no doubt. Being the weaker party, the petitioner could obtain a means of livelihood only upon acceptance of the terms imposed by the NHAI. If the petitioner had not accepted the contract, the NHAI could have several other intending contractors to choose from. Having accepted Clause 35, it is clear that choice of the petitioner, a retired defence employee, was limited and he had no other option. Clause 35 of the contract, in the manner it is worded, is clearly unconscionable and unreasonable and suffers from the vice of enabling discrimination and arbitrary action.*

*31. If one is conferred a drastic power, it necessarily carries with it a duty to exercise such power with a good degree of circumspection so that it is not abused. By the impugned notice, the NHAI has terminated the contract that was to subsist till 15.6.07. No reason has been assigned since Clause 35 expressly excludes assigning of any reason. Although the contract does not specifically provide that prior to termination of a contract in exercise of power conferred by Clause 35 thereof a notice is to be issued calling upon the contractor to show-cause as to why the contract shall not be terminated, can it be said that NHAI has unfettered and unbridled power to terminate a contract at its sweet will without notice and existence of any cogent reason? The answer has to be in the negative.*

*32. This Court would not venture to declare Clause 35 as void in the absence of a prayer made by the petitioner in this regard. But even if it had been challenged, on facts and in the circumstances of this case, this Court is inclined to hold that Clause 35 could be saved from being struck down and construed as reasonable if one reads natural justice into it and this would be well nigh-permissible being in consonance with fairness in action. If so*

*read, an opportunity of showing cause ought to have been given to the petitioner prior to taking the harshest step of terminating the contract. In fact, the NHAI by reading natural justice in Clause 35 had initially asked the petitioner to show-cause as to why the contract shall not be terminated. There appears to be no cogent reason as to what prevented issuance of such notice prior to the impugned action. The NHAI cannot at its option read natural justice in Clause 35 at one stage and exclude it at a subsequent stage. One cannot in the context ignore the development intervening the action imposing penalty on 12.10.06 and the impugned termination of contract effected on 8.1.07, i.e. the fact that only two days prior to the order terminating the contract an agency appointed by the NHAI itself to offer consultancy services had, regarding the six monthly performance of the petitioner, duly certified that the performance of the petitioner's security agency was satisfactory and that it was carrying out its duties and responsibilities effectively and efficiently and further that the management and administration at the toll plaza is co-operative and sincere to raise toll collection. Importantly, despite opportunity granted to the NHAI to deal with the contents of the writ petition and the supplementary affidavit by filing a composite counter affidavit, the NHAI has not disputed the contents of the supplementary affidavit. The contents of the supplementary affidavit stand uncontroverted and the same are deemed to have been admitted by the NHAI. In view of such contemporaneous document, the contents whereof have not been disputed by the NHAI, it is hard to accept the contention that the petitioner's service being utterly unsatisfactory and resulting in the NHAI incurring financial loss, it was justified in terminating the contract. The submission of Mr. Basak that the NHAI while making the order dated 12.10.06 had reserved its right to take further action does not advance the case of NHAI any further. Right of the NHAI to take further action cannot be in doubt but that too ought to have been preceded by a notice since the NHAI owed a duty to the petitioner to act fairly. The effect of the impugned notice is to curtail the period for which the petitioner was entitled to continue subject to compliance with all formalities. If only an opportunity had been granted to the petitioner, for whatever it is worth, such report could have been used by him if not as a sword but as a shield to counter the accusations of the NHAI alongwith any other point available to him in defence. After all, reasons cited by the petitioner for decrease in toll collection were serious in nature warranting serious consideration. That would have necessitated a reasoned decision upon proper application of mind, which in turn, could bear manifestation of a fair, just and reasonable approach to seal the petitioner's fate instead of the impugned notice which hardly reflects the mind of the decision maker and the materials considered by him prior to issuing it. Had it been so, the Writ Court's scope of enquiry would have been further restricted and it could well turn out to be not an appropriate case for interference, keeping in mind that it does not act as a bull in a china shop.*

*33. It has been noticed that Clause 35 empowers the NHAI to terminate the contract by issuing a notice but without assigning any reason. Similar expression fell for consideration in Shrilekha Vidharthi (supra). It was held that "without assigning any cause" is not to be equated with "without existence of any cause". It*

*merely meant that the reason for termination need not be communicated but absence of or non-existence of any cogent reason would be arbitrary.*

*34. It is the stand of the NHAI in its counter affidavit that "the decision to terminate the contract was based, inter alia, on the three surveillance reports as also on the reply to the show-cause which were found unsatisfactory". If one were to consider the report of SOWIL Ltd. dated 6.1.07 with an open mind, it really would reveal a chink in the NHAI's armoury and lay to rest any accusation of unsatisfactory performance. It is difficult to agree that lapses detected by the NHAI for which a penalty was imposed on the petitioner could form the basis for termination of the contract. That really amounts to double jeopardy, which is not permissible in our constitutional scheme. Also the subsequent report of SOWIL Ltd. is hardly of any relevance since the same was not in existence when the impugned notice was issued.*

*35. This Court thus holds that in not giving any opportunity to the petitioner to show-cause against proposed termination of contract and there being no sufficient reason to justify the impugned action, the NHAI has acted unfairly, unreasonably, in an arbitrary manner and in violation of principles of natural justice, thereby infringing the petitioner's right guaranteed by Article 14 of the Constitution of India.*

17. Upon a perusal of the relevant paragraphs above, one realises that the judgment sheds light on several fundamental principles regarding the judicial review of administrative actions, particularly concerning the termination of contracts by public authorities such as the National Highways Authority of India (NHAI). Primarily, public authorities exercising significant powers, like contract termination, must adhere to natural justice principles, ensuring the affected party has an opportunity to be heard or to show cause before adverse action is taken. This safeguards against unreasonableness and arbitrariness, requiring that administrative actions, including contract terminations, are based on valid reasons and reflect a fair, just, and reasonable approach. Furthermore, actions by public authorities affecting individual rights are subject to scrutiny under Article 14 of the Indian Constitution, which guarantees equality before the law and prohibits arbitrary actions. Objections related to non-disclosure of material facts may be disregarded by courts unless the non-disclosure is crucial and affects the case outcome. While courts may prefer to dismiss writ petitions citing the availability of alternative remedies, they may still hear the case on its merits if justified. The principle of double jeopardy is also highlighted, wherein imposing penalties and then using the same grounds for contract termination is generally impermissible. Moreover, contractual clauses allowing termination without assigning reasons must not be interpreted to enable arbitrary actions; the absence of communicated reasons does not imply the absence of reasons altogether. These principles collectively ensure that public authorities' power to terminate contracts is exercised judiciously, upholding fairness, reasonableness, and adherence to natural justice while safeguarding against arbitrary and unreasonable administrative actions.

18. The principles that emerge from the above judgements are as follows:

a. First, the principle of proportionality, which dictates that any

decision to blacklist must be reasonable, fair, and commensurate with the gravity of the alleged offense or breach. This doctrine ensures that the punishment or action taken is appropriate and proportional to the severity of the misconduct.

b. Second, the general principles of natural justice, which include Audi Alteram Partem (hear the other side), Nemo Judex in Causa Sua (no one can be a judge in their own case), and the right to a reasoned decision. In quasi-judicial proceedings, actions by State authorities must comply with these principles to ensure fairness in the process. Further, natural justice requires that decisions are made impartially and based on sound reasoning, upholding the rights of the parties involved.

c. Third, the principles of non-arbitrariness and non-discrimination, which are essential to ensure equality before the law. Actions by State authorities, including blacklisting decisions, must pass the test of reasonableness under Article 14 of the Indian Constitution. This principle would prevent arbitrary State actions and ensures that decisions are made based on lawful and relevant grounds, promoting fairness and equality.

d. Finally, the rule of law, which requires that every action of the State or its instrumentalities must be informed by reason and comply with legal standards. Decisions must be based on lawful and relevant grounds of public interest, ensuring that the exercise of power is justified and appropriate.

19. Upon perusal of the show cause notice, the reply given by the petitioner, and the impugned order, there seems to be a major lacuna in the impugned order with regard to addressing all the points and the submissions that have been raised by the petitioner in their reply. The nature of the show cause notice also indicates a pre-meditated mind. The extracts of some of the paragraphs are provided below:-

*4. That the Project Director, PIU Varanasi received a letter from N./s. Adhunik Road Carrier, Vadodara Gujrat, wherein they have infornned that their vehicle was forcefully stopped at Kaithi Toll Plaza by your staff on 20th December 2023 at 17:00 Hrs and got released on 21 December, 2023 at 11:00 Hrs after intervention of PIU office, Varanasi. They have also informed that usually your staff forced vehicles to stop for 4 to 5 hours and asked them for Rs. 5000-10000, as bribe for passing the vehicles through Toll Plaza. The complainant has also provided document in support of his accusation. Letter dated 01.01.2024 (enclosed herewith) with the document sent by PD, PIU Varanasi to you. Your reply received vide letter dated 04.01.2024 (enclosed herewith) was not found satisfactory.*

*5. That Manager (Tech) in office of PD PIU Varanasi sent a letter dated 15.01.2024 informing to you about the news items published in News Papers on 13.01.2024 & 15.01.2024 regarding overcharging on the overloaded vehicles and making illegal collection of user fee from the Highway users. The same instance was earlier noticed by PIU Varanasi, who had also warned you to operate Toll Plaza as per provision of Contract Agreement and any illegal activity will force to impose penalty on your Agency. Copy of letter dated 15.01.2024 is enclosed herewith. Your reply received vide letter dated 16.01.2024 (enclosed herewith) was not found satisfactory.*

*6. That one Dayal Sharan Mishra made a complaint dated 16.01.2024 and 01.02.2024 with affidavit regarding your*

*illegal activities. Coples enclosed herewith of the complaint. Your affidavit received vide letter dated 03.02.2024 (enclosed herewith) was not found satisfactory.*

*8. That the PD, PIU Varanasi wrote a letter/notice dated 07.02.2024 regarding the inspection made by Manager(Tech) at Kaithí Toll Plaza on 18.01.2024 who has noticed various shortcomings mentioned in the letter/notice dated 07.02.2024. The Manager (Tech) Inspected and found that there are violations of clause 12 of the Contract Agreement. During the Investigation, your staff was caught red handed with the illegal cash collection of Rs. 2500/- from the Truck passing through the Plaza. The Photographs of that person holding the illegal cash collection is enclosed with the letter. Other illegal activities have been referred which is clear from the letter dated 07.02.2024 enclosed herewith. Your reply received vide letter dated 08.02.2024 (enclosed herewith) was not found satisfactory."*

20. The show cause notice further provided in paragraph 15 as follows :-

*15. That, the present notice is being issued pursuant to the Order dated 21.05.2024 passed by Hon'ble Allahabad High Court in the said Writ Civil no. 17805 of 2024, and in terms of Clause 35(2)/(3) of the Contract Agreement, whereby, you are requested to explain, why, Contract Agreement dated 13.12.2023 shall not be terminated due to above detailed Contractual violations at your end and why you shall not be debarred from the list of pre-qualified bidders for a period as deemed fit and proper by NHAI.10.*

21. The finding in the impugned order dated May 31, 2024, with regard to paragraph 8 wherein the authority came to a particular finding is stated below:-

***PIU Varanasi letter dated 07.02.2024**: -*

*The PD, PIU, Varanasi wrote a letter/notice dated 07.02.2024 regarding to inspection date by Manager (Tech) at Kaithi User Fee Plaza on 18.01.2024, who has noticed various short comings mentioned in the letter/notice dated 07.02.2024. The PD, PIU, Varanasi has noticed the facts found during investigation by Manager (Tech). Relevant facts from the letter/notice dated 07.02.2024 are reproduced below:*

*"During the inspection, your staff was caught red handed with the illegal cash collection of Rs. 2,500/- from the truck passing through the Fee Plaza. The photographs of that person holding the illegal cash collection is enclosed with this letter, Moreover, it was also found that Rs. 220 is being collected regularly from the Iccal buses by the agency without issuing any cash collection receipt, which is also illegal and violation of operational transparency of Fee Plaza and loss of revenue to the Authority.*

*(iii) As per Clause 13(c), the personnel deployed have to wear prescribed uniform necessarily bearing the name of individual. During the inspection, the personnel deployed were not wearing the prescribed uniform as stated in the CA.*

*(iv) As per Clause 13(j), engagement of at least 30% Ex-Servicemen is mandatory, no such deployment was found at the fee plaza.*

*(v) Unwanted persons such as Bouncers were found to be sitted at fee plaza office, which is violation of Contract Agreement.*

*(vi) As per Clause 22(c) & 23(o), the Authority has right to inspect and check*

*receipt books, register and books of accounts maintained by the Contractor at any time. During Inspection no such records were provided, when asked for checking, which shows fraudulent behaviours and violation of transparency as per Contract Agreement.*

*(vii) As per Clause 18(d) of Contract Agreement, the user fee collection agency shall ensure the cleanliness of the toilet blocks, filing which shall lead to the imposition of penalty on the agency. During the site visit it has been noticed that the toilets blocks are not cleaned.*

*(viii) Further, lots of complaints through 1033 help line, pertaining to Kaithi Fee Plaza, are also being observed."*

*The Competent Authority has considered your reply dated 27.05.2024. You have admitted that the money was collected at the User Fee Plaza but your defence is that the same was collected by FASTag recharge company and individual was not wearing uniform of your Agency and was also not in employment with your Agency. It is to be noted that the employee of FASTag recharge company cannot enter in User fee Plaza for l collecting money for recharge. If any illegal money is being taken by any person at User Fee Plaza, in cash from any NH user, you would be wholly responsible for such illegal act. You have admitted that collection of Rs. 2500/- from passing through vehicle was collected at User fee Plaza, you are responsible for such illegal act. The Competent Authority found your reply not satisfactory.*

22. The above finding does not match the initial show cause notice wherein there was a charge in the show cause notice that the employee of the petitioner had taken money, whereas the finding in the impugned order is that an unauthorised person who was not an employee of the petitioner had taken money in the precinct of the fee plaza. The offence that emerges from the impugned order now is that the petitioner allowed unauthorised people to be present in the precinct of the fee plaza.

23. It is a common principle of law that unless an accusation is made in the show cause notice, a finding with respect to the same cannot be recorded on the same in the final order. The principle behind the same is that a person who is accused of a particular act must be given a chance to defend himself for the same. The authority cannot be allowed to change the goal post while passing the order.

24. We find similar findings with regard to other allegations made in the show cause notice in the impugned order. We further find that penalty has been imposed on the petitioner for a sum of Rs. 8,00,000/- for the various infractions that took place earlier.

25. It is to be further noted that these incidents did not take place in the same month, and therefore, the application of Clause 35(2) read with Clause 20 of the terms and conditions appear to be illegal as Clause 20 requires more than three defaults in the same month. The show cause notice, as dismissed above, is pre-determined and the impugned order travels beyond the scope of the said show cause notice. Another important aspect is that the punishment of debarment has been imposed in a very casual manner without taking into consideration the fact that the penalty had already been imposed on the petitioner and without any further illegality committed by the petitioner, the petitioner was burdened with the ban amounting to double jeopardy (that appears to be harsh on the face of the present facts). This casual manner

obviously has resulted in an arbitrary action and cannot be sustained in the eyes of the law. However, the court is cognizant of the fact that we are presiding over the extraordinary writ jurisdiction, and we cannot enter into the facets of contract law in this jurisdiction. Nevertheless, even though the fact that the entire controversy herein is contractual in nature, as seen from the Supreme Court judgements above, the writ court is duty bound to step in when the State acts in a whimsical, arbitrary and capricious manner.

26. In light of the same, we are of the view that the present order passed by the authority concerned suffers from the vice of violation of principles of natural justice as well as it fails on the altar of proportionality.

27. Accordingly, the impugned order dated May 31, 2024, is quashed with a direction to the authority concerned to once again issue a fresh show cause notice to the petitioner (de hors the prejudice in the earlier show cause notice). Once a show cause notice is issued, the petitioner shall be at liberty to file a detailed reply to the same within a period of seven days. Subsequent to the receipt of reply, an opportunity of hearing should be granted to the petitioner, and thereafter, a reasoned order be passed by the authority concerned. The authority concerned shall be at liberty to consider the judgements provided by the petitioner on the various issues.

28. With the above observations, the writ petition is allowed.

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**(2024) 7 ILRA 643**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 24.07.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE MANJIVE SHUKLA, J.**

Writ C No. 21956 OF 2024

**Haji Mahboob Ahmad & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Khaleeq Ahmad Khan, Mohemmed Amir Naqvi, Najam Zafar, Rafat Farooqui

**Counsel for the Respondents:**
G.A., Shiv P. Shukla

**A. Civil Law-Constitution of India, 1950-Article 226-Medical Termination of Pregnancy Act, 1971- Section 3(2-B)-seeking a writ of mandamus to medically terminate the pregnancy of a minor who is victim of rape-the petitioner was found to be 29 weeks pregnant at the time of recovery-The court directed the C.M.O. to constitute medical board to examine the petitioner-The medical board concluded that continuing the pregnancy would impact the physical and mental well being of the petitioner but termination at this stage would pose a risk to her life-The court relied Apex Court judgment and decide to allow the petitioner to deliver the child and put the child up for adoption in the best interest of the petitioner.(Para 1 to 26)**

**B. The Apex court in its judgment ensured that the rights of the victim were placed on the highest pedestal, keeping in mind the pregnant girl's Right to bodily autonomy enshrined under Article 21 of the Constitution of India and gave appropriate directions with regard to the adoption process that was to follow thereinafter. This placed more emphasis on the State's liability for bearing the expenses of the victims in such cases. Furthermore, it was highlighted that the Medical board must not restrict itself within the criteria of section 3(2-B) of the**

**Medical Termination of Pregnancy Act, 1971, but also take into account the physical and mental well being of the pregnant woman.(Para 24)**

**The petition is allowed.** (E-6)

**List of Cases cited:**

1. X Vs. U.O.I. (2023) SCC OnLine SC 1338

2. R Vs.U.O.I. & ors. SLP (Civil) Diary No. 4527 of 2024 (2024 SCC Online Del 440)

3. P Vs U.O.I. WP(s) Civil No(s). 65 of 2023

4. X Vs U.O.I. (2023) SCC OnLine SC 1338

5. A (Mother of X) Vs St. of Mah. (2024) SCC OnLine SC 835

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

1. Heard Sri Desh Ratan Chaudhary and Sri Siddharth Chaudhary, learned counsel appearing on behalf of the petitioner and Sri Birendra Prasad Shukla, the learned Standing Counsel appearing on behalf of the State.

2. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner has prayed for the issuance of a Writ of Mandamus commanding the Chief Medical Officer concerned (hereinafter referred to as respondent no. 3) to medically terminate the pregnancy of the petitioner.

**FACTUAL MATRIX OF THE CASE**

3. Factual matrix leading to the instant petition is delineated below:

a) Petitioner, aged 15 years, was living in the house of her maternal uncle.

b) On June 25, 2024, a First Information Report was lodged at Police Station concerned under Section 363 of the Indian Penal Code, 1860, by the petitioner's maternal uncle alleging that the petitioner was enticed away by a man.

c) On June 28, 2024, during the course of the investigation, the petitioner was recovered, and it was found that the petitioner was subjected to sexual intercourse. Subsequently, the case was converted under Sections 363 and 376 of the IPC and Section 3/4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act).

d) It was revealed by the ultrasonography report that the petitioner was having a pregnancy of about 29 weeks at the time of recovery.

4. From an examination of the date of the F.I.R. and the allegation of rape in the month of June, we were uncertain as to whether the case made out by the petitioner of her rape in the month of June is valid as she was 29 weeks pregnant in the month of June itself. However, it is to be noted that if the petitioner is actually only 15 years old, the same would constitute an offence of statutory rape.

5. Accordingly, keeping in mind the urgency of the matter and taking a humanitarian view as the petitioner is supposedly 15 years old (as per her high school mark sheet), respondent No. 3 was directed to immediately constitute a Five-member Team headed by the Department of Obstetrics and Gynaecology, Department of Anaesthesia and Department of Radio Diagnosis to examine the petitioner and submit a report before this Court in a sealed cover within a period of 3 days. The team was also directed to carry

out an age verification test on the petitioner and inform the Court of the same.

6. On July 18, 2024, the matter was placed before the coordinate Division Bench of this Court, who found the report dated July 16, 2024, provided by the Five-Member Team to be unclear with regard to the Medical Termination of Pregnancy and thereby directed respondent No. 3 to submit a fresh report before this Court on July 22, 2024, answering whether it is medically feasible and advisable to terminate the pregnancy suffered by the petitioner. The relevant portion of the report dated July 16, 2024, is reproduced herein:

***"मेडिकल बोर्ड की चिकित्सकीय आख्या :-***

*पीड़िता के अल्ट्रासाउण्ड की रिपोर्ट अनुसार गर्भ लगभग 31 wks का है जोकि period of viability के सापेक्ष पूर्ण है। अल्ट्रासाउण्ड की रिपोर्ट अनुसार गर्भ का अनुमानित वजन 1662±243 ग्राम है। fetal Heart Rate 130 BPM है। स्त्री रोग विशेषज्ञ के अनुसार पीडिता के गर्भ में पल रहे बच्चे का प्रसव कराया जा सकता है। आयु निर्धारण बोर्ड की राय अनुसार पीडिता की आयु लगभग 17 वर्ष अनुमानित है। बाल रोग विशेषज्ञ की राय-पीडिता की अल्ट्रासाउण्ड रिपोर्ट में पीडिता के गर्भ में पल रहा गर्भास्थ शिशु, लगभग 31 सप्ताह का है तथा पीडिता की स्वयं की आयु कम (17 वर्ष है)। यदि ऐसे पीडिता का प्रसव / एम०टी०पी० कराया जाता है जो जन्म लेने पाला शिशु काफी प्री मेचोर होगा तथा उसके फेफडे सहित अन्य सभी अंग प्री मेचोर होगे। जिस कारण शिशु सामान्य सांस लेने काफी कठिनाई होने की सम्भावना रहेगी।*

*अतः इस परिस्थिति में पीडिता का प्रसव / एम०टी०पी० उच्चीकृत संस्थान में कराना अधिक सुरक्षित होगा।"*

7. On July 22, 2024, the fresh report dated July 20, 2024, was submitted by respondent No. 3. The relevant portion of the report is produced herein:

***"मेडिकल बोर्ड की चिकित्सकीय आख्या :-***

*पीड़िता के अल्ट्रासाउण्ड की रिपोर्ट अनुसार गर्भस्थ भ्रूण लगभग 31 wks का है जोकि period of viability के सापेक्ष पूर्ण है। अल्ट्रासाउण्ड की रिपोर्ट अनुसार गर्भ भ्रूण का अनुमानित वजन 1662±243 ग्राम है। fetal Heart Rate 130 BPM है।*

*आयु निर्धारण बोर्ड की राय अनुसार पीडिता की आयु लगभग 17 वर्ष अनुमानित है। पीडिता की अल्ट्रासाउण्ड रिपोर्ट में पीडिता के गर्भ में पल रहा गर्भस्थ शिशु, लगभग 31 सप्ताह का है तथा पीडिता की स्वयं की आयु (17 वर्ष) है। गर्भ में पल रहे किसी भी भ्रूण का गर्भपात, गर्भधारण के 24 सप्ताह के उपरान्त नियमानुसार नही किया जा सकता है (MTP AMENDMENT ACT 2021).*

*अतः उपरोक्त परिस्थिति के दृष्टिगत पीडिता का गर्भपात नहीं कराया जा सकता है।"*

8. Upon perusal of the same, we found it to be inconclusive and passed a further order commanding the Chief Medical Officer, Prayagraj (hereinafter referred to as the C.M.O., Prayagraj) to constitute a Medical Board of five well-reputed doctors including the Doctors from the departments, namely, Department of Obstetrics & Gynaecology, Department of Neonatology and Department of Psychiatry to examine the petitioner physically as well as mentally. The Medical Board was also directed to counsel the petitioner and her parents and advise them of the possibilities of adoption and the secrecy/privacy thereof that would be maintained in the event the petitioner agrees to carry the child to full term. Furthermore, they were directed to answer the following questions, which were formulated thus:

*"a. Whether carrying the pregnancy to the full term would impact upon the physical and mental well-being of the petitioner?*

*b. Whether termination of the pregnancy can be carried out at this stage without any threat to the life of the petitioner?*

*c. Whether the age of the petitioner would impact on the health condition of the petitioner in case of medical termination of pregnancy?*

*d. Whether the petitioner and her parents are consenting to the said procedure as explained by the Doctors with regard to the medical termination of the pregnancy?"*

9. The conclusions in the report dated July 23, 2024, submitted by the Medical Board constituted by C.M.O., Prayagraj, are extracted below:

*"रिट याचिका संख्या-21956/2024 स्टेट ऑफ यू०पी० व 02 अन्य में मा० उच्च न्यायालय द्वारा पारित आदेश दिनांक 22.07.2024 में दिये गये निर्देशों के अनुपालन तथा प्रधानाचार्य, मोतीलाल नेहरू मेडिकल कालेज, प्रयागराज के पत्र संख्या-1664 दिनांक 23.07.2024 के क्रम में आज दिनांक 23.07.2024 को मेडिकल बोर्ड द्वारा याचिकर्ता का चिकित्सकीय परीक्षण किया गया तथा बिन्दु संख्या 7 में अंकित प्रश्नों के उत्तर निम्नवत दिये गये हैः-*

| *Question* | *Answer* |
|---|---|
| *a. Whether carrying the pregnancy to the full term would impact upon the physical and mental well being of the petitioner?* | *Yes, continuing the pregnancy to full term may impact on physical and mental well being of the petitioner.* |
| *b. Whether termination of the pregnancy can be carried out at this stage without any threat to the life of the petitioner?* | *No, termination of pregnancy cannot be carried out at this stage without any threat to the life of the petitioner because termination at this stage will require induction of labour that may be associated with complication and increased chances of surgical intervention.* |
| *c. Whether the age* | *Yes, the age of the* |

| *of the petitioner would impact on the health condition of the petitioner in case of medical termination of pregnancy?* | *petitioner would impact on the health condition of the petitioner in case of termination of pregnancy.* |
|---|---|
| *d. Whether the petitioner and her parents are consenting to the said procedure as explained by the doctors with regard to the medical termination of pregnancy?* | *Yes, the petitioner and her parents are consenting to the said procedure of termination of pregnancy after being explained and counseled regarding the procedure and possible outcomes.* |

10. Hence, the points put to the C.M.O., Prayagraj for determination were answered in the following terms:

a. Yes, the pregnancy would have an impact on the physical and mental well-being of the petitioner.

b. No, there cannot be a termination without any serious complications posed to the petitioner.

c. Yes, the age is a relevant factor in impacting the health of the petitioner.

d. Yes, the petitioner and her parents are consenting to the termination of pregnancy after getting counselled.

**MEDICAL TERMINATION OF PREGNANCY**

11. In the case of **X v. Union of India**, reported in **2023 SCC OnLine SC 1338**, the Three-Judge Bench comprising of Hon'ble Dr. D.Y. Chandrachud, C.J., Hon'ble J.B. Pardiwala, and Hon'ble Manoj Misra, JJ., the law relating to the Medical Termination of Pregnancies in India had been perspicuously laid out. The relevant paragraphs of the judgement are extracted as follows:

*"15. The termination of pregnancies is governed by the MTP Act and the rules framed under it. The MTP Act is a progressive legislation which regulates the manner in which pregnancies may be terminated. Section 3 spells out certain conditions which must be satisfied before a pregnancy can be terminated. The conditions depend upon the length of the pregnancy. Where the length of the pregnancy does not exceed twenty weeks, one Registered Medical Practitioner must be of the opinion, formed in good faith, that :*

*a. The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health. The anguish caused by a pregnancy which occurs due to the failure of a contraceptive method is presumed to constitute a grave injury to the mental health of the woman; or*

*b. There is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.*

*16. Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy is presumed to constitute a grave injury to the mental health of the woman. The presumption adverted to in (a) above makes it evident that the MTP Act recognizes the autonomy of the pregnant woman and respects her right to choose the course of her life.*

*17. Where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks, two RMPs must be of the opinion discussed in the preceding paragraph. The categories of*

*women where a pregnancy beyond 20 weeks and up to 24 weeks may be terminated are permitted to be prescribed by rules made by the delegate of the legislature. Rule 3B of the MTP Rules (as amended in 2021) provides grounds for the termination of a pregnancy up to twenty-four weeks. The termination may be allowed in the following cases or for the following persons:*

*a. Survivors of sexual assault or rape or incest;*

*b. Minors;*

*c. Change of marital status during the ongoing pregnancy (widowhood and divorce);*

*d. Women with physical disabilities with a major disability in terms of the criteria laid down under the Rights of Persons with Disabilities Act, 2016;*

*e. Mentally ill women including mental retardation;*

*f. Foetal malformation that has a substantial risk of being incompatible with life or where in the event of birth, the child may suffer from physical or mental abnormalities and be seriously handicapped; and*

*g. Women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government.*

*18. In X v. Principal Secretary, Department of Health and Family Welfare, GNCTD, this Court held that the benefits of Rule 3B(c) extend equally to both single and married women and that the benefits of Rule 3B extend to all women who undergo a change in their material circumstances.*

*19. Significantly, if in the opinion of an RMP, the termination of a pregnancy is immediately necessary to save the life of a pregnant woman, the provisions of Section 3 which relate to the length of the pregnancy and the opinion of two RMPs shall not apply. Section 4 (which concerns the place at which a pregnancy may be terminated) shall not apply to such cases as well. The design of the statute makes it evident that saving the life of the pregnant woman is of paramount importance, notwithstanding the length of the pregnancy.*

*20. Further, the provisions of Section 3(2) relating to the length of the pregnancy shall not apply to the termination of a pregnancy by an RMP, where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board. The Medical Board has the power to allow or deny the termination of a pregnancy the length of which is beyond twenty-four weeks. It may do so only after ensuring that the procedure would be safe for the woman at that gestation age and after considering whether the foetal malformation leads to a substantial risk of the foetus being incompatible with life, or where the child (if it is born) may suffer from such physical or mental abnormalities as to be seriously handicapped. Therefore, the outer temporal limit within which a pregnancy may be terminated is lifted in some cases.*

*21. The position of law can therefore be summarized as follows:*

| *Length of the pregnancy* | *Requirements for termination* |
|---|---|
| *Up to twenty weeks* | *Opinion of one RMP in terms of Section 3(2)* |
| *Between twenty and twenty-four weeks* | *Opinion of two RMPs in terms of Section 3(2) read with Rule 3B.* |
| *Beyond twenty-four weeks* | *If the termination is required to save the life of the pregnant woman, the opinion of one RMP in terms of Section 5* |

| | *If there are substantial foetal abnormalities, with the approval of the Medical Board in terms of Section 3(2B) read with Rule 3A(a)(i)"* |
|---|---|

**ANALYSIS**

12. We have heard the learned counsel appearing for the parties and perused the materials on record.

13. First and foremost, the issue that lies in front of us is whether or not to allow the termination of this pregnancy that has now culminated into its 32nd week.

14. In **R -v- Union of India & Ors., bearing SLP (Civil) Diary No(s). 4527/2024,** headed by Hon'ble Bela M. Trivedi and Hon'ble Prasanna Bhalachandra Varale, JJ., the case arose out of the Delhi High Court judgement of **R -v- Union of India & Ors, reported in 2024 SCC OnLine Del 440,** headed by Hon'ble Subramonium Prasad, J. The issue of whether or not to allow the termination of a 32-week pregnancy was placed before the Hon'ble Supreme Court. The case dealt primarily with the aspects of grave injury to the physical and mental health of the petitioner, which would have resulted out of carrying the pregnancy to term, given the material changes and circumstances in her marital life that arose out of the death of her husband. The Delhi High Court in its judgement considered the effects of preterm delivery on the mother keeping in mind the report of the Medical Board constituted by AIIMS, New Delhi, wherein they stated that given that this was her first pregnancy, the preterm induction of labor has a high chance of failure and may have serious implications on her future pregnancies. The relevant paragraph from the judgement is as follows:

*"9. Ms. Aishwarya Bhati, learned ASG appearing for Union of India, has drawn the attention of this Court to the report dated 13.01.2024 which states that as care providers, AIIMS is committed to provide best possible care to the mother and fetus, the mother's interest being paramount. The report also states that the outcome of severe depression with suicidal ideation cannot be predicted at present pre and post delivery. The report also states that the effects of the preterm delivery on the mother should also be considered and this being her first pregnancy, a preterm induction of labor has a high chance of failure and may lead to caesarean section which may have serious implications on her future pregnancies. The report also states that the outcome will be much better, if the baby is delivered at 34 weeks or beyond. The report also states that the provision of termination of pregnancies beyond 24 weeks is to be done for fetuses having significant abnormalities and feticide in this case is neither justified nor ethical as the fetus is grossly normal."*

15. Bearing this in mind, the Hon'ble Supreme Court upheld the decision of the Delhi High Court dated January 23, 2024. Relevant paragraphs from the Supreme Court judgement are extracted as follows:

*"3. Having heard learned counsel for the petitioner and having perused the impugned order passed by the High Court, it appears that the High Court had called for the report from the Medical Board, AIIMS which is reproduced as under:- "In this regard, it is informed that at present the period of gestation is 30 weeks plus 6 days, the fetus is viable and 2*

*the fetus will be alive after delivery. The anticipated requirement for NICU ICU care will range from 30-45 days with reasonable risk of physical mental handicap subsequently. However, if pregnancy is carried on till term (37 week), the anticipated requirement of NICU will be minimal to nil. There will be very high likelihood of morbidity free survival. Hence the medical board would like to request the Hon'ble High Court of Delhi for appropriate management of new born after delivery."*

*4. Considering the said Report, the High Court has observed as follows:-*

*"23. The Medical Reports indicate that a preterm induction of labor has a high chance of failure and may lead to caesarean section which may have serious implications on her future pregnancies. The report also indicates that the child which is born after a preterm induction of labor can have physical and mental deficiencies which will have drastic effect on the future of the child and that the NICU ICU care in such case is about 30-45 days with reasonable risk of physical and mental handicap of the new born.*

*24. In view of the Reports dated 06.01.2024, 12.01.2024 and 13.01.2024 of the AIIMS Hospital, which have been brought to the notice of this Court subsequent to the Order dated 04.01.2024, the Court is inclined to recall the Judgment dated 04.01.2024 passed by this Court. The Judgment dated 04.01.2024 is hereby recalled.*

*25. The Petitioner, who is already having as on date 32 weeks period of gestation, if so advised, can go to AIIMS Hospital, New Delhi and present herself before the Medical Board and it is for the Medical Board to take a decision as to how to go ahead with the delivery at the appropriate time.*

*26. It is for the Petitioner to decide where the delivery is to be conducted i.e., whether to go AIIMS or any other Central Government Hospital or at any State Government Hospital. If the Petitioner is inclined to undergo her delivery at any Central Government Hospital, the Central Government shall bear all the medical expenses and all other incidental charges of the delivery. If the Petitioner is inclined to undergo her delivery at any State Government Hospital, the State Government shall bear all the medical expenses and all other incidental charges of the delivery*

*27. If the Petitioner is inclined to give the new born child in adoption then as suggested by Ms. Aishwarya Bhati, learned ASG, the Union of India shall ensure that the process of adoption takes place at the earliest and in a smooth fashion."*

*5. In view of the above well-considered Judgment passed by the High Court, and considering the fact that the petitioner is having pregnancy of over 32 weeks by now, it is not advisable to accept her prayer as prayed for.*

*6. Since the High Court has taken sufficient safeguards in the impugned order, it is expected that the petitioner shall be taken care of by the Central Government Hospital/State Government Hospital as observed in the said order."*

16. Here, the Supreme Court upheld the judgement of the Delhi High Court, keeping in mind the late stage of pregnancy of the woman. It balanced the best interests of the mother and foetus and directed that upon delivery, the child shall be given up for adoption. This was done in consideration of the complications that might have arisen out of going ahead with the medical termination of such a late-stage pregnancy. This case subtly ensured that

the health of the mother was not compromised whilst also making an attempt to further the rights of the foetus, thereby stepping a step further in the current landscape of abortion laws in India.

17. In the case of **X -v- Union of India and Another (supra),** the Hon'ble Supreme Court dealt with the question of whether or not to terminate a pregnancy in its third trimester, for the foetus was a viable one. The petitioner, in that case, did not have the financial means to raise the child, which initially led her to seek the termination, but as the case evolved, she grew averse to terminating the baby and sought alternative means. Relevant paragraphs from the judgement have been extracted as follows:

*"29. As noticed above, the length of the pregnancy has crossed twenty-four weeks. It is now approximately twenty-six weeks and five days. A medical termination of the pregnancy cannot be permitted for the following reasons:*

*a. Having crossed the statutory limit of twenty-four weeks, the requirements in either of Section 3(2B) or Section 5 must be met;*

*b. There are no "substantial foetal abnormalities" diagnosed by a Medical Board in this case, in terms of Section 3(2B). This Court called for a second medical report from AIIMS to ensure that the facts of the case were accurately placed before it and no foetal abnormality was detected; and*

*c. Neither of the two reports submitted by the Medical Boards indicates that a termination is immediately necessary to save the life of the petitioner, in terms of Section 5.*

*30. Under Article 142 of the Constitution, this Court has the power to do complete justice. However, this power may not be attracted in every case. If a medical termination were to be conducted at this stage, the doctors would be faced with a viable foetus. One of the options before this Court, which the email from AIIMS has flagged, is for it to direct the doctors to stop the heartbeat. This Court is averse to issuing a direction of this nature for the reasons recorded in the preceding paragraph. The petitioner, too, did not wish for this Court to issue such a direction. This was communicated by her to the court during the course of the hearing. In the absence of a direction to stop the heartbeat, the viable foetus would be faced with a significant risk of lifelong physical and mental disabilities. The reports submitted by the Medical Board speak for themselves.*

*31. For these reasons, we do not accede to the prayer for the medical termination of the pregnancy.*

*32. The delivery will be conducted by AIIMS at the appropriate time. The Union Government has undertaken to pay all the medical costs for the delivery and incidental to it.*

*33. Should the petitioner be inclined to give the child up for adoption, the Union Government has stated through the submission of the ASG that they shall ensure that this process takes place at the earliest, and in a smooth fashion. Needless to say, the decision of whether to give the child up for adoption is entirely that of the parents."*

18. In the aforementioned case, the question that was put in front of the Hon'ble Supreme Court was pertaining to the AIIMS, New Delhi report dated October 10, 2023, wherein they stated that the foetus had strong chances of survival and thereby sought directions as to whether

the foetal heartbeat ought to be stopped, considering that if the same was not done, then the baby would be placed in an Intensive Care Unit and there was a high possibility of immediate and long-term physical and mental disability. The Court, after carefully analysing the law pertaining to Medical Termination of Pregnancy in India and the report provided by AIIMS, New Delhi, directed AIIMS to ensure that the delivery takes place smoothly whenever the time comes and for the State to ensure that the adoption of the child is also carried out seamlessly. This was done keeping in mind that the foetus would be able to survive on its own and that there was no express direction to stop the heartbeat. This judgement, too, in essence, put forward the idea of opting for adoption over terminating a third-trimester pregnancy.

**THE PROCESS OF ADOPTION IN INDIA**

19. Adoption in India is regulated by three primary laws: the Hindu Adoption and Maintenance Act of 1956, which applies to Hindus, Buddhists, Jains, and Sikhs; the Guardian and Wards Act of 1890, which governs adoption for Muslims, Parsis, Christians, and Jews; and the Juvenile Justice (Care and Protection) Act of 2000, which provides a more general framework. Prospective Adoptive Parents (PAPs) must submit their adoption application and necessary documents via CARA's website. Following this, a social worker from a CARA-recognized Specialised Adoption Agency (SAA) conducts a home study of the PAPs and uploads the report online. The SAA then shares profiles of children who are legally available for adoption with the PAPs, who are required to reserve a child within 48 hours.

20. In **P -v- Union of India**, bearing **WP(s) Civil No(s). 65/2023**, headed by Hon'ble D.Y. Chandrachud, C.J., Hon'ble Pamidighantam Sri Narasimha, and Hon'ble J.B. Pardiwala, JJ. dealt with the case of a petitioner who expressed her desire to proceed with the delivery at an early date and did not wish to retain the child after delivery. Additionally, two prospective parents registered with a registration number under the Central Adoption Resource Authority (CARA) came forward to adopt the child. The issue that was put before the Hon'ble Supreme Court therein was whether the petitioner's request to proceed with the delivery of the child and allow for the adoption of the child by the prospective parents identified. The Court, considering the petitioner's desire to proceed with the delivery and the expressed intention not to retain the child, granted the request to proceed with the delivery and allowed for the adoption of the child by the prospective parents registered with CARA. This was done keeping in mind the 'best interest of the child' principle as the identified adoptive parents provided a suitable environment for the child's upbringing. The relevant paragraphs from the judgement are attached hereinafter:

*"4. In the circumstances, having regard to the late stage of the pregnancy, it has been considered in the best interest of the mother and the fetus that the child, upon delivery, may be given in adoption. The request for adoption has been suggested by the petitioner since she would not be in a position to care for the child.*

*5. The petitioner is about twenty years old. She is reported to have lost her father during the Covid-19 pandemic. She has a mother, who is unwell. The petitioner also has a married sister who is about ten*

*years older than her. Ms Aishwarya Bhati has informed the Court that she has also interacted with the sister of the petitioner to explore whether she would be willing to take the child in adoption. However, the sister expressed her inability to do so for a variety of reasons.*

*6. In this backdrop, Mr Tushar Mehta, Solicitor General and Ms Aishwarya Bhati have apprised the Court that an effort has been made to facilitate the process of adoption of the child after delivery, by prospective parents who are registered with the Child Adoption Resource Authority under the auspices of the Union Ministry of Women and Child Development. The Court is apprised of the fact that two prospective parents who have been registered with a parent registration number under CARA are ready and willing to adopt the child. In the interest of the privacy of the adopted parents, the parent registration number has not been referred to in the present order.*

*7. We accordingly issue the following directions:*

*(i) In terms of the request which is made before the Court, the delivery of the child by the petitioner shall take place at AIIMS. We request the Director, AIIMS to ensure that all necessary facilities are made available without the payment of fees, charges or expenses of any nature so that the delivery can take place in a safe environment at AIIMS. The privacy of the petitioner shall be maintained and all steps shall be taken to ensure that the identity of the petitioner is not divulged in the course of the hospitalization at AIIMS; and*

*(ii) Permission is granted for the adoption of the child by the prospective parents whose details have been set out in the CARA registration form. CARA shall take all necessary steps to facilitate the implementation of this order."*

21. The cases of **R -v- Union of India & Ors (supra) and X -v- Union of India and Another (supra),** further placed emphasis on putting up the newborn child in adoption alongside ensuring that the State shall streamline the process of adoption in cases of petitions seeking Medical Termination of Pregnancies in later stages of pregnancy.

22. Keeping the above precedents in mind, the Court decided to counsel the girl and her relatives in the presence of the counsel appearing on behalf of the petitioner as well as the counsel on the behalf of the State. The court explained to the petitioner the risks involved in the termination due to the late stage of pregnancy. The petitioner and the relatives upon being made to understand the risks to the life of the petitioner and future risks with regard to losing the ability to be pregnant, subsequently opted to deliver the child instead of terminating the said pregnancy. The girl and her mother were both of the opinion that they would like to put the child for adoption post-parturition.

23. In the case of **A (Mother of X) -v- State of Maharashtra,** reported in **2024 SCC OnLine SC 835,** headed by Hon'ble Dr. D.Y. Chandrachud, C.J., Hon'ble J.B. Pardiwala, and Hon'ble Manoj Misra, JJ., the Hon'ble Supreme Court dealt with the issue of a minor child who was also subjected to sexual assault and was 25 weeks into her pregnancy. While the Court had allowed for the Medical Termination of Pregnancy of the foetus in its earlier order dated April 22, 2024, it recalled the same in its final judgement on the ground that the petitioner was unwilling to go ahead with the termination of pregnancy because of the risks that the same would pose to her life. Here, the Court directed the delivery of the

child to take place at the appropriate time and directed the State to bear all expenses concerning the same. Additionally, the State was also directed to ensure that if the victim wished for the child to be put up for adoption, then the same would also be taken care of by the State. The relevant paragraphs of the aforementioned judgements are extracted as follows:

*"36. In the present case the view of X and her parents to take the pregnancy to term are in tandem. The right to choose and reproductive freedom is a fundamental right under Article 21 of the Constitution. Therefore, where the opinion of a minor pregnant person differs from the guardian, the court must regard the view of the pregnant person as an important factor while deciding the termination of the pregnancy.*

*37. In the facts and circumstances of this case, we issue the following directions:*

*37.1. Sion Hospital shall bear all the expenses in regard to the hospitalisation of the minor over the past week and in respect of her re-admission to the hospital for delivery as and when she is required to do so; and*

*37.2. In the event that the minor and her parents desire to give the child in adoption after the delivery, the State Government shall take all necessary steps in accordance with the applicable provisions of law to facilitate this exercise. This shall not be construed as a direction of this Court binding either the parents or the minor and the State shall abide by the wishes as expressed at the appropriate stage.*

24. The Supreme Court, in this judgement, ensured that the rights of the victim were placed on the highest pedestal, keeping in mind the pregnant girl's Right to Bodily Autonomy enshrined under Article 21 of the Constitution of India. and gave appropriate directions with regard to the adoption process that was to follow thereinafter. This placed more emphasis on the State's liability for bearing the expenses of the victims in such cases. Furthermore, it was highlighted that the Medical Board must not restrict itself within the criteria of Section 3(2-B) of the Medical Termination of Pregnancy Act, 1971, but also take into account the physical and mental well-being of the pregnant woman.

25. In several judgements that have been cited above, the Courts have held that the choice of terminating one's pregnancy is a serious and delicate issue that needs to be dealt with a caring touch and in a humane manner. This Court is also of the opinion that a woman's decision in whether or not to go ahead with the termination of her pregnancy is a decision that is to be taken by no one but herself. This is primarily based on the widely acknowledged idea of bodily autonomy. Here, her consent reigns supreme. Even if she decides to go ahead with the pregnancy and put the child up for adoption, the duty lies on the State to ensure that it is carried out as privately as possible and also to ensure that the child, being a citizen of this land, is not stripped of the fundamental rights that are enshrined in the Constitution. Thereby, it is the State's duty to ensure that the adoption process, too, is carried out in an efficient manner and that the 'best interests of the child' principle are followed.

**DIRECTIONS**

26. Keeping in mind the decision of the petitioner and her mother, we direct that

the delivery of the child shall take place at Lala Lajpat Rai Memorial Medical College, Meerut. The State shall bear all the expenses with regard to the delivery of the child so that no hindrances exist in the course of the same. The District Magistrate, Meerut, is directed to be involved in the process so as to ensure that all the medical and ancillary expenses of the petitioner and her family are borne by the State, which shall be inclusive of their travel and stay in Meerut whensoever required. The parents of the petitioner may approach the Principal and Medical Superintendent of the Lala Lajpat Rai Memorial Medical College, Meerut and the District Magistrate, Meerut, for further course of action and proper guidance in this regard. The Principal and Medical Superintendent of the Lala Lajpat Rai Memorial Medical College, Meerut and the District Magistrate, Meerut, are directed to contact Sri Desh Ratan Chaudhary, Advocate at his Mobile No.9839035080 to ensure the future course of action.

27. Considering the fact that the petitioner and her mother have decided to give up the child for adoption, the Director of the Central Adoption Resource Authority (CARA) shall take appropriate steps in tandem with the applicable provisions of law to facilitate the process and ensure that the adoption process is expedited.

28. Keeping in mind the delicate nature of the issue involved, all the authorities concerned are directed to ensure complete secrecy in the matter so that the privacy of the petitioner and her family are maintained and the identity of the petitioner is not revealed in any manner whatsoever.

29. Counsel appearing on behalf of both the parties shall keep the Court informed of any developments that may take place and shall be at liberty to seek any further instructions as may be required for the smooth and efficient carrying out of the adoption process.

30. List this matter on August 28, 2024.

31. Since we have given directions to certain officers, we are suo motu impleading them in this writ petition.

32. Accordingly, the Principal & Medical Superintendent of the Lala Lajpat Rai Memorial Medical College, Meerut, the District Magistrate, Meerut and Director of the Central Adoption Resource Authority are impleaded in this writ petition.

33. The Registrar (Compliance) is directed to communicate this order directly to the Principal and Medical Superintendent of the Lala Lajpat Rai Memorial Medical College, Meerut, the District Magistrate, Meerut, and the Director of CARA forthwith. Registrar (Compliance) is further directed to also send copy of this writ petition to them.

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**(2024) 7 ILRA 655**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 31.07.2024**

**BEFORE**

**THE HON'BLE ANJANI KUMAR MISHRA, J.**
**THE HON'BLE JAYANT BANERJI, J.**

Writ C No. 28087 of 2023

**Raj Pratap Yadav** **...Petitioner**
**Versus**
**State of U.P. & Ors.** **...Respondents**

**Counsel for the Petitioners:**

Nisheeth Yadav, Sr. Advocate

**Counsel for the Respondents:**
C.S.C.

**A. Civil Law-Constitution of India, 1950-Article 226-Uttar Pradesh Minor Minerals (Concession) Rules, 2021-Rules 30 & 59-mining lease dispute-challenged to-District Magistrate several actions including issuance of notice , demanding dues for surrendering a sand mining lease and subsequent orders canceling the lease and forfeiting the earnest money-appellant was granted a mining lease for sand extraction in Deoria district through e-auction for five year lease period-citing an unusable road to the mining site, the petitioner sought to surrender the lease-the District Magistrate demanded payment for pending installments and subsequently terminated the lease for non-payment-Held, The amount of the security deposit cannot be set-off against the installments due and payable under the terms of the lease in cases where the surrender application is being positively considered-Clause (i) of Part III of the lease enables the State Govt. to forfeit the security amount in full or in part where the terms & conditions are breached-The notice dated 30.6.2023 is only in compliance of the said provision of lease-deed that mandates grant of proper opportunity to the lease-holder, therefore, the forfeiture of the security deposit cannot be faulted-since the application for surrender has held to be not valid, termination of the lease by the impugned order has been upheld-hence, the sixth and seventh installments are liable to be recovered from the petitioner.(Para 1 to 44)**

**The petition is dismissed.** (E-6)

**<u>List of Cases cited:</u>**

1. Vipul Tyagi Vs St. of U.P. & ors., Writ-C No. 17258 of 2020

2. Silppi Cons. Contrts. Vs U.O.I. & anr.(2020) 16 SCC 489

3. Bharat Coking Coal Ltd & ors. Vs AMR Dev Prabha & ors. (2020) 16 SCC 759

4. D.K. Trivedi & sons & ors. Vs St. of Guj. & ors. (1986) Supp SCC 20

(Delivered by Hon'ble Jayant Banerji, J.)

1. Under challenge in the present petition are: a notice dated 30.6.2023 issued by the District Magistrate to the petitioner directing him to deposit all the dues relating to the surrender of the lease, failing which, the lease granted to the petitioner would be cancelled; the order dated 4.8.2023 passed by the District Magistrate, Deoria, whereby while cancelling the mining lease granted to the petitioner, the earnest money deposited by the petitioner has been directed to be forfeited; and the consequential order dated 7.8.2023 whereby an amount of Rs. 39,54,600/- payable towards the 6th and 7th instalments in respect of mining lease has been directed to be recovered from the petitioner.

2. The case of the petitioner is that the State-respondent decided to allot sand mining rights through e-tendering/e-auction pertaining to a sand mining site near Ghaghra river over plot no. 396/1, area 11.7 hectares situated in Tehsil Salempur, District Deoria, for mining 1,17,000 cubic meters per year of sand. The petitioner deposited earnest money of Rs. 19,01,250/-. The petitioner was the highest bidder, his bid being Rs. 169/- per cubic meter, and a letter of intent was issued to him by the District Magistrate on 24.9.2021. Accordingly, for the first year, the annual value of the mining site was Rs. 1,97,73,000/-, twenty five percent of which

was to be deposited under the head of security amount along with twenty percent of the annual value which would be the first instalment amounting to Rs. 39,54,600/- as advance payment and as such the total amount to be deposited was Rs. 88,97,850/-. By adjusting the amount of earnest money, the amount to be actually paid was Rs. 69,96,600/- which was deposited by the petitioner on 30.9.2021.

3. The lease deed dated 16.12.2022 was executed in favour of the petitioner which granted mining rights for excavating sand over the mining site for a period of 5 years starting from 16.12.2022, fixing nine instalments for each of the five years of lease, with no instalments payable for the three monsoon months of July, August and September in each year.

4. It is stated that the road to the excavating site was too dilapidated and it was impossible to transport the minerals from the mining site which resulted in losses and therefore, the petitioner decided to surrender the mining lease and thus stopped excavating work from 1.5.2023. On receipt of a letter of 9.5.2023 from the District Magistrate regarding default of partial deposit of the 5th deposit and not depositing the 6th instalment, certain deposits were made by the petitioner on different dates and he made complete payment of the 5th instalment. It is stated that other than the 5th instalment, no further instalments under the mining lease terms were required to be paid by the petitioner in view of the fact that the petitioner submitted an application dated 18.5.2023 before the District Magistrate to surrender the mining lease.

5. A letter dated 22.5.2023 was issued by the Mining Officer requiring to submit a 'no objection' for transferring the Environmental Clearance Certificate obtained by the petitioner, and a no dues certificate. It is stated that pursuant to a letter of 26.5.2023 written by the petitioner in respect of surrender of the mining lease, a note sheet was prepared by the respondents in which it was reflected that there was sufficient amount available as security money that was previously deposited by the petitioner and as such, given the requirement of the provisions of surrender of mining lease, twenty five percent of the annual value pertaining to the mining site can be adjusted from the security amount and the mining site should be declared vacant.

6. It is stated that noting on the note-sheet were approved by all the concerned officers including the District Magistrate. Thereafter, the impugned notice dated 30.6.2023 was issued by the District Magistrate, Deoria demanding the royalty for the month of May, 2023 and for June, 2023 failing which, the lease would be terminated. The petitioner filed a detailed representation, whereafter the impugned orders dated 4.8.2023 and 7.8.2023 were passed. It is stated that provisions of Rule 59 of the Rules, 2021 would be inapplicable in view of the facts of the case and therefore, the termination of the mining lease is illegal. The learned counsel has referred to a judgment dated 11.1.2021 of a coordinate Bench of this Court in the matter of **Vipul Tyagi Vs. State of U.P. and others** passed in Writ-C No. 17258 of 2020 to contend that given the provisions of Section 30 of the Rules, 2021, and the letter of the Mines Officer stating that from 1.5.2023 the mining work was stopped by the petitioner, and, given the provision of sub-section (3) of Section 15 of the Mines and Mineral (Development and Regulation)

Act, 1957, the instalments for the months of May and June, 2023 could not be demanded from the petitioner and neither could the lease be terminated, but, the surrender of the mining lease should have been accepted with effect from 18.5.2023.

7. Learned Standing Counsel, on the other hand, has filed short counter affidavits dated 30.10.2023 and 12.2.2024 on behalf of the respondent nos. 4 and 5 on behalf of the respondent nos. 2, 3, 4, and 5, respectively. It has been stated that as per the conditions of the lease deed the instalments were to be deposited by the lease-holder on the first date of every month and as such, in view of the default of the petitioner, notice dated 9.5.2023 was issued, but without depositing the amount of instalments, he moved an application dated 18.5.2023 for surrender of the lease. It is stated that there was an irregular deposit of the 5th instalment and non-payment of the 6th instalment.

8. Learned Standing Counsel has referred to the various conditions of the lease deed stating that in view of the default, the lease deed was liable to be and was correctly cancelled. It has further been stated that the terms of the lease deed themselves reflect that the access road to the mining site was required to be constructed and maintained by the lease-holder himself and no liability can be fastened by the lease-holder/petitioner on the State-respondents for non-maintenance of the access road. Learned Standing Counsel has placed a letter of the District Magistrate dated 8.2.2024, in which, the dues pertaining to the outstanding royalty, D.M.F. and T.C.S. as on 18.5.2023 and other dues have been stated. The letter is reproduced below:

"प्रेषक,

जिलाधिकारी,

देवरिया।

सेवा में,

मुख्य स्थायी अधिवक्ता , मा० उच्च न्यायालय

इलाहाबाद ।

संख्या- 48 / खनन / वाद-2024

दिनांक- 08 फरवरी, 2024

विषय मा० उच्च न्यायालय द्वारा पारित आदेश दिनांक - 31.01.2024 के सम्बन्ध में।

महोदया,

कृपया उपर्युक्त विषयक के सम्बन्ध में अवगत कराना है कि मा० उच्च न्यायालय इलाहाबाद में योजित रिट संख्या - 28087/2023 राजप्रताप यादव बनाम उ०प्र० सरकार व अन्य में पारित आदेश के क्रम में बकाया रायल्टी , डी०एम०एफ व टी०सी०एस० का विवरण दिनांक - 18.05.2023 तक निम्नलिखित हैः-

| क्र० सं० | बकाया रायल्टी | डी०एम०एफ० | टी०सी०एस० |
|---|---|---|---|
| 1 | 2 | 3 | 4 |
| 1 | 2477540.00 | 1186380.00 | 237276.00 |

इसके अतिरिक्त अवगत करना है कि पट्टेधारक के द्वारा उ०प्र० उपखनिज परिहार नियमावली 1963 के अनुसार पट्टा अभ्यर्पण आवेदन पत्र के साथ वार्षिक

किस्त का 25% अग्रिम रूप से रू०-4943250रू० जमा नही किया गया था जिसे सिक्यूरिटी धनराशि से समायोजित करने के उपरान्त उपरोक्त बकाया है,

इसके अतिरिक्त देय तिथि से विलम्ब भुगतान करने पर 1.5% प्रति माह के दर से व्याज भी पट्टेधारक पर लागू होता है।

ह० अप०
08.02.24
जिलाधिकारी
देवरिया।"

9. Learned Standing Counsel has relied upon the judgment of the Supreme Court in the case of **Silppi Constructions Contractors v. Union of India and another**, and in the case of **Bharat Coking Coal Limited and others Vs. AMR Dev Prabha and others** to contend that in the matter of Government contracts the court may not exercise its discretionary powers unless there is any infirmity in the decision making process.

10. As stated above, a letter of intent dated 24.9.2021 was issued and, thereafter, a lease-deed was executed in favour of the petitioner on 16.12.2022 and was registered on 19.12.2022.

11. On 9.5.2023, a notice regarding violation of the terms of the lease was issued to the petitioner in which it was stated that payments of the fifth and sixth instalments of the first year were not made which are punishable under Rule 59. It was, therefore, directed that within a period of fifteen days, the entire outstanding amount be deposited, failing which further legal action would be taken. It has been stated by the petitioner that the fifth instalment due was paid by him.

12. On 15.6.2023, it appears that in view of a reference raised by the petitioner on the IGRS portal, the Mines Officer wrote a letter to the District Magistrate regarding the complaint made by the petitioner of illegal mining. The Mines Officer informed that since 1.5.2023, the mining work in the leased area has been stopped for which the instalment has not been deposited by the petitioner and the procedure for cancellation of the lease is underway.

13. Thereafter, on 18.5.2023, the petitioner sent a letter to the District Magistrate informing that he has not been able to deposit the instalment for the month of May as the road (approach road to the mining area) is in a very bad shape because of which very few vehicles are able to pass. The instalment for the month of May was not paid, thus, the lease is being surrendered. It was mentioned therein that if the amount of security deposit is forfeited, the petitioner would have no objection.

14. By a letter dated 22.5.2023, the Mines Officer wrote a letter to the petitioner in respect of the application for surrender of lease asking him to submit a 'No Objection' with regard to the transfer of environment clearance certificate and to submit 'No Dues Certificate' with regard to mining.

15. The application dated 18.5.2023 filed by the petitioner before the District Magistrate seeking surrender of the lease states that in case the security amount is forfeited, he would have no objection. The

Mines Officer by its letter of 22.5.2023 to the petitioner has mentioned that the aforesaid two documents pursuant to the application for surrender dated 18.5.2023 are awaited. By means of a letter dated 26.5.2023, the petitioner purportedly complied with the aforesaid letter dated 22.5.2023 sent by the Mines Officer. In this letter of 26.05.2023 the petitioner submitted the treasury challan dated 25.5.2023 which was the balance amount of instalment due for the month of April 2023 (that is, the fifth instalment), and, an affidavit containing no-objection with regard to the Environment Clearance Certificate.

16. The respondents' office noting/report of 29/31.5.2023 reflects that the lease holder (petitioner) had deposited the instalment for the month of April, 2023. It was further mentioned that the petitioner would be issued a separate notice and recovery certificate with regard to payments pertaining to DMF and TCS. Accordingly, the report was put up that 25 percent of the annual instalment be adjusted against the security deposit and, while prohibiting the lease holder from carrying out mining activity, the lease area be declared vacant. The District Magistrate noted on the aforesaid report as follows:-

**"O.K.**
**अग्रेतर कार्यवाही भी सम्पन्न कराएं**
(Further proceeding also be taken)
**02.06.2023"**

17. However, after nearly a month, the impugned notice dated 30.6.2023 was issued by the District Magistrate stating that for purposes of 'No Dues Certificate' the 'royalty' for the month of May, 2023 has not been deposited by the petitioner and as such the certificate for 'No Dues' cannot be issued and also the dues for the ensuing month (June, 2023) is also due. It was mentioned that the dues be deposited without any delay failing which, the lease deed would be terminated. The petitioner replied to the said notice by his letter dated 7.7.2023 stating that the royalty up to 18.5.2023 demanded by the letter dated 30.6.2023 is wrong and, accordingly, sought refund of the security amount after adjusting the due royalty.

18. By means of the impugned order dated 4.3.2023, exercising powers under Rule 59, the mining lease granted to the petitioner was terminated by the District Magistrate.

19. Some questions that would arise for consideration in the aforesaid petition are as follows:-

(i) Once the surrender application was moved on 18.5.2023 without depositing the instalments due till then and once the admitted case is that mining has been stopped in the leased area since 01.5.2023 then, are the respondents bound to accept the surrender application with effect from 18.5.2023 and, as a corollary, can the lease-deed be terminated?

(ii) Whether, under the terms and conditions of the lease deed and / or the applicable law, the earnest money deposited by the petitioner is liable to be forfeited?

(iii) Whether the amounts payable under the lease towards the sixth and seventh instalments (i.e. for the months of May and June, 2023, respectively) are liable to be recovered from the petitioner.

20. The Uttar Pradesh Minor Minerals (Concession) Rules, 20213 was published in U.P. Gazette by means of a notification on 29.10.2021. The preamble reads that *"in exercise of the powers conferred by sub-section (1) of section l5 of the Mines and Minerals (Development and Regulation) Act, 1957 (Act no. 67 of 1957), read with section 2l of the General Clauses Act, 1897 and in supersession of the Uttar Pradesh Minor Minerals (Concession) Rules, 1963, the Governor is pleased to make the following rules with a view to regulating the concession of minor minerals and other purposes connected therewith".* Therefore, even though the lease deed of 16.12.2022 refers to the Uttar Pradesh Minor Minerals (Concession) Rules, 19634, on the date of execution of the lease-deed the Rules, 2021 were applicable in the case of the petitioner. The procedure adopted by the State Government was by way of e-tender-cum-e-auction and as such is covered under Chapter IV of the Rules, 2021, which Chapter contains Rules 23 to 31. Under sub-rule (3) of Rule 23, the provisions of Chapter II, III, VI and IX except Rule 10, 17 and 95 are not applicable to the area leased to the petitioner.

21. Consequently, under Chapter IV, the relationship between the petitioner and the State-respondents is governed by the terms of the lease-deed. The lease was granted in Form MM-6 for a period of five years which provides, *inter alia*, that for the subsequent years, the amount payable will be increased at the rate of 10% on the preceding year's payable amount. The lease was for mining ordinary sand to the extent of 1,17,000 cubic meters per annum in respect of which for the first year an amount of Rs.1,97,73,000 was payable in the instalments fixed as per Schedule V of the Rules.

22. The provision of surrender of mining lease was inserted by Rule 29-A in the Rules, 1963 by means of the Uttar Pradesh Minor Minerals (Concession) (Forty Seventh Amendment) Rules, 2019 which was notified on 13.08.2019. It read as under:-

**"29-A. Surrender of Mining Lease**- Lease holder, on the intended day of surrender, shall submit over and above security deposit, an amount equivalent to 25% of the annual installment of that year and apply for surrender along with the following documents-

(a) No objection for transfer of Environment Clearance Certificate obtained for the concerned lease area in favour of the State Government or subsequent proponent.

(b) Certificate of money deposited for difference between quantity mentioned in Environment Clearance and mined out quantity or in case of no difference, a Certificate in this regard for the concerned lease issued by Mines Officer/Mines Inspector.

In accordance with the above, lease-holder will be prohibited from carrying out mining activities from the date of application for surrender of lease and the area will be deemed to be vacant."

23. Now, Rule 30 of the Rules, 2021 provides for surrender of mining lease and it reads as follows:-

**"30. Surrender of Mining Lease-** Lease holder, on the intended day of surrender, shall submit an amount equivalent to twenty-five percent of the annual instalment of that year which may be adjusted against the security deposit and apply for surrender along with the following documents-

(a) no objection for transfer of Environment Clearance Certificate obtained for the concerned lease area in favour of the State Government or subsequent proponent.

(b)5 certificate of money deposited for difference between quantity mentioned in Environment Clearance Certificate and mined out quantity or in case of no difference, a Certificate in this regard for the concerned lease issued by Senior Mines Officer/Mines Officer/Mines Inspector.

In accordance with the above, lease-holder will be prohibited from carrying out mining activities from the date of application for surrender of lease and the area will be deemed to be vacant."

24. Rule 59, under which the lease of the petitioner has been terminated, reads as follows:-

**"59. Consequences of non-payment of royalty rent or other dues-** (1) The State Government or any officer authorised by it in this behalf may terminate the mining lease after serving a notice on the lessee to pay within thirty days of the receipt of the notice any amount due or dead rent under the lease including royalty due to the State Government if it was not paid within fifteen days next after the date fixed for such payment. This right shall be in addition to and without prejudice to the right of the State Government to realise such dues from the lessee as arrears of land revenue.

(2) Without prejudice to the provisions of these rules, simple interest at the rate of 18 percent per annum may be charged on any rent, royalty, demarcation fee and any other dues under these rules, due to the State Government after the expiry of the period of notice under sub-rule (1);

Provided that the District Magistrate, after adjusting the security money against the total amount due, shall issue recovery certificate for recovery of the outstanding amount."

25. Under the lease-deed, the instalments payable for the first year were as follows:-

भाग-2

इस पट्टे द्वारा संरक्षित स्वामित्व

1. स्वामित्व की धनराशि : पट्टेदार इस पट्टे की अवधि में राज्य सरकार को पट्टे पर दिये गये क्षेत्र में उसके द्वारा हटाये गये सभी बालू/मोरम के सम्बन्ध में उ०प्र० उपखनिज (परिहार) नियमावली-1963 के नियम-27(3) के अनुसार निविदा/नीलामी की धनराशि पंचम अनुसूची में दी गयी व्यवस्था के अनुसार स्वामित्व का भुगतान करेगा।

देय धनराशियों के जमा करने की पंचम अनुसूची

(1) प्रथम वर्ष की निर्धारित किश्ते :-

| क्र०सं० | पट्टा वर्ष | किश्त / देयता तिथि | देय धनराशि (रू०में) | पट्टा धनराशि का प्रतिशत |
|---|---|---|---|---|
| 1. | प्रथम वर्ष | प्रथम किश्त, दिसंबर,2022 | 39,54,600.00 | 20 प्रतिशत |

| | | (अग्रिम रुप से जमा) | | (अग्रिम जमा) |
|---|---|---|---|---|
| 2. | " | द्वितीय किश्त, 01 जनवरी, 2023 | 19,77,300.00 | 10 प्रतिशत |
| 3. | " | तृतीय किश्त, 01 फरवरी, 2023 | 19,77,300.00 | 10 प्रतिशत |
| 4. | " | चतुर्थ किश्त, 01 मार्च, 2023 | 19,77,300.00 | 10 प्रतिशत |
| 5. | " | पंचम किश्त, 01 अप्रैल, 2023 | 19,77,300.00 | 10 प्रतिशत |
| 6. | " | छठा किश्त, 01 मई, 2023 | 19,77,300.00 | 10 प्रतिशत |
| 7. | " | सप्तम किश्त, 01 जून, 2023 | 19,77,300.00 | 10 प्रतिशत |
| 8. | " | अष्ठम किश्त, 01 अक्टूबर 2023 | 19,77,300.00 | 10 प्रतिशत |
| 9. | " | नौवी किश्त, 01 नवम्बर, 2023 | 19,77,300.00 | 10 प्रतिशत |
| प्रथम वर्ष की पट्टा धनराशिः- | | | रु०1,97,73.000.00 | 10 प्रतिशत |

26. In Part III of the lease, which provides for general conditions of the lease, there is a provision for forfeiture of security deposit, which is as follows:-

<u>भाग-3</u>

<u>सामान्य उपबन्ध</u>

"1. नियमों, प्रसंविदाओं और शर्तो को भंग करने पर पट्टा समाप्त किया जा सकता है : यदि पट्टेदार उत्तर प्रदेश उप खनिज (परिहार) नियमावली 1963 के किसी नियम या इस पट्टे की किसी प्रसंविदा तथा किसी शर्त को भंग करें तो राज्य सरकार पट्टा समाप्त कर सकती है और प्रतिभूति जमा को पूर्णतः या अंशतः जब्त कर सकती है किन्तु प्रतिबन्ध यह है कि पट्टा समाप्त किये जाने के पूर्व पट्टेदार को उन्हें भंग करने का स्पष्टीकरण देने के लिए यथोचित अवसर दिया जायेगा।"

27. The additional terms that are provided in the lease-deed are as follows:-

<u>"अतिरिक्त शर्ते</u>

1. पट्टा विलेख के निष्पादन के उपरान्त खनन संक्रियायें तत्काल प्रारम्भ करेगा और तत्पश्चात् जान बूझकर कोई स्थगन किये बिना ऐसी खनन संक्रियाओं का संचालन उचित और दक्षतापूर्ण रीति के कुशल कारीगर की भांति करेगा।

2. पट्टेदार नियमावली-1963, नियम-35 के अनुसार पट्टेदार अपने स्वंय के व्यय पर ऐसे सीमाचिन्ह को और खम्भे को परिनिर्मित करेगा और सदैव अनुरक्षित

करेगा और अच्छी स्थिति में रखेगा तथा वाहनों के प्रवेश व निकासी पर निगरानी के लिये स्वंय के व्यय पर 360 डिग्री कोण पर दृश्यता रिकार्डिग के योग्य चार सी०सी०टी०वी० कैमरा लगाने सहित चेक पोस्ट/ गेट का निर्माण करेगा। पट्टेदार उक्त चेक पोस्ट / गेट पर आर०एफ०आई०डी० स्कैनर भी रखेगा, जिससे सम्बन्धित खननपट्टा क्षेत्र से उपखनिजों के परिवहन हेतु प्रयुक्त प्रत्येक यान के सापेक्ष निर्गत किये गये प्रपत्र ई०-एम०एम०-11 पर अंकित बार कोड का डाटा पढ़ने और सुरक्षित रखने की सुविधा होगी और उसका समुचित रुप से रख-रखाव करेगा एवं सदैव उसे चालू रुप में अनुरक्षित रखेगा। पट्टेदार उक्त सी०सी०टी०वी० कैमरे और आर०एफ०आई०डी० स्कैनरों द्वारा की गयी समस्त रिकार्डिग को कम से कम 30 दिनों तक सुरक्षित रखेगा और नियम-66 के उपबन्धों के अधीन प्राधिकृत अधिकारी के द्वारा रिकार्ड मांगे जाने पर उक्त रिकार्डिग को उपलब्ध करायेगा। यदि पट्टाधारक नियम-35 के उपबन्धो का उल्लंघन करता है तो प्रत्येक चूक के लिये प्रतिदिन रू० 25,000.00 की दर से शास्ति उदगृहित की जायेगी और ऐसी उदगृहित शास्ति को जमा करने पर चूक की दशा में उक्त धनराशि की कटौती खनन पट्टा के सापेक्ष जमा की गयी प्रतिभूति की धनराशि से की जायेगी।

3. प्रत्येक वर्ष मानसून सत्र में (माह जुलाई, अगस्त व सितंबर) सा०बालू का खनन/ परिवहन कार्य प्रतिबन्धित रहेगा।

4. पट्टेदार/ प्रतिनिधि प्रत्येक वाहन को ई-एम०एम०-11 सही विवरण सहित दो प्रतियों में जारी करेगा तथा तिथि सहित हस्ताक्षर करेंगा। प्रत्येक वाहनों को निर्गत ई-एम०एम०-11 पर जनित बार कोड को चेक गेट पर पढ़ने तथा दर्ज डाटा सेव करने के लिये आर०एफ०आई०डी० स्कैनर लगायेगा तथा सदैव उसका अनुरक्षण करेगा और उन्हे सही एवं चालू दशा में रखेगा। उक्त का अनुपालन न करने की दशा में नियमावली-1963 के नियम-59 के अन्तर्गत शास्ति का भागीदार होगा।

5. पट्टेदार 03 मीटर की गहराई अथवा जल स्तर में से जो कम हो, से अधिक गहराई में खनन संक्रियायें नहीं करेगा।

6. जिलाधिकारी द्वारा चिन्हित सुरक्षा क्षेत्र में खनन नही किया जायेगा।

7. स्वीकृत क्षेत्र के अन्दर जहाँ परिवहन प्रपत्र निर्गत किया जायेगा, वहाँ पर खनिजों का विक्रय मूल्य प्रदर्शित करेगा।

8. पट्टाधारक को पट्टा समाप्ति के उपरान्त पर्यावरणीय स्वीकृति राज्य सरकार व अनुवर्ती प्रस्तावक के पक्ष में अन्तरित किये जाने में कोई आपत्ति नही होगी।

9. पट्टेदार नियमावली-1963, नियम-34 के अधीन उपबन्धित उपबन्धो के अनुसार जारी अनुमोदित खनन योजना और

पर्यावरण अनापत्ति प्रमाण-पत्र में उल्लिखित निबन्धन एवं शर्तो का उल्लंघन करते हुये पाये जाने पर वह प्रत्येक चूक के प्रति अवसर के अनुसार रू० 50,000.00 की दर से ऐसी शास्ति के लिये दायी होगी।

10. खनन / परिवहन में जनधन की हानि की समस्त जिम्मेदारी पट्टेदार की होगी।

11. पट्टेदार द्वारा मा० उच्च न्यायालय, मा० राष्ट्रीय हरित प्राधिकरण अथवा मा० सर्वोच्च न्यायालय द्वारा पारित आदेशों का पालन किया जायेगा।

12. नियमों एवं शर्तो के उल्लंघन के परिणामस्वरुप यदि कोई वाद अथवा अपराधिक प्रक्रिया योजित होती है, तो इसकी सम्पूर्ण जिम्मेदारी पट्टेदार की होगी एवं यदि इस सम्बन्ध में कोई व्यय होता है तो उसका वहन पट्टेदार द्वारा किया जायेगा।

13. राज्य सरकार अथवा केन्द्र सरकार द्वारा यदि नियमों / अधिनियमों में कोई संशोधन होता है अथवा कोई शर्त अथवा विधि प्रख्यापित की जाती है तो वह पट्टेदार को मान्य होगा।

14. पट्टेदार द्वारा राज्य अथवा केन्द्र सरकार द्वारा समय-समय पर निर्धारित कर एवं शुल्क यथा आयकर विभाग का टी०सी०एस०, जिला खनिज फाउण्डेशन (डी०एम०एफ०) नियमानुसार जमा किया जायेगा।

15. पट्टेदार को खनन क्षेत्र में पहुंच मार्ग का निर्माण स्वंय करना होगा तथा यदि तृतीय पक्ष द्वारा कोई विवाद उत्पन्न किया जाता है, तो उसके लिये वह स्वंय जिम्मेवार होंगे।

16. पट्टेदार को उत्तर प्रदेश उपखनिज (परिहार) नियमावली 1963 यथा संशोधित एवं सुसंगत शासनादेशों एवं माननीय न्यायालयों के आदेशों को अक्षरशः पालन करना होगा।

17. पट्टेदार स्वीकृत एवं चिन्हांकित खनन क्षेत्र से बाहर किसी भी दशा में खनन कार्य नहीं करेगा।

18. पट्टेदार नियमावली 1963 के नियम-73के प्रावधानों के अन्तर्गत पूर्ववर्ती त्रैमास के संबंध में प्रत्येक वर्ष जुलाई, अक्टूबर, जनवरी और अप्रैल के द्वितीय सप्ताह में प्रपत्र एम०एम०-12 में जिलाधिकारी और भूतत्व एवं खनिकर्म निदेशालय के क्षेत्रीय कार्यालय को त्रैमासिक विवरणी प्रस्तुत करेगा तथा विनिर्दिष्ट समय के भीतर विवरण प्रस्तुत करने मे विफल होने पर रू० 2000.00 की शास्ति का भागी होगा तथा पट्टेदार की ऐसी चूक, खनन पट्टा विलेख की शर्तो का उल्लंघन माना जायेगा।

19. खनन कार्य करने के दौरान यदि कोई अन्य खनिज / उपखनिज प्राप्त होता है तो उसकी सूचना पट्टेदार तत्काल जिला कार्यालय तथा भूतत्व एवं खनिकर्म

विभाग (उ०प्र०) के क्षेत्रीय कार्यालय एवं निदेशालय को देगा।

20. मा० सर्वोच्च न्यायालय में प्रस्तुत रिट याचिका(सी) सं०-114/2014 (कॉमन काज बनाम यूनियन आफ इण्डिया) में पारित निम्नवत आदेश दिनांक 08.01.2020 का अनुपालन पट्टाधार को करना अनिवार्य होगाः-

The mining lease holders shall, after ceasing mining operation, undertake regrassing the mining area and any other area which may have been disturbed due to their mining activities and restore the land to a condition which is fit for growth of fooder, flora funna etc.

20. पट्टेदार को पट्टाकृत क्षेत्र में खनिज के समुचित विकास हेतु वैज्ञानिक ढंग से खनन कार्य करते हुए पर्यावरण की सुरक्षा हेतु खनिज / उपखनिज का खनन व निकासी करने के उपरांत क्षेत्र का समतलीकरण कर वहाँ वृक्षारोपण करना होगा।

21. स्वीकृत क्षेत्र में स्थायी सीमा स्तम्भ लगाने के बाद ही खनन कार्य करने की अनुमति दी जायेगी।

22. खनन पट्टा स्वीकृति के पश्चात भविष्य में वन विभाग या किसी अन्य विभाग द्वारा शर्तो के विपरीत कार्य करने के कारण आपत्ति किये जाने पर उक्त नियमावली 1963 के नियम 60 के अधीन युक्तियुक्त अवसर दिये जाने के पश्चात खनन पट्टा निरस्त किया जायेगा।

23. पट्टेदार द्वारा खनन क्षेत्र तक पहुँच मार्ग स्वंय के व्यय पर बनाया जायेगा। यदि खनिजों के परिवहन हेतु किसी काश्तकार की भूमि से होकर रास्ते का निर्माण किया जाता है तो सम्बन्धित काश्तकार की लिखित सहमति सम्बन्धी अभिलेख जिला क्वैरी कार्यालय, देवरिया में प्रस्तुत करना अनिवार्य होगा। रास्ते के निर्माण में होने वाले व्यय के लिए राज्य सरकार का कोई उत्तरदायित्व नहीं होगा।

24. खनन स्थल से निकाले गये खनिज पदार्थ का अभिवहन वन विभाग की लिखित सहमति के बिना वन मार्ग से नही किया जायेगा।

25. स्वीकृत खनन पट्टा क्षेत्र की परिधि के बाहर कोई अवैध खनन पाये जाने पर उक्त नियमावली 1963 के नियम 60 के अधीन युक्तियुक्त अवसर दिये जाने के पश्चात खनन पट्टा निरस्त किया जायेगा।

26. नियमावली-1963 के नियम-41(ज) के अधीन उपबन्धित उपबन्धों के अनुसार जलधारा में सक्शन मशीन / लिफ्टर के माध्यम से खनन कार्य निषिद्ध होगा। पट्टेदार उक्त नियम के उपबन्धों का उल्लंघन करता हुआ पाया जाता है तो प्रत्येक अवसर में पांच लाख रूपये की दर से शास्ति के लिये दायी होगा। शास्ति की उपरोक्त उल्लिखित धनराशि को जमा करने में विफल होने पर उक्त धनराशि को पट्टे

के सापेक्ष जमा की गयी प्रतिभूमि की धनराशि से कटौती की जायेगी।

27. नियमावली-1963 के नियम-44 में उपबन्धित की गयी किसी शर्त को भंग करने पर पचास हजार रूपये की शास्ति / उद्ग्रहण के लिये दायी होगा। शास्ति की उक्त धनराशि जमा करने में विफल होने पर सम्बन्धित पट्टे के सापेक्ष जमा की गयी प्रतिभूति की धनराशि से कटौती कर ली जायेगी।

28. स्वीकृत खनन पट्टा क्षेत्र के भीतर किसी प्रतिबन्धित क्षेत्र (यदि कोई हो) में खनन कार्य नहीं किया जायेगा। ऐसे प्रतिबन्धित क्षेत्र में खनन पाये जाने पर नियमानुसार खनन पट्टा समाप्त किया जा सकता है।

29. रीवर बेड माइनिंग की स्थिति में खनन की गहराई 03 (तीन) मीटर अथवा वाटर लेवल में से जो न्यूनतम् हो, तक ही किया जायेगा।

30. पर्यावरण स्वच्छता प्रमाण-पत्र में उल्लिखित शर्तों तथा उ०प्र० उपखनिज (परिहार) नियमावली, 1963 के नियम-34(4) के अनुसार निदेशालय द्वारा अनुमोदित खनन योजना में उल्लिखित शर्तों का पालन पट्टेदार को किया जाना आवश्यक होगा।

31. पट्टाधारक विहित लोडिंग सन्नियमो की पुष्टि करने विफल हो जाने पर ऐसे प्रत्येक चूक की दशा में रूपया पच्चीस हजार रूपये की शास्ति अधिरोपित की जायेगी। शास्ति की उक्त धनराशि जमा करने में विफल होने पर सम्बन्धित पट्टे के सापेक्ष जमा की गयी प्रतिभूति की धनराशि से कटौती कर ली जायेगी।

32. ई-निविदा सह ई-नीलामी विज्ञप्ति दिनांक 02.08.2021 के बिन्दु सं०-22 के शर्त-(1) से आश्वस्त होकर पट्टाधारक द्वारा खनन पट्टा प्राप्त किया गया है। यह ई-निविदा सह ई-नीलामी 05 वर्ष की अवधि व निर्धारित मात्रा के लिये है। खनन पट्टा विलेख निष्पादन के उपरान्त उपखनिज की मात्रा निर्धारण करने सम्बन्धी प्रार्थना-पत्र / दावा मान्य नही होगा।"

28. Evidently, the instalments were fixed in the lease deed as per Schedule V of the Rules. The application for surrender of mining lease is required to be considered under Rule 30 of the Rules, 2021. Therefore, lease holder has to ensure that on the day of the intended surrender, an amount equivalent to 25 percent of the annual instalment of that year is submitted by him which may be adjusted against the security deposit. Two documents are required to be furnished along with the surrender application. One is a document declaring no objection for transfer of Environment Clearance Certificate6 obtained for the concerned lease area in favour of the State Government or subsequent proponent. Secondly, the application for surrender is to be accompanied by a certificate of money deposited for difference between quantity mentioned in the ECC and mined out quantity or in case of no difference, a certificate in this regard for the concerned lease deed issued by the competent

officer/Inspector. In the last paragraph of Rule 30, the consequences of such an application being filed are mentioned. It reads that in accordance with the above, the lease holder will be prohibited from carrying out mining activities from the date of application for surrender of lease and the area will be deemed to be vacant.

29. A reading of Rule 30 reflects that it presumes that compliance of the terms of the lease have been made by the lease holder till the intended day of surrender. That is to say, inter alia, a condition precedent to the moving of a valid application for surrender would be that the due instalments and other dues payable under the terms of the lease have been deposited. Any violation of the terms of the lease would attract action of termination of the lease. The requirement in Rule 30 of deposit of 25 percent of the annual instalment of that year (in which the intended day of surrender falls), which may be adjusted against the security deposit, has to be read as being in the nature of compulsory exaction due to surrender of the mining lease prior to the expiry of the lease. Therefore, in a case of surrender, the security deposit cannot be adjusted against any outstanding installments or other dues except against the adjustment of the 25% deposit of the annual installment specified in Rule 30. The loss of revenue to the State Government due to such surrender would be a plausible reason for inserting this requirement which is in public interest. However, in the event of termination of the mining lease under the provisions of Rule 59, the security deposit can be adjusted against the total amount due.

As far as the requirement of no objection for transfer of Environment Clearance Certificate obtained for the concerned lease area in favour of the State Government or subsequent proponent is concerned, it is an important consideration in the interest of State Government's revenue inasmuch as under the proviso to sub-Rule (5) of Rule 35 of the Rules, 2021, the environment clearance granted in favour of such lessee may be transferred to a legal person in favour of whom such lease is settled within the lease validity period.

30. Evidently, the application for surrender was filed by the petitioner on 18.5.2023, but without depositing the entire amount of instalment for the month of April 2023 and without depositing the instalment for the month of May 2023 (that is, the 5th and 6th instalments payable on 01.04.2023 and 01.05.2023 respectively), and further, without the two requisite documents that were required to be filed alongwith the application. Compliance of the provisions of Section 30 is stated to have been made by the petitioner in the letter dated 26.5.2023. The deposit of the balance amount for the month of April 2023 was noted in the report put up before the District Magistrate by the concerned officers on 29/31.5.2023, on which application the District Magistrate made the afore-quoted noting dated 2.6.2023.

31. The notice of the District Magistrate dated 30.6.2023 to the petitioner demanding 'royalty' for the month of May, 2023 for purpose of issue of 'no dues certificate' is required to be read also in context of Clause (b) of Section 30. That is to say, it is referable also to the provision of the Rule itself which is the requirement of certificate of money deposit for difference, if any, between the quantity mentioned in the ECC and the mined out quantity. It necessitates submission of

certificate of deposit of that money payable to the extent of the quantity of the mineral mined out. The certificate of deposit envisaged in Rule 30 has nothing to do with the requirement of deposit of the due instalments under the terms of the lease. Therefore, the notice dated 30.06.2023 of the District Magistrate is to be read as an indication to the petitioner to comply with the terms of the lease by depositing the due instalments (referred to in the notice as 'royalty') which would be a condition precedent to the moving of the application for surrender of the mining lease. The phrase 'intended day of surrender' appearing in Rule 30 of the Rules, 2021 would be the day by which all due instalments are paid and on that day no instalments or other dues are outstanding, under the terms of the lease, for and till the month in which such day falls.

32. At this stage it is important to discuss Section 15(3) of the Act, 1957 which has been relied upon in the aforesaid judgment of **Vipul Tyagi** in which judgment it is observed, inter alia, that once the lease holder admittedly did not carry out any mining operations, no royalty was liable to be recovered from him. For convenience, Section 15 is quoted in its entirety:-

**"15. Power of State Governments to make rules in respect of minor minerals.—**(1) The State Government may, by notification in the Official Gazette, make Rules for, regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith.

(1-A) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the person by whom and the manner in which, applications for quarry leases, mining leases or other mineral concessions may be made and the fees to be paid therefor;

(b) the time within which, and the form in which, acknowledgement of the receipt of any such applications may be sent;

(c) the matters which may be considered where applications in respect of the same land are received within the same day;

**(d) the terms on which, and the conditions subject to which and the authority by which quarry leases, mining leases or other mineral concessions may be granted or renewed;**

**(e) the procedure for obtaining quarry leases, mining leases or other mineral concessions;**

(f) the facilities to be afforded by holders of quarry leases, mining leases or other mineral concessions to persons deputed by the Government for the purpose of undertaking research or training in matters relating to mining operations;

**(g) the fixing and collection of rent, royalty, fees, dead rent, fines or other charges and the time within which and the manner in which these shall be payable;**

(h) the manner in which rights of third parties may be protected (whether by way of payment of compensation or otherwise) in cases where any such party is prejudicially affected by reason of any prospecting or mining operations;

(i) the manner in which rehabilitation of flora and other vegetation such as trees, shrubs and the like destroyed by reason of any quarrying or mining operations shall be made in the same area

or in any other area selected by the State Government (whether by way of reimbursement of the cost of rehabilitation or otherwise) by the person holding the quarrying or mining lease;

(j) the manner in which and the conditions subject to which, a quarry lease, mining lease or other mineral concession may be transferred;

(k) the construction, maintenance and use of roads power transmission lines, tramways, railways, serial rope ways, pipelines and the making of passage for water for mining purposes on any land comprised in a quarry or mining lease or other mineral concession;

(l) the form of registers to be maintained under this Act;

(m) the reports and statements to be submitted by holders of quarry or mining leases or other mineral concessions and the authority to which such reports and statements shall be submitted;

(n) the period within which and the manner in which and the authority to which applications for revision of any order passed by any authority under these rules may be made, the fees to be paid therefore, and the powers of the revisional authority; and

(o) any other matter which is to be, or may be, prescribed.

(2) Until rules are made under sub-section (1), any rules made by a state Government regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals which are in force immediately before the commencement of these Act shall continue in force.

**(3) The holder of a mining lease or any other mineral concession granted under any rule made under sub-section (1) shall pay royalty or dead rent, whichever is more in respect of minor minerals removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee at the rate prescribed for the time being in the rules framed by the State Government in respect of minor minerals:**

**Provided that the State Government shall not enhance the rate of royalty or dead rent in respect of any minor mineral for more than once during any period of three years.**

(4) Without prejudice to sub-sections (1), (2) and sub-section (3), the State Government may, by notification, make rules for regulating the provisions of this Act for the following, namely:—

(a) the manner in which the District Mineral Foundation shall work for the interest and benefit of persons and areas affected by mining under sub-section (2) of section 9B;

(b) the composition and functions of the District Mineral Foundation under sub-section (3) of section 9B; and

(c) the amount of payment to be made to the District Mineral Foundation by concession holders of minor minerals under section 15A."

*(emphasis supplied)*

Section 15 of the Act, 1957 pertains to the power of the State Government to make rules in respect of minor minerals. Sub-section (1) thereof gives general power to the State Governments to make rules for regulating the grant of quarry leases and mining leases or other mineral concessions in respect of minor minerals and for the purposes connected therewith, by issuing notification in the official gazette. Sub-section (1-A) was inserted by Act No. 37 of 1986 with effect from 10.2.1987 which provides for several matters in respect of all or any of which, the rules that can be made by the State Government may provide for without

prejudice to the generality of the power delegated under sub-section (1).

33. Constitutionality of Section 15(1) of the Act, 1957 came up for consideration before the Supreme Court in the case **of D.K. Trivedi and sons and others Vs. State of Gujarat and others.** Further, the scope of sub-Section (3) of Section 15 was also considered therein for purpose of that case. After considering the legislative history of the Act, 1957, that provided for regulation of mining of minerals, the Supreme Court noted that the legislature of the Dominion of India enacted the Mines and Minerals (Regulation and Development) Act, 1948 with the object of regulating mines and oilfields and mineral development; under Section 5 of this Act, the Central Government made the Mineral Concessions Rules, 1949 and Rule 4 thereof provided that the said Rules shall not apply to minor minerals, the extraction of which shall be regulated by such rules as the Provincial Government may prescribe. Thereafter, the Act, 1957 was enacted which defined the term 'minor mineral' and also a number of provisions which till then had been dealt with under the rule making power of the Central Government were transferred to the Act, 1957 in order to restrict the scope of subsidiary legislation. The Act, 1957 was subjected to amendments with important amendments being effected pursuant to the enactment of the Mines and Minerals (Regulation and Development) Amendment Act, 1972. Amongst the principle changes so effected, were the imposition of specific obligation on holders of mining leases in respect of payment of royalty for minerals removed by their agents, sub-lessees or employees; providing a statutory basis for a calculation of a dead rent; and the application of minor minerals rules to quarry leases. The Supreme Court noted the distinct provisions of Section 13, 14 and 15 of the Act, 1957 and the amendment effected by insertion of sub-section (3) in Section 15 with retrospective effect by the Amendment Act, 1972. It was noted that in exercise of power conferred by Section 13 of the Act, 1957, the Central Government by notification made the Minor Minerals (Concession) Rules, 1960; that in exercise of power conferred by Section 15(1) of the Act, 1957, various State Governments made rules in respect of minor minerals. The majority of the States provided for two types of the minerals concessions namely, a lease on tenure basis and a permit to extract a specified quantity of a minor minerals. Thereafter, the Supreme Court while examining the rule making power conferred on the State Government by Section 15(1) observed that although under Section 14, Section 13 is one of the sections which does not apply to minor minerals, the language of Section 13(1) is in pari materia with the language of Section 15(1). It was observed that each of the provisions {that is, Sections 13(1) and 15(1)} confers the powers to make rules for "regulating". The Court referred to Entry 54 in the Union List to hold that Section 4 to 12 form a group of sections under the heading "General Restrictions On Undertaking Prospecting and Mining Operations" and exclusion of the application of these sections to minor minerals meant that the restrictions would not apply to the minor minerals but it was left to the State Governments to prescribe such restrictions as they thought fit by the rules made under Section 15(1). It was held that Sections 13, 14 and 15 fall in the group of sections which bears the header "Rules for Regulating Grant of Prospecting Licenses and Mining Leases" and these three sections have to be read together. The Supreme Court held that in drafting, that

Section 13 would not apply to quarry leases, minor leases or other mineral concessions in respect of minor minerals, what was done was to take away from the Central Government the power to make rules in respect of minor minerals and to confer that power by Section 15(1) upon the State Governments. The terms royalty and dead rent were enunciated by the Supreme Court as follows:

"39. In a mining lease the consideration usually moving from the lessee to the lessor is the rent for the area leased (often called surface rent), dead rent and royalty. Since the mining lease confers upon the lessee the right not merely to enjoy the property as under an ordinary lease but also to extract minerals from the land and to appropriate them for his own use or benefit, in addition to the usual rent for the area demised, the lessee is required to pay a certain amount in respect of the minerals extracted proportionate to the quantity so extracted. Such payment is called "royalty". It may, however, be that the mine is not worked properly so as not to yield enough return to the lessor in the shape of royalty. In order to ensure for the lessor a regular income, whether the mine is worked or not, a fixed amount is provided to be paid to him by the lessee. This is called "dead rent." "Dead rent" is calculated on the basis of the area leased while royalty is calculated on the quantity of minerals extracted or removed. Thus, while dead rent is a fixed return to the lessor, royalty is a return which varies with the quantity of minerals extracted or removed. Since dead rent and royalty are both a return to the lessor in respect of the area leased, looked at from one point of view dead rent can be described as the minimum guaranteed amount of royalty payable to the lessor but calculated on the basis of the area leased and not on the quantity of minerals extracted or removed. In fact, clause (ix) of Rule 3 of the Rajasthan Minor Mineral Concession Rules, 1977, defines "dead rent" as meaning "the minimum guaranteed amount of royalty per year payable as per rules or agreement under a mining lease". Stipulations providing for the lessee's liability to pay surface rent, dead rent and royalty to the lessor are the usual covenants to be found in a mining lease."

It was observed that the powers to make rules for regulating the grant of such leases include the power to fix the consideration payable by the lessee to the lessor in the shape of ordinary rent or service rent, dead rent and royalty.

While referring to the provisions of sub-section (3) of Section 15 of the Act, 1957, the Supreme Court observed as follows:

"45. A proper reading of sub-section (3) of Section 15 shows that it does not confer any power upon the State Governments to make rules with respect to royalty. Royalty is payable by the holder of a quarry lease or mining lease or other mineral concession granted under rules made under sub-section (1) of Section 15. What sub-section (3) does is to make such holder liable to pay royalty in respect of minor minerals removed or consumed not only by him but also by his agent, manager, employee, contractor or sub-lessee. It thus casts a vicarious liability upon such holder to pay royalty in respect of the acts of persons other than himself. The very fact that under sub-section (3) the liability of such holder is to pay royalty "at the rate prescribed for the time being in the rules framed by the State Government in respect of minor minerals" shows that the prescribing of the rate of royalty in respect of minor minerals is to be done under the

rule-making power of the State Governments which is to be found in sub-section (1) of Section 15. Yet another purpose of enacting sub-section (3) is to be found in the proviso to that sub-section which prohibits the State Government from enhancing the rate of royalty in respect of any minor mineral for more than once during any period of four years10. If the reliance placed by the Gujarat and the Andhra Pradesh High Courts on sub-section (3) of Section 15 in order to ascertain the intention of Parliament was misplaced, their reliance upon Section 9-A was even more misplaced. Section 9-A was inserted in the 1957 Act by the Amendment Act of 1972 but it was not inserted with retrospective effect. It was, therefore, not there when Section 15(1) was placed upon the statute book while enacting the 1957 Act. Section 9-A was enacted with a two-fold purpose. It cast a liability upon the holder of a mining lease whether granted before or after the commencement of the 1972 Act, that is, either before or after September 12, 1972, to pay to the State Government dead rent at the rates specified for the time being in the Third Schedule to the 1957 Act "notwithstanding anything contained in the instrument of lease or in any other law for the time being in force". The purpose of inserting Section 9-A in the 1957 Act, as stated in the Statement of Objects and Reasons to Legislative Bill 83 of 1972, was to make a "provision of a statutory basis for calculation of dead rent". Section 9-A also provides that the liability of the lessee would be to pay either royalty or dead rent whichever is greater, thus embodying in the Act what was contained in the proviso to clause (c) of Rule 27 of the Minor Mineral Concession Rules, 1960. Section 9-A was inserted also with a view to prohibit the Central Government from enhancing the rate of dead rent more than once during any period of four years. It is pertinent to note that by the Amendment Act of 1972 Section 9 was also amended. While under the original sub-section (1) of Section 9 the liability of the holder of a mining lease was only to pay royalty in respect of any mineral removed by him, after the amendment he is made liable to pay royalty in respect of any mineral "removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee". By the Amendment Act of 1972 the power of the Central Government to amend by notification the Second Schedule which specifies the rate of royalty was also curtailed by inserting a proviso to Section 9(3) in order to provide that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of four years. The amendments made by the Amendment Act of 1972 have, therefore, no relevance for ascertaining the scope of the rule-making power of the State Governments under Section 15(1).

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48. It was then contended that the very language of sub-section (1) of Section 15 shows that it does not confer any power upon the State Governments to enhance the rate of royalty or dead rent because the rules which are to be made under that sub-section are for regulating the grant of quarry leases, mining leases and other mineral concessions in respect of minor minerals and, therefore, the rules under that sub-section can be made only with respect to the time when such leases or concessions are granted and not with respect to any point of time subsequent thereto and there being no provision similar to sub-section (3) of Section 15 with respect to dead rent, any rule providing for increase in the rate of dead rent during the subsistence of a

lease would be ultra vires Section 15. This submission is devoid of substance. As pointed out earlier, sub-section (3) of Section 15 does not confer any power to amend the rules made under Section 15(1), for the power to amend the rules is comprehended within the power to make the rules conferred by sub-section (1) of Section 15. The construction sought to be placed upon the word "grant" in Section 15(1) also cannot be accepted. While granting a lease it is open to the grantor to prescribe conditions which are to be observed during the period of the grant and also to provide for the forfeiture of the lease on breach of any of those conditions. If the grant of a lease were not to prescribe such conditions, the lessee could with impunity commit breaches of the conditions of the lease. Ordinary leases of immovable property at times provide for periodic increases of rent and there is no reason why such increases should not be made in a mining or quarry lease or other mineral concession granted under a regulatory statute intended for the benefit of the public and even less reason why such a statute should not confer power to make rules providing for increases in the rate of dead rent during the subsistence of the lease. In any event, the power to make rules under Section 15(1) is also for purposes connected with the grant of mining and quarry leases and other mineral concessions and the expression "and for purposes connected therewith" read with the word "grant" would include the power to enhance the rate of dead rent during the subsistence of the lease."

The Supreme Court summarized its conclusions in paragraph 76 of the aforesaid judgment. Extract of the conclusions for purpose of this case are as follows:-

"76. To summarize our conclusions:

(1) Sub-section (1) of Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, is constitutional and valid and the rule-making power conferred thereunder upon the State Governments does not amount to excessive delegation of legislative power to the executive.

(2) There are sufficient guidelines provided in the 1957 Act for the exercise of the rule-making power of the State Governments under Section 15(1) of the 1957 Act. These guidelines are to be found in the object for which such power is conferred, namely, "for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith"; the meaning of the word 'regulating', the scope of the phrase "for purposes connected therewith"; the illustrative matters set out in sub-section (2) of Section 13; and the restrictions and other matters contained in Sections 4 to 12 of the 1957 Act.

(3) The power to make rules conferred by Section 15(1) includes the power to make rules charging dead rent and royalty.

(4) The power to make rules under Section 15(1) includes the power to amend the rules so made, including the power to amend the rules so as to enhance the rates of royalty and dead rent.

(5) A State Government is entitled to amend the rules under Section 15(1) enhancing the rates of royalty and dead rent even as regards leases subsisting at the date of such amendment.

(6) Sub-section (3) of Section 15 does not confer upon the State Governments the power to make rules

charging royalty or to enhance the rate of royalty so charged from time to time.

(7) The sole repository of the power of the State Governments to make rules and amendments thereto, including amendments enhancing the rates of royalty and dead rent, is sub-section (1) of Section 15.

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……………………."

34. It is pertinent to mention here that sub-section (1-A) of Section 15 of the Act, 1957 which provides for the rules made by the State Governments to provide in particular for all or any of the matters mentioned therein without prejudice to the generality of the power under sub-section (1), specifically refers to certain matters, which, inter alia, are:-

"…………………..

(d) the terms on which, and the conditions subject to which and the authority by which quarry leases, mining leases or other mineral concessions may be granted or renewed;

(e) the procedure for obtaining quarry leases, mining leases or other mineral concessions;

……………………….

(g) the fixing and collection of rent, royalty, fees, dead rent, fines or other charges and the time within which and the manner in which these shall be payable.

……………………..."

Thus, the delegation of rule making power to the State Governments is of a wide spectrum concerning, inter alia, the matters specified in the afore-quoted clauses, which is without prejudice to the generality of power under sub-section (1) of Section 15.

35. It has been held in **D.K. Trivedi** that sub-section (3) of Section 15 of the Act, 1957 does not confer any power upon the State Governments to make rules with respect to royalty. Royalty is payable by the holder of a quarry lease or mining lease or other mineral concession granted under rules made under sub-section (1) of Section 15. What sub-section (3) does is to make such holder liable to pay royalty in respect of minor minerals removed or consumed not only by him but also by his agent, manager, employee, contractor or sub-lessee. It thus casts a vicarious liability upon such holder to pay royalty in respect of the acts of persons other than himself. The very fact that under sub-section (3) the liability of such holder is to pay royalty "at the rate prescribed for the time being in the rules framed by the State Government in respect of minor minerals" shows that the prescribing of the rate of royalty in respect of minor minerals is to be done under the rule-making power of the State Governments which is to be found in sub-section (1) of Section 15.

36. In the year 2012, the State Government amended the provisions of auction/ tender/ auction-cum-tender or e-auction lease, and declaration by the State Government of the area or areas which may be leased out in such manner. This was incorporated in the rules, 1963 by substitution of the existing Rule 23 and other rules by means of a Notification dated 23.12.2012. In the year 2017, the State Government formulated a Mining Policy which sought to increase its share from revenue obtained from minerals over the next five years from 1.85% to 3% while working towards sustainable socio-economic development through mines and minerals, conservation of minerals, and maintaining the balance between

environment and ecology. The aims and objects of the policy, inter alia, included promotion of opportunities of employment in the mining sector; providing encouragement to healthy competition in the mining industry; to encourage investment of private capital in the procedure for mineral development and to develop entrepreneurship; for bringing transparency in the procedure for approval of concessions in minerals, the process for implementation of e-tendering/e-auction/e-bidding, and while simplifying the procedure for administration of mining, making the process transparent and free from corruption.

37. The State Government also issued a Government Order dated 14.8.2017 in respect of mining concessions in sand, moram, bajari etc. available in the river beds by way of e-tendering-cum-e-auction of the areas. This Government Order provides, inter alia, that bids for minerals will be made on the basis of per cubic meter which would not be less than the royalty fixed in Schedule I of the Rules, 1963. The highest bid received would be multiplied by the estimated quantity in cubic meters and the amount due for the first year would be calculated accordingly which amount would be enhanced by 10 percent in every subsequent year. Various other procedures are prescribed in the Government Order. However, in the Rules, 2021, as stated aforesaid, the procedure for grant of auction lease has since been specified in Chapter IV thereof.

It would be pertinent to mention here that under the Rules, 2021, royalty is payable in terms of Rule 21 of Chapter III which reads as under:

**"21. Royalty – (1) The holder of a mining lease granted on or after the commencement of these rules shall pay royalty in respect of any mineral removed by him from the lease area at the rates for the time being specified in the First Schedule to these rules.**

(2) Notwithstanding anything to the contrary contained in Rule 3, royalty should be payable by concerned brick klin owner or user of ordinary clay or ordinary earth at the rate, for the time being, specified in First Schedule to these rules:

Provided that the State Government shall take fees to be known as Regulating Fees from brick klin owners in respect of districts categorized, on the basis of paya's at such rates as may be notified from time to time by it.

(3) The State Government may, by notification in the Gazette, amend the First Schedule so as to include therein or exclude there from or enhance or reduce the rate of royalty in respect of any mineral with effect from such date as may be specified in the notification:

Provided that the State Government shall not enhance the rate of royalty in respect of any mineral for more than once during any period of three years and shall not fix the royalty at the rate of more than 20 percent of the pit's mouth value.

(4) Where the royalty is to be charged on the pit's mouth value of the mineral, the State Government may assess such value at the time of the grant of the lease and the rate of royalty will be mentioned in the lease deed. It shall be open to the State Government to re-assess not more than once in a year the pit's mouth value if it considers that an enhancement is necessary.

(5) Regulating Fees may be determined by the State Government from time to time on minerals entering the State from other States."

*(emphasis supplied)*

As regard the auction lease which is the case in the instant petition, the installments are payable under sub-rule (3) of Rule 27 which reads as under:

**"27. Procedure for approval/grant of Lease by e-tender/e-auction/e-tender-cum-e-auction -**

(1) …………..

(2) …………..

(3) Upon grant of lease, the lease holder of river bed minerals such as sand, morrum, bajri boulder shall make payment of such amount as mentioned in the Fifth Schedule and the lease holder of other minerals shall make payment of such amount as mentioned in the Fourth Schedule."

As noted above, the application of provisions of Chapter III is excluded by means of sub-rule (3) of Rule 23 of Chapter IV.

38. In the backdrop of the aforesaid discussion, in a case of auction lease that is covered by Chapter IV of the Rules, 2021, to say that while considering an application of surrender of mining lease, 'royalty' would be payable only to the extent of the mineral removed or consumed, would not be appropriate. Doubtless, where there occurs violation of the terms and conditions of the mining lease which is not promptly attended to by the lessee, the authorities are required to take steps without delay for termination of the lease in the interest of all concerned. But where the mining lease deed executed in Form MM-6 or in similar format under the Rules made under the provisions of Section 15 (1) and (1-A) of the Act, 1957 provides for the quantity of minor mineral to be excavated annually in cubic meters, and the highest bid offered by the lessee, and the total amount of instalments payable in the first year and subsequent years, which also form the consideration for the contract, then the instalments would be payable under the terms of the lease. Therefore, the provisions of Section 15 (3) of the Act, 1957 cannot be read or interpreted in a manner to confer a benefit on the lessee for not paying the installments where no mineral has been removed or consumed by him. Thus, to this extent, the judgment of this court in Vipul Tyagi when read in the light of the judgment of the Supreme Court in D.K. Trivedi, the provisions of the Act 1957, and of the Rules of the State Government framed under the powers delegated by the Act 1957, would not operate as a binding precedent.

39. In the present case, as noted above, the petitioner did not furnish the requisite documents along with his application for surrender dated 18.5.2023 nor did he pay the due instalment for that month. Therefore, the instalments due until that day were payable by the petitioner under the terms and conditions of the lease-deed. As noted above, the petitioner reported compliance of Rule 30 aforesaid by his letter dated 26.5.2023. However, till that date, he had deposited only the fifth instalment for the month of April 2023 and not the sixth instalment for the month of May, 2023.

40. Payment of the sixth instalment which fell due on 01.05.2023 would have been, under the circumstances, one of the conditions precedent to render the application for surrender of mining lease valid. Had that deposit been made by the petitioner, and no other dues were outstanding, and other conditions of Rule 30 of the Rules, 2021 been met, the respondents would have been under an obligation to accept the surrender of the

mining lease. As observed above, the noting of the District Magistrate on 2.6.2023 regarding the office note / report dated 29/31.5.2023, would have to be read in light of requirement of compliance of the provisions of Rule 30 aforesaid. In any view of the matter, the noting of the District Magistrate that "further proceeding also be taken" can only be construed to mean ensuring due compliance. The sixth instalment not having been paid, the seventh instalment too became due and payable on the due date, that is, on 01.06.2023.

41. For the reasons aforesaid, the petitioner cannot claim benefit of the report of the Mining Officer dated 15.6.2023 that the mining work in the leased area has been stopped from 1.5.2023 for not paying the due installments. That report is relevant only insofar as issuance of the certificate under clause (b) of Rule 30 is concerned. Therefore, the notice dated 30.6.2023 sent by the District Magistrate to the petitioner, asking him to deposit the instalment of May and June 2023 is relevant. Under the circumstances, the surrender application dated 18.5.2023 moved by the petitioner was not valid for want of compliance of the provisions of Rule 30 of the Rules, 2021 as well as for non-payment of due installments and other dues, and consequently, the District Magistrate was not bound to accept the application for surrender. In fact, he had no option but, in view of non-compliance by the petitioner of the notice dated 30.6.2023, to terminate his lease by means of the impugned order dated 4.8.2023 in terms of Rule 59. It has been held above that the amount of 25 percent of the annual instalment of the year which may be adjusted against the security deposit that is required to be submitted on the intended day of surrender, is in the nature of compulsory exaction due to surrender of the mining lease prior to the expiry of the lease. The amount of the security deposit cannot be set-off against the instalments due and payable under the terms of the lease in cases where the surrender application is being positively considered. The first question is answered accordingly.

42. Clause (i) of Part-III of the lease, which has been quoted above, enables the State Government to forfeit the security amount in full or in part where the Rules, contracts or terms and conditions are breached, provided that proper opportunity is accorded to the lease-holder prior to the termination of the lease. The notice aforesaid dated 30.6.2023 is only in compliance of the said provision of the lease-deed that mandates grant of proper opportunity to the lease-holder. It has been observed above that the sixth and seventh instalments were due and payable under the terms of the lease which had not been paid. Under the circumstances, the forfeiture of the security deposit cannot be faulted. The second question is thus answered.

43. In view of the aforesaid, since the application for surrender has been held to be not valid, and since the termination of the lease by the impugned order has been upheld, and since the sixth and seventh instalments due under the terms of the lease have been held to be payable, the sixth and seventh installments are liable to be recovered from the petitioner. The third question is, accordingly, answered.

44. This petition is therefore, **dismissed**.

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**(2024) 7 ILRA 679**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 16.07.2024**

**BEFORE**

**THE HON'BLE SALIL KUMAR RAI, J.**

Writ C No. 30624 of 2023
And
Writ C No. 23066 of 2023

**Committee of Management, Jairajpur Muslim Educational Society, Jairajpur, Azamgarh & Anr. ...Petitioners**
**Versus**
**Assistant Registrar Firms, Societies and Chits, Azamgarh region, Azamgarh & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Adarsh Singh, Sri Indra Raj Singh, Sri Vineet Kumar Singhi

**Counsel for the Respondents:**
C.S.C., Sri Rishabh Srivastava, Sri H.N. Singh, Sr. Advocate

**A. Civil Law-Constitution of India, 1950-Article 226-Societies Registration Act, 1860-Sections 4-B & 25(2)-Two writ petitions were filed concerning the validity of elections held in the Society-The governing body elections of the Society held on 23 september 2022 were recognized, while subsequent elections claimed to have been held on 20 October 2022 were rejected by the Assistant Registrar due to lack of supporting documents-The Assistant Registrar's notification of a tentative voter list was challenged as it excluded certain members-The Registrar failed to reconcile two different lists of general body members submitted by the petitioner on 10 October and 31 October 2022-The court upheld the rejection of the 20 October 2022 elections, finding no jurisdictional error-The Assistant Registrar directed to complete the registration of the general body list before conducting any elections u/s 25(2), ensuring consistency and legal compliance.(Para 1 to 26)**

**B. The Assistant Registrar has the power to verify documents and reject the registration of office-bearers under section 4 if the requisite documents supporting elections are not provided. The Assistant Registrar is not obligated to refer every election dispute to the Prescribed Authority under section 25(1), unless there is a bona fide dispute regarding the election's validity. The Registrar retains discretion to reject elections where there is a failure to establish that the elections were duly conducted.(Para 21,22)**

**The petition is partly allowed.** (E-6)

**List of Cases cited:**

1. Vijai Narain Singh Vs Registrar Firms Societies & Chits Registration, U.P. Lko. & ors. (1981) UPLBEC 308

2. Abhay Grasth Gramin Jan Sangathan Kusmikhalan & anr.Vs Asst Registrar Firms Societies & Chits Vs Region, VNS & anr. (1990) UPLBEC (1) 480

3. Gram Shiksha Sudhar Samiti, Jr. High School Sikandara Distt Kanp. Dehat & anr.Vs Registrar Firms Societies & Chits, U.P. Lko & ors. (2010) UPLBEC 3 2522

4. Dy. Dr. of Edu. IV Region, Alld & ors. (1987) UPLBEC 14

5. C/M, Anjuman Kherul Almin Allahganj & anr. Vs St. of U.P. & ors. (2013) 0 Supreme (All) 2849

6. C/M Madrasa Arbia Azizia Majaharool Uloom Vs St. of U.P. & ors. (2023) 1 UPLBEC 217

7. C/M, Kisan Shiksha Sadan, Banksahi, Distt Basti & anr.Vs Asst Registrar, Firms, Societies &

Chits, Gorakhpur Region, Gorakhpur & anr.(1995) 2 UPLBEC 1242

8. C/M, Naldeo Kuldeo Purva Madhyamik Vidyalaya Belaon, Distt. Jaunpur & anr.Vs Asst. Registrar, Firms, Societies & Chits, Azamgarh & anr.(1997) 2 UPLBEC 1009

9. C/M, Sarvodaya Mandal, Baranpur, Koraon Distt Alld & ors. Vs Asst Registrar, Firms, Societies & Chits, Alld & ors. (1997) 1 UPLBEC 258

10. Harish Chandra Gupta Vs Registrar, Firms, Societies & Chits & ors. (1990) AWC 1246

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. The above mentioned two writ petitions were connected by order of this Court, therefore, were heard together and are being decided by a common judgment.

2. The petitioners in Writ – C No. 30624 of 2023 shall be referred as 'petitioners' in the present judgment and the petitioners in Writ – C No. 23066 of 2023 shall be referred as 'respondents' in the present judgment.

3. The facts of the case are that Jairajpur Muslim Educational Society, Jairajpur, Azamgarh, U.P. (hereinafter referred to as, 'Society') is a Society registered under the Societies Registration Act, 1860 (hereinafter referred to as, 'Act, 1860') and the registration of the Society stands renewed for a period of five years w.e.f. 12.10.2020. The Society manages an Institution in the name of Nishwa Inter College, Jairajpur, Azamgarh which is a recognized Institution under the U.P. Intermediate Education Act, 1921 (hereinafter referred to as, 'Act, 1921') and receives grant-in-aid upto Junior High School.

4. The admitted elections of the governing body and the office-bearers of the Society were held on 23.10.2019 in which one Abdul Haqim was elected as Secretary/Manager and the petitioner no. 2 was elected as Joint Secretary. Under the bye-laws of the Society, the term of the governing body and the elected office-bearers of the Society is three years. Under the bye-laws of the Society, the Joint Secretary, in absence of the Secretary, is empowered to summon the meetings of the Society. Abdul Haqim died on 1.11.2020. The petitioner no. 2, being the Joint Secretary of the Society, summoned a meeting of the governing body on 23.9.2022 to fill up the vacancy on the post of Secretary caused due to death of Abdul Haqim and in the said meeting, the petitioner no. 2 was elected as Secretary for the remaining term. On 10.10.2022, the petitioner no. 2 submitted the requisite documents before the Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh for registration. The list of the elected office-bearers and also list of the members of the general body for the year 2022-23 were also filed by the petitioner no. 2 before the Assistant Registrar for registration under Section 4 of the Act, 1860.

5. The petitioner no. 2 claims that on 20.10.2022, fresh elections to constitute the governing body of the Society and to elect its office-bearers were held in which the petitioner no. 2 was elected as Secretary and one Sri Wasiudin was elected as President. It is also claimed by the petitioner no. 2 that the documents relating to the elections held on 20.10.2022 along with the list of newly elected office-bearers and a list of members of the general body for the year 2022-23 were submitted before the Assistant Registrar for registration

under Section 4 of the Act, 1860. The list of members of the general body submitted along with proceedings of the election dated 20.10.2022 was different from the list of the members of the general body submitted on 10.10.2022. The list of the members of the general body submitted on 10.10.2022 has been annexed as Annexure No. 6 to the writ petition and contains the name of the respondents while the list of the members of the general body of the Society for the period 2022-23 submitted along with the proceedings of the elections held on 20.10.2022 excludes the respondents and has been annexed as Annexure No. 7 to the writ petition.

6. The Assistant Registrar, Firms, Societies and Chits, i.e., respondent no. 1 vide his order dated 28.6.2023 has recognized the elections dated 23.9.2022 wherein petitioner no. 2 was elected as Secretary but has rejected the elections claimed by the petitioners to have been held on 20.10.2022. By the same order dated 28.6.2023, the Assistant Registrar has held that the term of the governing body of the Society had already expired, therefore, elections were to be held under Section 25(2) of the Act, 1860 and by the same order, the Assistant Registrar has notified a tentative list of 37 members of the Society entitled to vote in the proposed elections. The tentative list of voters notified by the Assistant Registrar is the same list which was submitted by the petitioner along with the proceedings of the alleged elections held on 20.10.2022 and not the list which was submitted by the petitioners on 10.10.2022. The list notified by the Assistant Registrar does not contain the name of the respondents.

7. The order dated 28.6.2023 so far as it rejects the election dated 20.10.2022 claimed by the petitioner has been challenged by the petitioner in Writ – C No. 30624 of 2023. In Writ – C No. 23066 of 2023 the respondents challenge the order dated 28.6.2023 so far as it notifies the tentative list of 37 members / voters excluding the respondents.

8. It was argued by the counsel for the petitioners that the issue before the Assistant Registrar was regarding the validity of the elections dated 20.10.2022, therefore, the matter had to be referred to the Prescribed Authority under Section 25(1) of the Act, 1860 and could not have been decided by the Assistant Registrar in proceedings registered under Section 4 of the Act, 1860. It was argued that for the aforesaid reason, the order dated 28.6.2023 passed by the Assistant Registrar so far as it rejects the elections dated 20.10.2022 is without jurisdiction. It was further argued that the claim of the petitioners regarding elections dated 20.10.2022 have been rejected on the ground that no document relating to the aforesaid elections had been submitted by the petitioner. It was argued that opportunity to file the necessary documents relating to the elections set up by the petitioner was granted after the hearing was concluded by the Assistant Registrar on 24.4.2023. It was argued that opportunity to file the necessary documents should have been given to the petitioners before concluding the hearing and not after the hearing was concluded, therefore, the procedure adopted by the Assistant Registrar was contrary to law. It was argued that for the aforesaid reasons, the order dated 28.6.2023 passed by the Assistant Registrar is liable to be quashed. In support of his contentions, the counsel for the petitioners has relied on the judgments reported in ***Vijai Narain Singh vs. Registrar Firms Societies and Chits***

***Registration, U.P. Lucknow and Ors. 1981 UPLBEC 308; Abhay Grasth Gramin Jan Sangathan Kusmikhalan and Anr. vs. Assistant Registrar Firms Societies and Chits Varanasi Region, Varanasi and Anr. 1990 UPLBEC (1) 480; Gram Shiksha Sudhar Samiti, Junior High School Sikandara District Kanpur Dehat and Anr. vs. Registrar Firms Societies and Chits, U.P. Lucknow and Ors. 2010 UPLBEC (3) 2522; Ramadhar Shastri and Anr. Vs. Deputy Director of Education, IV Region, Allahabad and Ors. 1987 UPLBEC 14; Committee of Management, Anjuman Kherul Almin Allahganj and Anr. Vs. State of U.P. and Ors. 2013 (0) Supreme (All) 2849 and Committee of Management, Madrasa Arbia Azizia Majaharool Uloom vs. State of U.P. and Ors. 2023 (1) UPLBEC 217.***

9. Rebutting the arguments of the counsel for the petitioners, the counsel for the respondents has supported the order dated 28.6.2023 so far as it rejects the elections dated 20.10.2022 set up by the petitioners and proceeds to hold the elections under Section 25(2) of the Act, 1860. It has been argued that the elections dated 20.10.2022 set up by the petitioner have been rejected not because of any dispute raised on the validity of the elections but because the petitioner did not file the requisite documents to establish the proceedings of the alleged elections held on 20.10.2022. It was argued that the elections set up by the petitioner were not even prima facie established by the documents filed by him. It was argued that no jurisdictional error has been committed by the Assistant Registrar while rejecting the elections dated 20.10.2022 set up by the petitioners. In support of their contention, the counsel for the respondents has relied on the judgments of this Court reported in ***Committee of Management, Kisan Shiksha Sadan, Banksahi, District Basti and Anr. vs. Assistant Registrar, Firms, Societies and Chits, Gorakhpur Region, Gorakhpur and Anr. 1995 (2) UPLBEC 1242; Committee of Management, Naldeo Kuldeo Purva Madhyamik Vidyalaya Belaon, District Jaunpur and Anr. vs. Assistant Registrar, Firms, Societies and Chits, Azamgarh and Anr. 1997 (2) UPLBEC 1009 and Committee of Management, Sarvodaya Mandal, Baranpur, Koraon District Allahabad and Ors. vs. Assistant Registrar, Firms, Societies and Chits, Allahabad and Ors. 1997 (1) UPLBEC 258.***

10. While challenging the order dated 28.6.2023 so far as it notifies the tentative list of 37 members of the general body of the Society, the counsel for the respondents have argued that the list notified by the Assistant Registrar is the same list of members which was submitted by the petitioners along with the proceedings of the alleged elections held on 20.10.2022. The proceedings of elections dated 20.10.2022 has been rejected by the Assistant Registrar vide his order dated 28.6.2023, therefore, the list of members submitted by the petitioners along with the said proceedings could not have been accepted by the Assistant Registrar. It was argued that the petitioners would not have any opportunity to file their objections to the tentative list notified by the Assistant Registrar as objections can only be filed against the persons who have been included in the said list and cannot be filed by a person who is not included in the tentative list of voters notified by the Assistant Registrar under Section 25(2) of the Act, 1860. It was argued that before holding the elections under Section 25(2), the Assistant Registrar is duty bound to pass final orders

on the list submitted for registration under Section 4-B of the Act, 1860, therefore, a mandamus is to be issued to the Assistant Registrar to decide the claim of the petitioners under Section 4-B of the Act, 1860 and only thereupon, proceed to hold elections under Section 25(2) of the Act, 1860. It was argued that for the aforesaid reasons, the order dated 28.6.2023 so far as it notifies the tentative list of 37 members for elections to be held under Section 25(2) is contrary to law and is liable to be quashed. In support of his contention, the counsel for the petitioner relies on a Division Bench Judgment of this Court delivered in ***Harish Chandra Gupta vs. Registrar, Firms, Societies and Chits and Ors. 1990 AWC 1246.***

11. I have considered the submissions of the counsel for the parties.

12. It is true that in proceedings under Section 4 of the Act, 1860, the Assistant Registrar cannot decide any dispute regarding the validity of the elections or continuance in office of an office-bearer of the Society and any such dispute can be decided only by the Prescribed Authority under Section 25(1) of the Act, 1860. If any such dispute arises during the proceedings under Section 4, the Assistant Registrar has no alternative but to refer it to the Prescribed Authority.

13. But the Registrar would lose the jurisdiction to proceed under Section 4 and would have to refer the matter to the Prescribed Authority under Section 25(1) only when a bona fide dispute regarding elections is raised. Under Section 4, the Registrar has the jurisdiction to consider whether there is any bona fide dispute regarding elections which requires reference under Section 25(1) or a frivolous dispute has been raised only to avoid or delay a decision under Section 4. It has been held by a Division Bench of this Court in ***C/M, Kisan Shiksha Sadan (supra)*** that under Section 4 of the Act, 1860, the Registrar is under an obligation to maintain a register of members of the managing body for his own administrative purpose and is also under an obligation to record the names of the elected members of the managing body and for that purpose, he can hold an inquiry to find out who are the elected members of the managing body of the society. The Registrar has to apply his mind to the facts of the case and take a decision before referring the matter to the Prescribed Authority and in taking such a decision, the Registrar will be quite justified to take into account all the relevant circumstances. The observations of the Division Bench of this Court in Paragraphs 2 and 3 of the judgment are reproduced below:-

*"2. It is submitted by the learned Counsel for the appellants that the Registrar has no power or jurisdiction to decide the question relating to the membership of the second appellant. When he raised a dispute about the election of the Manager of the Shiksha Sadan, he had no other alternative but to refer the doubt or dispute relating to the election of the Manager of the Shiksha Sadan to the Prescribed Authority under Section 25 of the Societies Registration Act, 1860 (in short 'the Act'). On the other hand, it is submitted by the learned Counsel appearing for the respondents that the Registrar may or not refer a dispute or doubt relating to the election of the Manager of a Society to the Prescribed Authority for valid reasons and the Registrar is under no obligation to refer any dispute or doubt relating to the*

*election, without applying his mind, to the Prescribed Authority. It is further submitted that the Registrar is under an administrative obligation under Section 4 of the Act to maintain a register of members of the managing body for his own administrative purpose. He is under an obligation to record the names of the elected members of the managing body and for that purpose he can held an enquiry so as to find out who are the elected members of the managing body of a Society. On the basis of such enquiry, if the Registrar comes to the conclusion that a person or persons are not even the members of the Society, he will be quite justified in not referring the doubt or dispute as to the election of members of the managing body of a Society.*

*3. Having regard to the provisions of the Act, we see force in the submission of the learned Counsel for the Respondents. Section 4 of the Act provides that a list of members of the managing body of a Society shall be filed with the Registrar. That list is maintained by the Registrar for the purpose of performing his administrative functions as a Registrar. Section 25 of the Act provides that whenever any doubt or dispute is raised regarding the election of members of a managing body of a Society, the Registrar may refer such doubt or dispute to the Prescribed Authority for his decision. But when one fourth members of the Society raise a doubt or dispute relating to the election of the members of managing body or Society, the matter automatically goes to the Prescribed Authority for decision and in such a case the Registrar does not come into the picture.* ***In exercising this power whether to refer or not any doubt or dispute relating to the election of members of the managing body of a Society to the Prescribed Authority, the Registrar has to apply his mind to the facts of the case and take a decision. In taking such a decision, the Registrar will be quite justified to take into account all the relevant circumstances, as he has done in the present case. If an objection is raised about the membership of a person, in our view, it is the duty of the Registrar, for his own administrative purpose, to enquire into whether the person concerned is a member of the Society or not. If the Registrar comes to the conclusion that such a person is not a member of the Society then he is under no obligation to refer the dispute or doubt relating to his election to the Prescribed Authority for decision.*** *In the present case, the Registrar has applied his mind to the facts of the case to find out whether the second appellant herein or was not a member of the Shiksha Sadan. He found that he was not even a member of a Society. It is a pure question of facts. If any person feels aggrieved by such a decision, the proper course open to him is to approach the Civil Court and seek appropriate relief. The Registrar is bound by the decision of the Civil Court and his decision will be subject to the decree passed by the Civil Court."*

*(emphasis supplied)*

14. Similarly, in ***Committee of Management, Sarvodaya Mandal, Baranpur (supra),*** a Single Judge of this Court held that reference under Section 25 is to be made only when there is a genuine dispute about office-bearers of the Society and a frivolous dispute is not required to be referred under Section 25(1) of the Act, 1860.

15. By his order dated 28.6.2023, the Assistant Registrar has rejected the claim of the petitioner regarding the elections dated 20.10.2022 on the ground that the

petitioner had not filed before the Assistant Registrar any document including notice of the agenda of the meeting relating to the proceedings of the election. In fact, the petitioner had not filed any document disclosing the details of any proceedings relating to the alleged elections dated 20.10.2022. The petitioner had only submitted the resolution of the meeting dated 20.10.2022 which did not disclose even the names of the members who had participated in the meeting. It is in the said circumstances that the Assistant Registrar rejected the claim of the petitioner regarding the election dated 20.10.2022. The elections of the petitioners have not been rejected on any claim made by the respondents or on any dispute raised by them on the validity of the elections but on the failure of the petitioners to supply the requisite documents relating to the elections and to prima facie establish that any meeting dated 20.10.2022 was held electing the petitioner no. 2 as Secretary. In his order dated 28.6.2023, the Assistant Registrar has not decided the validity of the elections claimed by the petitioner but has held that the petitioner had not been able to establish that the elections claimed by him had been held. In proceedings under Section 4, the Assistant Registrar has the power / jurisdiction to reject the list of elected office-bearers or members of the governing body of the Society submitted for registration, if the persons claiming themselves to be the elected office-bearers do not supply the necessary documents to enable the Assistant Registrar to verify the correctness of the lists submitted for registration which would also require an inquiry into the question as to whether the elections were actually held. The documents showing that the requisite formalities for holding the said elections had been completed are to be considered by the Assistant Registrar. If the Assistant Registrar in proceedings under Section 4 comes to the conclusion that the documents submitted by the party do not establish that the elections were held, then he is not required to refer the matter to the Prescribed Authority under Section 25(1) of the Act, 1860 and would not be deprived of his jurisdiction to refuse to register the list of elected office bearers as submitted before him. In such a situation, the decision of the Assistant Registrar would not be a decision on the validity of the election and his order would not be without jurisdiction. In view of the aforesaid, the contention of the counsel for the petitioners that the order dated 28.6.2023 passed by the Assistant Registrar is without jurisdiction stands rejected.

16. It was further argued by the counsel for the petitioners that the Assistant Registrar concluded the hearing on 24.4.2023 and the parties were asked to submit their written arguments and original documents within one week after the hearing was concluded. It was argued that the aforesaid procedure adopted by the Assistant Registrar was contrary to law and the requisite documents to establish the claim of the parties had to be sought before hearing was concluded. In support of his contention, the counsel for the petitioners has relied on a Division Bench judgment of this Court reported in ***Ramadhar Shastri (supra).***

17. A reading of the impugned order dated 28.6.2023 shows that the procedure challenged by the petitioner was adopted by the Assistant Registrar with the consent of the parties. There is no averment in the writ petition challenging the recital in the order dated 28.6.2023 that it was with the consent of the parties that the hearing was

concluded and the parties were permitted to file their written arguments as well as the original documents within one week after the hearing was concluded. It is not the case of petitioner no. 2 that he had previously submitted the necessary documents but the Assistant Registrar had refused to take the same on record. Even, if the argument of the counsel for the petitioners that the Assistant Registrar could not have asked the parties to submit the requisite documents after the hearing was concluded is accepted, the said fact would not vitiate the order dated 28.6.2023 as the parties had not filed any document after the hearing was concluded by the Assistant Registrar on 24.4.2023. In ***Ramadhar Shastri (supra),*** the parties had filed their evidence after the hearing was concluded and there was a chance that the adjudicating authority had either relied or rejected any of the evidence filed by the parties without giving either of the parties the opportunity to explain or rebut the evidence filed by the other party. In the present case, no reliance has been placed by the Assistant Registrar on any document filed by the opposite parties who had disputed the claim of the petitioner. In view of the aforesaid, the judgment in ***Ramadhar Shastri (supra)*** is not applicable in the present case.

18. For all the aforesaid reasons, I do not find any illegality in the order dated 28.6.2023 so far as it rejects the claim of the petitioners based on the elections dated 20.10.2022 and for the said reason, Writ – C No. 30624 of 2023 is liable to be dismissed.

19. However, the plea of the respondents that the order dated 28.6.2023 so far as it declares a tentative list of 37 members of the general body of the Society which list excludes the petitioner is contrary to law, has force.

20. It is apparent from the records annexed by the petitioner himself in Writ – C No. 30624 of 2023, especially annexure no. 6 to the writ petition, that after the elections dated 23.9.2022 electing the petitioner as the Secretary, the list of elected office bearers and members of the general body of the Society for the year 2022-23 was submitted by the petitioner before the Assistant Registrar on 10.10.2022. The list of members of the general body contained the name of the respondents. Subsequently, on 31.10.2022 a fresh list of members of the general body for the year 2022-23 along with the list of elected office bearers of the Society was submitted by the petitioners along with the proceedings of elections dated 20.10.2022. The list of the members of the general body of the Society submitted on 31.10.2022 did not include the name of the petitioners. The Assistant Registrar in his order dated 28.6.2023 has notified the second list as the tentative list of the members of the general body of the Society and the electoral roll for the elections proposed to be held under Section 25(2).

21. It is apparent that two different lists of members of the general body of the Society were submitted by the petitioner before the Assistant Registrar. Both the lists purported to be of the year 2022-23. The first list was submitted on 10.10.2022 as a consequence of the elections held on 23.9.2022. The proceedings dated 23.9.2022 have been accepted by the Registrar. The second list was submitted on 31.10.2022 as a consequence of the elections allegedly held on 20.10.2022. The claim of the petitioners regarding the elections held on 20.10.2022 has been

rejected by the Assistant Registrar. However, no reasons have been given by the Assistant Registrar for accepting the second list and not the first list submitted by the petitioner no. 2. A reading of the order dated 28.6.2023 does not show that there is any consideration by the Registrar regarding the validity of the different lists of members of the general body submitted by the petitioner no. 2 himself. In his counter affidavit filed in Writ – C No. 23066 of 2023, the petitioner no. 2 has stated that the respondents were defaulters and had not paid their membership fees. A reading of the order dated 28.6.2023 does not show that any such claim was made by the petitioner no. 2 before the Assistant Registrar. However, before deciding on the validity of any list, the Assistant Registrar was bound to have considered the different records of the Society as enumerated in Section 4-B(1) of the Act, 1860 but as noted earlier, the order dated 28.6.2023 does not show that the Assistant Registrar examined the different lists of members of the general body submitted by the petitioner no. 2.

22. Apart from the aforesaid, when the Registrar proposes to hold elections under Section 25(2) of the Act, 1860 his role as Election Officer merges with his power under Section 4-B of the Act, 1860. ***Where elections are to be held under Section 25(2) of the Act, 1860 and the list of members of the general body of the Society are pending for registration under Section 4-B of the Act, 1860, the Registrar has to first decide and pass orders under Section 4-B before proceeding with the elections to be held under Section 25(2) of the Act, 1860.*** Any other procedure may result in inconsistent orders being passed by the Registrar, one as Election Officer holding the elections under Section 25(2) of the Act, 1860 and the other as the competent authority empowered to register the list of members under Section 4-B of the Act, 1860. The probable inconsistencies in orders of the Registrar would make the Act, 1860 unworkable as the electoral roll declared by the Assistant Registrar as Election Officer under Section 25(2) could be different from the list subsequently registered under Section 4-B of the Act, 1860. In view of the aforesaid, the order dated 28.6.2023 so far as it notifies a tentative list of 37 members excluding the petitioner from the same and without passing any orders under Section 4-B of the Act, 1860 is contrary to law and is liable to be quashed and a direction is to be issued to the Assistant Registrar to register the list of members of the general body under Section 4-B of the Act, 1860 after due examination of the different lists submitted before him by the petitioner no. 2 before holding the elections under Section 25(2).

23. The order dated 28.6.2023 passed by the Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh so far as it notifies a tentative list of 37 members excluding the petitioners is, hereby, quashed.

24. The Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh, i.e., respondent no. 1 is directed to pass appropriate orders in accordance with law under Section 4-B of the Act, 1860 regarding the different lists of members of the general body submitted by petitioner no. 2 on 10.10.2022 and 31.10.2022 within a period of one month from today and before holding the elections under Section 25(2). The meeting to hold elections under Section 25(2), shall be called by the Assistant Registrar in accordance with the bye-laws of the

Society immediately after appropriate orders are passed under Section 4-B of the Act, 1860.

25. It is clarified that the order dated 28.6.2023 passed by the Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh so far as it rejects the claim of petitioner no. 2 based on the elections dated 20.10.2022 is not being interfered with through the present order.

26. With the aforesaid observations and directions, Writ – C No. 30624 of 2023 is ***dismissed*** and Writ – C No. 23066 of 2023 is ***allowed***.

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**(2024) 7 ILRA 688**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 01.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ C No. 1002401 of 1985

**Smt. Shanti Devi ...Petitioner**
**Versus**
**District Judge, Gonda & Ors. ...Respondents**

**Counsel for the Petitioner:**
Pramod Kumar, S.K. Srivastava, U.S. Sahai

**Counsel for the Respondents:**
C.S.C., Pradeep Agrawal

**A. Civil Law-Constitution of India, 1950-Article 226-Indian Forest Act, 1927-Section 4-Lease dispute-the petitioner claimed leasehold rights over approximately 123 acres of land based on the lease deed executed in 1951 by the Ex-Zamindar Rani Kaneez Bakar-the disputed land was declared banjar under UPZA & LR Act-the court ruled that non-appearance by the petitioner to prove her case allowed the assumption that the claim was not genuine-despite the petitioner's name being recorded in the revenue records, the court found that these entries were made without following proper legal procedures and thus did not confer any rights to the petitioner-The court upheld the validity of the forest land notification issued by the State under the Forest Act, 1927-The petitioner's claims to the land based on the lease deed were found to be invalid.(Para 1 to 77)**

**The petition is dismissed.** (E-6)

**List of Cases cited:**

1. C/M Vs Dy Dir. of Edu. (2006) LCD 1328

2. Jyoti Bhushan Mishra & anr. Vs. D. F.O. Gonda North Gonda & anr. (2006) LCD 989

3. Raghunath Singh Vs. St. of U.P. (1966) RD 337

4. Mahendra Lal Jaini Vs St. of U.P. (1962) SCC OnLine SC 55

5. St. of U.P. Vs IV A.D.J. (2012) SCC OnLine All 709

6. St. of U.P. Vs Kamal Jeet Singh (2017) SCC OnLine All 4733

7. Wali Mohd. Vs Ram Surat (1989) 4 SCC 574

8. Vishwa Vijay Bharati Vs Fakhrul Hassan (1976) 3 SCC 642

9. Ram Awadh Vs DDC (1985) RD 363 = 1985 SCC Online All 430

10. Gurmukh Singh & ors. Vs DDC/A.D.M. (F & R). & ors.. (1997) RD 276

11. Ram Awadh Vs Collector/ DDC (2011) 113 RD 712 = 2011 SCC OnLine All 2641

12. S. Saktivel Vs M. Venugopal Pillai (2000) 7 SCC 104

13. Vidhyadhar Vs Manikrao (1999) 3 SCC 573.

14. Shantabai Vs St. of Bom. (1958) AIR SC 532= 1958 SCC Online SC 20

15. Sawarni Vs Inder Kaur (1996) 6 SCC 223

16. Bhimabai Mahadeo Kambekar Vs Arthur I & E Co. (2019) 3 SCC 191

17. Dhirajlal Girdharlal Vs CIT (1954) SCC Online SC 46

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

1. Heard Sri Mohd. Arif Khan Senior Advocate assisted by Sri U. S. Sahai Advocate, the learned counsel for the petitioner and Sri Kuldeep Pati Tripathi, the learned Additional Advocate General assisted by Sri Arya Shreshtha Tiwari, the learned Additional Chief Standing Counsel.

2. Briefly stated, the facts pleaded in the Writ Petition are that the State Government had issued a notification dated 19.04.1954 under Section 4 of the Forest Act, 1927 for constituting certain lands as a reserved forest. The petitioner filed objections before the Forest Officer stating that he was the Seerdar of the land in question and the erstwhile Zamindar Rani Kaneez Bakar had executed a lease-deed in her favour on 06.05.1951 for cultivation purpose. Some Mahua trees were existing on the land in dispute, which had been sold to the petitioner for a sale consideration of Rs.2,000/-.

3. The Forest Settlement Officer passed an order dated 13.04.1957 stating that the owner of the land had executed a patta in favour of the petitioner on 06.07.1951, hence the proceedings were dropped and the land was released in favour of the lessee.

4. The Forest Department challenged the order by filing an appeal which was allowed and the matter was remanded.

5. After remand, the petitioner's objections were turned down by means of an order dated 13.05.1959. The petitioner again filed an appeal, which was dismissed by means of order dated 26.09.1961. The petitioner filed a revision before the State Government, which was referred to the Tribunal / District Judge, Gonda and was registered as Civil Revision No. 37 of 1973. The District Judge allowed the revision by means of an order dated 24.08.1973 and the matter was again remanded to the Forest Settlement Officer.

6. After remand, the Forest Settlement Officer passed an order dated 23.06.1982, whereby the petitioner's objection has been rejected again. The petitioner filed a Misc. Revenue Appeal No.11 of 1982 which was rejected by means of a judgment and order dated 28.02.1985 passed by the District Judge, Gonda.

7. The petitioner has filed the instant Writ Petition seeking quashing of the judgment and order dated 23.06.1982 passed by the Forest Settlement Officer, Gonda in Case No.1129 under Section 6 of the Forest Act and the judgment and order dated 28.03.1985 passed by the District Judge, Gonda in Misc. Revenue Appeal No.11 of 1982.

8. The State has filed a counter affidavit denying that any lease had actually been executed in favour of the petitioner by ex-Zamindar Rani Kaneez Bakar on 14.07.1951. Sale of Mahua trees by Rani Kaneez Bakar to the petitioner has also been denied.

9. The petitioner has filed a rejoinder affidavit and a copy of a registered lease-deed dated 14.07.1951 executed by Rajkumari Kaneez Bakar in favour of the petitioner Smt. Shanti Devi granting lease-hold rights in respect of 123.95 acres land situated in Mauja Pure Datai, Mohal Birhara, Pargana and District Gonda along with the trees existing on it on a rental of Rs.374 and 6 aanna per year with effect from year 1358 Fasli. It is recorded in the lease-deed that the possession of the land was handed over to Smt. Shanti Devi with effect from 20.01.1951 and mutation of her name had also been carried out. The lease-deed further states that the Lessee will have all the rights generation after generation in respect of the leased land and the trees existing thereon and that the rent would be payable in two installments, half after Kharif crop in the month of Kwaar and half after Rabi crop in the month of Vaishakh. This lease-deed was registered in the office of Sub-Registrar on 07.09.1951.

10. It has further been stated in the rejoinder affidavit that Smt. Shanti Devi has paid Rs.240.63 towards lease-rent through a treasury challan, a copy whereof has been annexed with the rejoinder affidavit.

11. The State has filed a supplementary counter affidavit annexing therewith a copy of the relevant extract of Khatauni for the year 1356 Fasli (i.e. 01.07.1948 to 30.06.1949, before commencement of U.P. Zamindari Abolition and Land Reforms Act) and a note is written on it that *Zeeman spasht nahi hai* i.e the class of the land is not clear. Land bearing Gata Nos. 225/22.43, 228/2-11.80 acre, 302/4-37.5 acre, 379/5-70.40 acre, 940/1-13.10 acre and 980-20.40 acre were recorded in the name of Gram Panchayat as 'Banjar Deegar'. The petitioner claims to have obtained lease-hold rights in respect of the land in question through the lease-deed dated 06.07.1951, which was registered on 07.09.1951 and in the Khatauni for the year 1359 Fasli (i.e. 01.07.1951 to 30.06.1952), land bearing Gata Nos.379/5-44.23 acre, 225/1-23.79 acre, 228/3-11.68 acre and 302-35.85 acre was mentioned as Imaarti Jungle and it was recorded in the name of the petitioner - Smt. Shanti Devi. However, in the revenue records relating to the years 1377-1379 Fasli, Gata Nos.379/5-42.74, 225/1-23.79, 228/3-11.68, 302/1-33.22 acre, 940/1-12.90 and 980-18.50 acre are recorded as Jungle. The name of Forest Range Officer is recorded in revenue records in basic year Khatauni and the same continued to be recorded even after consolidation.

12. A supplementary rejoinder affidavit has been filed by the petitioner annexing therewith copies of Khataunis for the year 1359 Fasli and 1362 Fasli in which the land bearing Gata No.379/5 area 44-23 was recorded in the name of the petitioner Smt. Shanti Devi.

13. A copy of the statement of Anand Prakash, husband of the petitioner Smt. Shanti Devi has also been annexed with the supplementary rejoinder affidavit, wherein he stated that her wife Smt. Shanti Devi is the Seerdar of the land in question, which she had taken on lease in the year 1950-51 from Zamindar Rani Kaneez Bakar. At that time he was posted as District Engineer, Gonda. The leased land measures 150 acres. He stated that he and his wife had gone to Lucknow to meet the Manager of the Zamindar for taking this land. The Zamindar herself had talked to his wife and had agreed to give the land on lease and

under her orders, the lease-deed was executed at Gonda and it was signed by the Zamindar and was accepted by the petitioner. Thereafter, four leases were admitted in Tehsil Gonda and a single document in respect of three leases was executed. It was done because the revenue payable in respect of these leases exceeded Rs.100 and its registration was mandatory. Therefore, the lease-deed was presented by the petitioner in the Registrar's Office and it was executed by the Zamindar's Manager in the capacity of her power of attorney holder. Thereafter, the Manager, Ziledar and Amin demarcated the land in presence of Patwari and handed over its possession and since then, he started making efforts to make the land cultivable. Under supervision of his employee Chaudhary Harbans Singh, who used to manage the land, the first crop of Arhar was sown in the year 1360 Fasli and thereafter the second crop of Lahi was sown. After that, the Forest Department restrained them and the petitioner lost possession of the land.

14. The petitioner's husband Anand Prakash further stated that there were about 43 trees of Mahua on the land, which were purchased for Rs.2,000/-. This amount was paid through a cheque, which was encashed. Receipt for the amount was issued by Manager Atahar Hussain Nakvi. **He further stated that the Tahsildar had passed an order for mutation and it was carried out in the Khatauni.** He also stated that he got Rs.1,000/- per year for two years as value for Mahua crop but thereafter he was restrained by the Forest Department and since then he neither got value of Mahua crop nor possession of the trees. He stated that value of the trees would have been approximately Rs.300/- to Rs.350/- per tree. The witness stated that his wife (the petitioner) was suffering from Blood Pressure and Gout and was not in a position to give her statement. In cross-examination, the petitioner's husband stated that the petitioner was present at Gonda and she had gone to manage the land occasionally. The land was in Mauja Pure Datai, which was about 20 miles away from Gonda. The petitioner had gone to the land with her husband once or twice in the year 1951-52 but she never went there on her own. The petitioner did not observe Parda. He could not tell whether any dense Jungle was standing on the land in dispute at the time of making the statement. As far as he knew, there was no dense forest and the land was cultivable. The Forest Department had taken possession from the petitioner in 1954-55 after issuance of the notification. A few months after execution of the lease-deed, a deal for the trees was entered into separately. This negotiation was held in April 1951 for the first time. However, he did not get any of the trees cut down as he did not need its timber. He further stated that Arhar and Laahi crops were sown only once in the year 1360 Fasli. His Manager Harbans Singh used to keep accounts of expenses incurred in sowing the crop and as the Manager had died, he could not get any of the documents.

15. A copy of the statement of Shri S. M. Atahar Hussain Nakvi has also been annexed with the supplementary rejoinder affidavit. This statement had been recorded through Commission executed by Sri. Ravindra Kumar Srivastava Advocate Commissioner. He stated that Birhara State was not in District-Gonda but it was in District Barabanki. No village forming a part of Birhara State fell in District-Gonda. Mauja Pure Datai is situated in District Gonda. Proprietor of this Mauja was Smt. Rani Kaneez Bakar D/o Raja Abdul Hasan,

Talukdar Riyasat Birhara, District Barabanki. **Rani Kaneez Bakar had executed a registered power of attorney in his favour but he did not have the original power of attorney because he had handed over the charge of all the documents**. A copy of the power of attorney dated 31.05.1976 available on the paper book was admitted by this witness. He stated that 3-4 lease-deeds were executed in favour of the petitioner in respect of land situated in Pure Datai but he did not remember as to whether the lease-deeds had been registered or not. Thereafter, he said that he was remembering that out of the lease-deeds, one lease-deed was registered in the Registrar's Office. After execution of the lease-deed, possession was handed over to the petitioner and lease-rent was taken from her. Value of the trees existing on land was also taken. In his cross-examination, **Atahar Hussain Nakvi stated that Rani Kaneez Bakar was a Parda Nasheen lady and as per his knowledge, she had never gone to any Registrar's Office or to any Court.** Power of attorney was registered in the Registrar's Office at Lucknow and he himself had taken her to the Registrar's Office. He did not remember as to how many sale deeds had been executed in favour of the petitioner and he did not remember area of land leased or the number of trees existing on the land. The trees were scattered and the land was vacant. The compensation of trees was perhaps Rs.2,000/- and receipt in this regard has been given. Perhaps, the compensation of trees had been taken before execution of the lease-deed. No mention of payment of compensation of trees was made in the lease-deed. However, he denied his signatures on the rent receipt.

16. The petitioner has annexed with the supplementary rejoinder affidavit a copy of a letter dated 21.07.1952 sent by the Manager of the Lessor to the petitioner's husband Anand Prakash, stating that he had received a cheque of Rs.280/- from the petitioner's husband, which was being returned because it was a crossed cheque and he did not have an account in Imperial Bank and secondly, the Lessee was liable to pay Rs.560/- for the year 1359 Fasli and there was no use in paying only a part of the rent. It is written in that letter that Pure Datai and Kunderkala are owned by two different proprietors. Pure Datai belongs to Rani Kaneez Bakar and her account is in Central Bank, Gonda. Kunderkala belongs to Rani Kaneez Ali and her account is in Imperial Bank, Gonda.

17. The Manager of the Zamindar sent another letter to the petitioner's husband stating that he had received a cheque of Imperial Bank in the name of Rani Kaneez Ali and it was a crossed cheque while the bank account was in the Imperial Bank and it was in the name of Mohd. Ameer Haider Khan Maharaj, Kumar of Mahmoodabad. The Manager demanded a crossed cheque in the name of Maharaj Kumar Mohd. Ameer Haider Khan.

18. The petitioner further claims that she had paid Rs.2,000/- to Rajkumari Kaneez Bakar towards price of unspecified number of existing upon land bearing Gata Nos.375, 940, 980, 302 and 228, along with 204 Mahua trees existing on plot No.225 on 21.06.1951 through a cheque dated 19.06.1951 drawn on Imperial Bank.

19. The petitioner has annexed a copy of a Treasury challan dated 18.03.1954

regarding payment of Rs.399.03 towards land revenue for the year 1361 Fasli for lands situated in Village Kashhra, Kunderkala and Pure Datai. The challan mentions that the petitioner had paid 88 Rupees 8 annas for village Kashhra, 55 Rupees 2 annas for Village Kunderkala and 255 Rupees 6 annas and 03 paisa for Village Pure Datai.

20. Sri Mohamad Arif Khan Senior Advocate , the learned Counsel for the petitioner, has submitted that the lease-deed was executed on 06.07.1951 and it was registered on 07.09.1951 for the reason that the three lease-deeds executed earlier had not been registered. As the lease-deeds had been executed prior to enactment of U.P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as 'The U.P.Z.A.L.R. Act'), the petitioner became a Seerdar of the leased land under Section 19 (iv) of the U.P. Z.A.L.R. Act. The trees existing on the land were cut down and the land became cultivable. The petitioner had paid rent to the proprietor/Government.

21. Learned counsel for the petitioner has further submitted that the land was recorded as 'Banjar Deegar' and it did not vest in the State upon abolition of Zamindari. Therefore, Section 3 of the Forest Act will not apply to this land.

22. The learned counsel for the petitioner also submitted that while passing the impugned order, the Forest Settlement Officer has not followed directions issued by the District Judge in the remand order.

23. In support of his submissions, the learned Counsel for the petitioner has relied upon the judgments in the cases of **Committee of Management Versus Deputy Direction of Education:** 2006 LCD 1328**, Jyoti Bhushan Mishra and another Versus Divisional Forest Officer, Gonda North, Gonda and another: (2006) LCD 989 and Raghunath Singh Versus State of U.P.:** 1966 RD 337.

24. Per contra, Sri. Arya Shreshth Tiwari, the learned Additional Chief Standing Counsel representing the Forest Department of the State of U.P., has submitted that the District Judge had set aside the earlier order dated 30.05.1959 passed by the Forest Settlement Officer and the order dated 26.09.1961 passed by the Additional Commissioner, Faizabad Division on the ground that both the authorities were required to answer the question whether Smt. Shanti Devi had acquired any Seerdari rights in respect of four plot Nos.940/1, 980, 379/5 and 302 by virtue of the lease-deed referred to above and in respect of the other two plots on account of being in cultivatory possession thereof since before the abolition of Zamindari and they had failed to discuss the oral and documentary evidence available on record.

25. Sri. Tiwari has submitted that the petitioner's claim is based on the lease-deeds executed in the year 1951 and entry of her name in the revenue records. The petitioner has not produced the original lease-deed or its certified copy at any stage of the proceedings. Although it is recorded in the revisional order dated 24.08.1973 passed by the District Judge that the revisional Court had seen the original Pattas, it is also mentioned therein that none of the four original lease-deeds had been filed to support the petitioner's contention. Mere production of the original lease-deeds for perusal of the revisional

Court without bringing it on record of the case will not be sufficient to prove the claim based on the lease-deeds.

26. Sri. Arya Shreshth Tiwari has filed elaborate written submissions and the submissions have been supported by the judgments in the cases of **Mahendra Lal Jaini Versus State of U.P.:** 1962 SCC OnLine SC 55, **State of U.P. Versus IV Additional District Judge:** 2012 SCC OnLine All 709, **State of U.P. Versus Kamal Jeet Singh**: 2017 SCC OnLine All 4733, **Wali Mohd. Versus Ram Surat**: (1989) 4 SCC 574, **Vishwa Vijay Bharati Versus Fakhrul Hassan:** (1976) 3 SCC 642, **Ram Awadh Versus Deputy Director of Consolidation:** 1985 RD 363 = 1985 SCC OnLine All 430, **Gurmukh Singh and Ors. Versus Dy. Director of Consolidation/ A.D.M. (F. and R.) and Ors.,** 1997 RD 276, **Ram Awadh Versus Collector/District Deputy Director of Consolidtion**: (2011) 113 RD 712 = 2011 SCC OnLine All 2641, **S. Saktivel Versus M. Venugopal Pillai**: (2000) 7 SCC 104 and **Vidhyadhar Versus Manikrao:** (1999) 3 SCC 573.

27. Now I proceed to adjudicate the dispute involved in the case in light of the pleadings and submissions advance on behalf of the parties, referred to above.

28. The petitioner claims her title on the basis of the lease-deed dated 06.07.1951 executed by Rajkumari Kaneez Bakar in respect of plot nos. 940 area 13-10, Plot no. 980 area 25-50, Plot No. 379/5 area 49-50 and plot no. 302 area 35-85, totaling to 123 acres 95 decimal situated in village Poore Datai. A perusal of the lease-deed dated 06.07.1951 shows that it was presented for registration by the petitioner on 14.07.1951 and its execution by the lessor was acknowledged by her power of attorney holder Sri. Syed Mohd. Atahar Hussain Naqvi on 06.09.1951. However, there is no documentary evidence on record to prove the due execution of a power of attorney in favour of Sri. Syed Mohd. Atahar Hussain Naqvi. Sri S. M. Atahar Hussain Naqvi had stated that Rani Kaneez Bakar had executed a registered power of attorney in his favour but he did not have the original power of attorney because he had handed over the charge of all the documents. He further stated that Rani Kaneez Bakar was a Parda Nasheen lady and as per his knowledge, she had never gone to any Registrar's Office or to any Court. Thus the execution of a power of attorney by Rani Kaneez Bakar and its registration could not be proved.

29. The lease-deed dated 06.07.1951 states that the lessor had already given 124 acres 95 decimal land on lease to the petitioner in the year 1358 Fasli (01.07.1950 to 30.06.1951), and had handed over its possession with effect from 20.01.1951, but it makes no mention of the consideration for the lease granted in the year 1358 Fasli. There is no evidence regarding any payment of consideration for the lease granted in the year 1358 Fasli. Therefore, the leases allegedly granted in the year 1358 Fasli were void for want of consideration. Moreover, no registered lease-deed was executed prior to 06.07.1951 and, therefore, the same was not admissible in evidence.

30. The lease-deed dated 06.07.1951 mentions the consideration to be rent amounting to Rs.374 and 6 annas per year, which was payable in two installments, half (i.e.187 Rupees and 3 annas) after Kharif crop in the month of Kwaar and half after Rabi crop in the month of Vaishakh. The

petitioner claims to have paid Rs.240.63 towards rent of the leased land through a treasury challan dated 13.07.1953. A copy of the challan has been filed with the rejoinder affidavit and it shown that in the column titled "Full particulars of the remittance and of authority (if any)", it mentions – "L.R. of 13607 of V. Pure Datai Distt Gonda". The column titled "Head of account" mentions "L.R. of Distt. Gonda". The treasury challan does not make a mention of any plot number and the quantum of the amount paid through it does not correspond to the amount payable as lease-rent under the lease-deed dated 06.07.1951 – either annually or six-monthly. Therefore, the entries made in this treasury challan dated 13.07.1953 do not correspond to the lease-deed dated 06.07.1951 and it does not prove that the petitioner had paid any rent to the owner of the land Rajkumari Kaneez Bakar.

31. The petitioner has annexed with the supplementary rejoinder affidavit a copy of a letter dated 21.07.1952 sent by the Manager of the Lessor to the petitioner's husband Anand Prakash, stating that he had received a cheque for Rs.280/- from the petitioner's husband, which was being returned because it was a crossed cheque and he did not have an account in Imperial Bank and secondly, the Lessee was liable to pay Rs.560/- for the year 1359 Fasli and there was no use in paying only a part of the rent. It is written in that letter that Pure Datai and Kunderkala are owned by two different proprietors. Pure Datai belongs to Rani Kaneez Bakar and her account was in Central Bank, Gonda. Kunderkala belongs to Rani Kaneez Ali and her account was in Imperial Bank, Gonda. This letter does not mention the plot numbers in respect of which the lease-rent was demanded and it is not a proof of payment of lease-rent by the petitioner. The amount of rent mentioned in this letter also does not correspond to the lease-rent mentioned in the lease-deed dated 06.07.1951.

32. The Manager of the Zamindar had sent another letter to the petitioner's husband stating that he had received a cheque of Imperial Bank in the name of Rani Kaneez Ali and it was a crossed cheque while the bank account was in the Imperial Bank and it was in the name of Mohd. Ameer Haider Khan Maharaj Kumar of Mahmoodabad. The Manager demanded a crossed cheque in the name of Maharaj Kumar Mohd. Ameer Haider Khan. However, there is nothing on record to establish that Rani Kaneez Bakar had demanded any rent from the petitioner or that the petitioner had paid any rent to the Rani Kaneez Bakar.

33. In absence of proof of payment of any consideration under the lease-deed dated 06.07.1951, the petitioner cannot claim any right on the basis of the lease-deed.

34. The petitioner has annexed a copy of a challan dated 18.03.1954 regarding payment of Rs.399.03 towards land revenue for the year 1361 Fasli for lands situated in Village Kashhra, Kunderkala and Pure Datai. The challan mentions that the petitioner had paid 88 Rupees 8 annas for village Kashhra, 55 Rupees 2 annas for Village Kunderkala and 255 Rupees 6 annas and 03 paisa for Village Pure Datai. The challan does not mention any plot numbers in village Pure Datai in respect of which the lease-rent was paid and the amount of 255 Rupees 6 annas and 03 paisa does not correspond to the lease-rent mentioned in the lease-deed dated

06.07.1951. Thus this copy of challan dated 18.03.1954 does not establish payment of lease-rent under the lease-deed dated 06.07.1951.

35. The petitioner Smt. Shanti Devi did not appear as a witness to prove her own case. As she did not get herself examined, there was no occasion for her cross-examination. The petitioner's husband Anand Prakash had stated in his statement that she was not a Parda Nasheen lady. She did not come forward to get her statement recorded merely because she was suffering from Blood Pressure and Gout. This was no reason for the petitioner not coming forward to get her statement recorded and, in any case, her statement could have been recorded on commission like another witness S.M. Atahar Hussain Nakvi.

36. Both the learned Courts below have drawn an adverse inference from the petitioner's abstaining from appearing as a witness to prove her case. In this regard, it will be relevant to refer to the provision contained in Section 114 of the Evidence Act, 1872 and illustration (g) appended thereto, which provides as follows: -

***<u>"114. Court may presume existence of certain facts.</u>**—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—*

* * *

*(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;*

* * *"

37. In **Vidhyadhar versus Manikrao**: (1999) 3 SCC 573, the Hon'ble Supreme Court held that: -

*"17. Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council...."*

38. Non-appearance of the petitioner to prove her case and to offer her to be cross-examined raises a presumption against the genuineness of the case set up by her.

39. As the petitioner has failed to establish due execution of the lease-deed dated 06.07.1951 and payment of consideration under the lease-deed dated 06.07.1951, she cannot claim any rights on the basis of this lease-deed.

40. The petitioner did not lead any evidence in respect of her claim of being in cultivatory possession of two other plots since before the abolition of Zamindari and no evidence in this regard has been placed even before this Court. Therefore, this plea cannot be accepted.

41. The petitioner further claims that she had paid Rs.2,000/- to Rajkumari Kaneez Bakar towards price of the trees existing upon land bearing Gata Nos.375, 940, 980, 302 and 228 along with 204 Mahua trees existing on plot No.225 on

21.06.1951 through a cheque dated 19.06.1951 drawn on Imperial Bank. The petitioner claims to have acquired rights in respect of the land in question through a registered lease-deed dated 06.07.1951 for an agreed consideration of rent amount to Rs. Rs.374 and 6 aanna per year but she claims to have purchased the trees existing on the land for a sale consideration of Rs.2,000/- through an oral arrangement, without execution of any deed of sale. In this regard, it would be appropriate to refer to Section 92 of the Evidence Act, 1872, which reads as thus: -

*"92. Exclusion of evidence of oral agreement.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:*

***

*Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents."*

42. The learned Additional Chief Standing Counsel has placed before this Court a judgment of the Hon'ble Supreme Court in the case of **S. Saktivel versus M. Venugopal Pillai**: (2000) 7 SCC 104, wherein it was held that: -

*"5…A perusal of the aforesaid provision shows that what Section 92 provides is that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced in the form of a document, have been proved, no evidence of any oral agreement or statement is permissible for the purpose of contradicting, varying, adding or subtracting from the said written document. However this provision is subject to provisos (1) to (6) but we are not concerned with other provisos except proviso (4), which is relevant in the present case. The question then is whether the defendant-appellant can derive any benefit out of proviso (4) to Section 92 for setting up oral arrangement arrived at in the year 1941 which has the effect of modifying the written and registered disposition. Proviso (4) to Section 92 contemplates three situations, whereby:*

*(i) The existence of any distinct subsequent oral agreement to rescind or modify any earlier contract, grant or disposition of property can be proved.*

*(ii) However, this is not permissible where the contract, grant or disposition of property is by law required to be in writing.*

*(iii) No parol evidence can be let in to substantiate any subsequent oral arrangement which has the effect of rescinding a contract or disposition of property which is registered according to the law in force for the time being as to the registration of documents.*

*6. In sum and substance what proviso (4) to Section 92 provides is that where a contract or disposition, not required by law to be in writing, has been arrived at orally then subsequent oral agreement modifying or rescinding the said contract or disposition can be substantiated*

*by parol evidence and such evidence is admissible. Thus if a party has entered into a contract which is not required to be reduced in writing but such a contract has been reduced in writing, or it is oral, in such situations it is always open to the parties to the contract to modify its terms and even substitute by a new oral contract and it can be substantiated by parol evidence. In such kind of cases the oral evidence can be let in to prove that the earlier contract or agreement has been modified or substituted by a new oral agreement.* ***Where under law a contract or disposition is required to be in writing and the same has been reduced to writing, its terms cannot be modified or altered or substituted by oral contract or disposition. No parol evidence will be admissible to substantiate such an oral contract or disposition. A document for its validity or effectiveness is required by law to be in writing and, therefore, no modification or alteration or substitution of such written document is permissible by parol evidence and it is only by another written document the terms of earlier written document can be altered, rescinded or substituted.*** *There is another reason why the defendant-appellant cannot be permitted to let in parol evidence to substantiate the subsequent oral arrangement. The reason being that the settlement deed is a registered document. The second part of proviso (4) to Section 92 does not permit leading of parol evidence for proving a subsequent oral agreement modifying or rescinding the registered instrument.* ***The terms of registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise.*** *If the oral arrangement as pleaded by the appellant, is allowed to be substantiated by parol evidence, it would mean rewriting of Ext. A-1 and, therefore, no parol evidence is permissible.*

(Emphasis added)

43. In this regard, it would be relevant to refer to the definition of 'immovable property' contained in Section 2(6) of the Registration Act, 1908, which is as follows: -

*"(6) "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and* ***things attached to the earth****, or permanently fastened to anything which is attached to the earth,* ***but not standing timber****, growing crops nor grass;*

44. A Constitution Bench judgment of the Hon'ble Supreme Court in Shantabai versus State of Bombay: AIR 1958 SC 532 = 1958 SCC OnLine SC 20, held that: -

*"23. Now it will be observed that "trees" are regarded as immoveable property because they are attached to or rooted in the earth. Section 2(6) of the Registration Act expressly says so and, though the Transfer of Property Act does not define immoveable property beyond saying that it does not include "standing timber growing crops or grass", trees attached to earth (except standing timber) are immoveable property, even under the Transfer of Property Act, because of Section 3(26) of the General Clauses Act. In the absence of a special definition, the general definition must prevail. Therefore, trees (except standing timber) are immoveable property."*

*24. Now, what is the difference between standing timber and a tree? It is clear that there must be a distinction*

*because the Transfer of Property Act draws one in the definitions of "immoveable property" and "attached to the earth"; and it seems to me that the distinction must lie in the difference between a tree and timber. It is to be noted that the exclusion is only of "standing timber" and not of "timber trees".*

*Timber is well enough known to be—*

*"wood suitable for building houses, bridges, ships etc., whether on the tree or cut and seasoned." (Webster's Collegiate Dictionary).*

*Therefore, "standing timber" must be a tree that is in a state fit for these purposes and, further, a tree that is meant to be converted into timber go shortly that it can already be looked upon as timber for all practical purposes even though it is still standing. If not, it is still a tree because, unlike timber, it will continue to draw sustenance from the soil."*

45. It is relevant to note that the petitioner's husband Anand Prakash had stated that he got Rs.1,000/- per year for two years as value for Mahua crop, which establishes that the trees standing on the land were fruit bearing trees and were not standing timber.

46. As the land had allegedly been transferred to the petitioner through a registered lease-deed and trees existing on the land, which were also immovable property, had not been transferred through that registered lease-deed, the subsequent transfer of the trees existing on the land amounts to variance of the terms of the registered lease-deed dated 06.07.1951 and this could only be made through another registered transfer deed and it could not be done orally.

47. The petitioner claims that she had paid Rs.2,000/- to Rajkumari Kaneez Bakar towards price of the trees existing upon land bearing Gata Nos.375, 940, 980, 302 and 228 along with 204 Mahua trees existing on plot No.225 on 21.06.1951 through a cheque dated 19.06.1951 drawn on Imperial Bank, but there is no proof that this amount had actually been credited to the bank account of Rajkumari Kaneez Bakar. Therefore, the petitioner's contention regarding payment of consideration for the trees existing on the land in dispute could not be established.

48. So far as the claim of the petitioner based on revenue entries is concerned, firstly, it is well settled law that the revenue entries do not confer any title. In **Sawarni versus Inder Kaur**, (1996) 6 SCC 223, the Hon'ble Supreme Court was pleased to lay down that: -

*"Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question."*

49. The aforesaid principle was reiterated by the Hon'ble Supreme Court in **Bhimabai Mahadeo Kambekar versus Arthur Import & Export Co.,** (2019) 3 SCC 191 in the following words: -

*"6. 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 has it 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 v. Inder Kaur (1996) 6 SCC 223, Balwant Singh v. Daulat*

*Singh (1997) 7 SCC 137 and Narasamma v. State of Karnataka (2009) 5 SCC 591.*

50. As the petitioner could not establish the due execution of the lease-deed dated 06.07.1951, the mere mutation of her name in the revenue records will not confer any rights upon her in respect of the land in dispute.

51. Secondly, the petitioner is claiming rights on the basis of entry of her name as hereditary tenant in the Khatauni of 1359 Fasli having one years' period of cultivation, which entry was allegedly incorporated in the Khatauni of 1359 Fasli on the basis of a registered lease-deed dated 06.07.1951. Both the learned Court's below have concurrently held that the entry in revenue records was not made in accordance with the procedure prescribed for the same and holding the entry to the illegal, both the Courts have rejected the petitioner's claim. The Khatauni of 1359 Fasli (01.07.1951 to 30.06.1952) relates to a period prior to 01.07.1952 – the date of enforcement of the U.P.Z.A.L.R. Act. The Petitioner did not produce any copy of extract of Khasra to establish her possession.

52. Before abolition of Zamindari, the rights and interest of the cultivators (Tenants) and proprietors (Landlords/Zamindars) were governed by the provisions of the United Provinces Tenancy Act, 1939 and the records of rights, title, rent, crop etc. of cultivators and proprietors were maintained as Khasra, Khatauni and Khewat respectively as prescribed by the Land Records Manual. Prior to enactment of U.P. Z.A.L.R. Act, 'Khewat' was the record of rights of Zamindars and 'Khasra' maintained under Chapter V of Land Record Manual was the record of all non-Zamindari abolition entries. The map and khasra for the area where the Zamindari Abolition Act does not apply are contained in Chapter A-V. Para 60 under Chapter V and Para A-60 under Chapter A-V provide forms of Khasra, which have some differences due to the difference of rights and interest of the cultivators, because under the U.P. Tenancy Act, 1939, the rights of cultivators were not transferable and it was only the proprietor i.e. Landlord who were the owner of the land.

53. In **Wali Mohd. versus Ram Surat**: (1989) 4 SCC 574, the Hon'ble Supreme Court held that: -

*"4... The said section deals with the question as to who is entitled to take or retain possession of the land in question. The plain language of the aforesaid clause (i) of sub-section (b) of Section 20 of the said Act suggests that this question has to be determined on the basis of the entry in the Khasra or Khatauni of 1356 Fasli Year prepared under Sections 28 and 33 respectively of the U.P. Land Revenue Act, 1901. An analysis of the said section shows that under sub-section (b) of Section 20 the entry in the Khasra or Khatauni of the Fasli Year 1356 shall determine the question as to the person who is entitled to take or retain possession of the land. It is, of course, true that **if the entry is fictitious or is found to have been made surreptitiously then it can have no legal effect as it can be regarded as no entry in law** but merely because an entry is made incorrectly that would not lead to the conclusion that it ceases to be an entry. It is possible that the said entry may be set aside in appropriate proceedings but once the entry is in existence in the Khasra or Khatauni of Fasli Year 1356, that would*

*govern the question as to who is entitled to take or retain possession of the land to which the entry relates.*

*5. It was submitted by learned counsel for the appellants that if the entry was not correct, it could not be regarded as an entry made according to law at all and the right to take or retain possession of the land could not be determined on the basis of an incorrect entry. He placed reliance on the decision of this Court in Bachan v. Kankar (1972) 2 SCC 555. In that judgment the nature of the entries in Khasra or Khatauni is discussed and it is also discussed as to how this entry should be made. This Court held that* ***entries which are not genuine cannot confer Adhivasi rights****. It has been observed that an entry under Section 20(b) of the said Act, in order to enable a person to obtain Adhivasi rights, must be an entry under the provisions of law and entries which are not genuine cannot confer Adhivasi rights. In that judgment it has been stated that the High Court was wrong when it held that though the entry was incorrect, it could not be said to be fictitious. That observation, however, has to be understood in the context of what follows, namely, that an entry which is incorrectly introduced into the records by reason of ill-will or hostility is not only shorn of authenticity but also becomes utterly useless without any lawful basis. This judgment, in our view, does not lay down that all incorrect entries are fictitious but only lays down that a wrong entry or incorrect entry which has been made by reason of ill-will or hostility cannot confer any right under Section 20(b) of the said Act. This decision is clarified by a subsequent judgment of this Court in Vishwa Vijay Bharati v. Fakhrul Hassan [(1976) 3 SCC 642 : AIR 1976 SC 1485 : 1976 Supp SCR 519] , where it has been held as follows: (SCC p. 645, para 14)*

***"It is true that the entries in the revenue record ought, generally, to be accepted at their face value and courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent, entries. The distinction may be fine but it is real. The distinction is that one cannot challenge the correctness of what the entry in the revenue record states but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title."***

(Emphasis added)

54. In **Vishwa Vijay Bharati versus Fakhrul Hassan**: (1976) 3 SCC 642, the Hon'ble Supreme Court reiterated that: -

*"14. It is true that the entries in the revenue record ought, generally, to be accepted at their face value and courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent, entries. The distinction may be fine but it is real. The distinction is that one cannot challenge the correctness of what the entry in the revenue record states but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title."*

55. In **Ram Awadh versus Deputy Director of Consolidation**: 1985 RD 363 = 1985 SCC OnLine All 430, this Court held that: -

*"7. ...The provisions of para A71 of Land Record Manual enjoins a duty upon the Lekhpal to make entry in the following manner:—*

*"A-71(3): If a person other than the one recorded in Col. 4 or 5 is found to be in actual occupation of the plot at the time of the partal, his name shall be recorded in the, remarks column as "baquabza" so and so. All such entries shall be made in red ink and in cases in which Court order regarding them are not received during the year, they shall be repeated in the same ink in the past year's Khasra, if possession is found to continue and treated as new entries so that they may be checked by the inspecting officers. Such entries shall in no case be made in black ink. In case the person recorded in column 5 of the Khasra is Asami holding land in lieu of maintenance allowance, the Qabiz will be recorded with the words "Dar Asami" before the name of such person in the remarks column of the Khasra by the Supervisor Qanungo."*

*8. In AIR 1968 SC 466 Smt. Sonawati v. Sri Ram, their Lordships of the Supreme Court have also emphasised that the entry of Qabiz should be in red ink.*

*9. A learned single Judge of this Court in 1982 RD 1 Ganga Ram v. D.D.C. has also emphasised that the entry in the remarks column should be in red ink. Therefore, I think that the revisional Court has patently erred in placing reliance upon the revenue entries in favour of the contesting opposite party and has wrongly commented that whether the entry is in black ink or red ink would not matter for its evidenciary value. Since the entries in favour of the contesting opposite party was not made strictly in accordance with the rules, the revisional Court was hot justified in placing reliance upon the same with a view to confer tenancy right upon the contesting opposite party Ram Deo."*

56. In **Gurmukh Singh and Ors. Vs. Dy. Director of Consolidation/ A.D.M. (F. and R.) and Ors.**: 1996 SCC OnLine All 823 = 1997 RD 276, it was held that: -

*"5 . Para A-60 of the U.P. Land Records Manual provides that the Khasra shall be prepared in Form P-3 given thereunder. Para A-80 provides that the Lekhpal while on partal in the village shall keep with him a book or memorandum of facts of possession in cases of the Chapter mentioned in Para A-72 (ii) and A-72 (iii). He shall make inquiries regarding nature of the land in dispute and he shall at the same time record the number of the plots. Para A-8D provides that after completing the Kharif or Rabi or said partal of a village each page of the memorandum in Form P.A. 24 shall be signed by the Lekhpal. Para A-81A provides that the Lekhpal shall inform the Chairman, the Land Management Committee and all tenure-holders of the village including the persons concerned with the entries made in the memorandum delivered to the Supervisor Kanungo. Para A-102C provides that the entries shall be valid if they are made in accordance with the provisions of the Land Records Manual.*

*6. It is clear from Para A-102C of the Land Records Manual that the entries will have no evidentiary value if they are not made in accordance with the provisions of Land Records Manual. There is presumption of correctness of the entries provided it is made in accordance with the relevant provision of Land Records Manual..."*

57. In **Ram Awadh versus Collector/District Deputy Director of**

**Consolidtion**: (2011) 113 RD 712 = 2011 SCC OnLine All 2641, the well settled law that where the law prescribes a manner for doing a thing, it can be done in that manner alone or not at all, was reiterated in the following words: -

*"10. It is also equally well settled that the procedure prescribed in law cannot be avoided, inasmuch as, if it is required to be done in a particular manner then it should be done in that manner alone and not otherwise. Reference may be had to the deci sions noticed in the case of Prof. Ramesh Chandra v. State of U.P. [2007 (4) ESC 2339 (All) (DB).] , (Para graph 27) extracted below:*

*"……(Vide Taylor v. Taylor (1876) 1 Ch. D. 426., Nazir Ahmed v. King Emperor AIR 1936 PC 253, Deep Chand v. State of Rajasthan AIR 1961 SC 1527, Patna Improvement Trust v. Smt. Lakshmi Devi AIR 1963 SC 1077, State of Uttar Pradesh v. Singhara Singh AIR 1964 SC 358, Nika Ram v. State of Himachal Pradesh (1972) 2 SCC 80, Ramchandra Keshav Adke v. Govind Joti Chavare (1975) 1 SCC 559, Chettiam Veettil Ammad v. Taluk Land Board (1980) 1 SCC 499, State of Bihar v. J.A.C. Saldanna (1980) 1 SCC 554, A.K. Roy v. State of Punjab (1986) 4 SCC 326, State of Mizoram v. Biakchhawna (1995) 1 SCC 156, J.N. Ganatra v. Morvi Municipality Morvi (1996) 9 SCC 495, Babu Verghese v. Bar Council of Kerala (1999) 3 SCC 422, and Chandra Kishore Jha v. Mahavir Prasad (1999) 8 SCC 266 ."*

58. The year 1359 Fasli denotes the period from 01.07.1951 to 30.06.1952 and entry in the Khatauni of 1359F was claimed to be on the basis of a lease-deed dated 06.07.1951, which was registered on 07.09.1951. Any entry on the basis of a transaction effected after commencement of the Fasli year could only be made in furtherance of a mutation order passed by a competent authority, the particulars whereof should be mentioned in the remarks column of Khatauni, whereas no such particulars are mentioned in the Khatauni in the present case. This establishes that the entry of the petitioner's name in the main column of Khatauni of 1359 Fasli has been made contrary to the established procedure of law and it appears to be fictitious. Para 102-B of Land record Manual provides that if the Lekhpal fails to comply with any of the provision contained in para 89A, the entries in remarks column of the Khasars will not be deemed to have been made in the discharge of his official duty.

59. In Khewat of 1345 Fasli and in Khatauni of 1356 Fasli the land in dispute was entered as waste land and in 1359 Fasli and 1360 Fasli Khatauni name of petitioner had been entered alongwith existing entry of Imarati Jangal, without mentioning particulars of the orders under which the mutation was affected. The entry of the name of the petitioner in the Khatauni of 1359 Fasli has not been made in accordance with the procedure prescribed by law and both the Courts below have rightly recorded a finding of fact that the entry of the petitioner's name in the Khatauni is fictitious, it has no evidentiary and probative value and it confers no right upon the petitioner.

60. The learned Counsel for the petitioner has also submitted that the land was recorded as Banjar or waste-land and it did not vest in the State upon abolition of Zamindari. This submission of the learned Counsel for the petitioner is also without any force, as would be apparent from a bare

perusal of the statutory provision contained in Section 6 (1) of the U.P.Z.A.L.R. Act, which reads follows: -

***"6. Consequences of the vesting of an estate in the State.***—*When the notification under Section 4 has been published in the Gazette, then, notwithstanding anything contained in any contract or document or in any other law for the time being in force and save as otherwise provided in this Act, the consequences as hereinafter set forth shall, from the beginning of the date of vesting, ensure in the area to which the notification relates, namely:*

*(a)* ***all rights, title and interest of all the intermediaries***—

*(i)* ***in every estate in such area including land (cultivable or barren), groveland, forests whether within or outside village boundaries****, trees (other than trees in village abadi, holding or grove), fisheries, tanks, ponds, waterchannels, ferries, pathways, abadi sites, hats, bazars and melas [other than hats, bazars and melas held upon land to which clauses (a) to (c) of sub-section (1) of Section 18 apply], and*

*(ii)* ***in all sub-soil in such estates including rights, if any, in mines and minerals, whether being worked or not, shall cease and be vested in the State of Uttar Pradesh free from all encumbrances;"***

(Emphasis added)

61. The word "Intermediary" occurring in Section 6 (1) of the U.P.Z.A.L.R. Act has been defined in Section 3 (12) of the Act as follows: -

*(12) "intermediary" with reference to any estate means a proprietor, under-proprietor, sub-proprietor, thekedar, permanent lessee in Avadh and permanent tenure-holder of such estate or part thereof;*

62. Thus the land in question, which was recorded in the Khewat and Khatauni as waste land, had vested in the State upon abolition of Zamindari. In such circumstances on account of the entry of land in dispute as waste land in 1356 F and afterwards the entry of Imarti Jangal, the State Government has the authority to notify it as a reserved forest and the aforesaid submission of the learned Counsel for the petitioner to the contrary is liable to be rejected

63. The learned Counsel for the petitioner has drawn attention of the Court towards the provisions of Forest Act to contend that land forming part of a holding of any tenure holder cannot be reserved as a Forest.

64. The words 'Forest' and 'Forest Land' are defined in sub sections (b) and (c) of Section 38A of the Forest Act, 1927, as it applies to the State of Uttar Pradesh, which read as follows: -

*"38-A. Definition.—In this Chapter unless there is anything repugnant in the subject or context:*

* * *

*(b) 'Forest' means a tract of land covered with trees, shrubs, bushes or woody vegetation whether of natural growth or planted by human agency, and existing or being maintained with or without human effort, or such tract of land on which such growth is likely to have an effect on the supply of timber, fuel, forest produce, or grazing facilities, or on climate, steam-flow, protection of land*

*from erosion, or other such matters, and shall include—*

*(i) land covered with stumps of trees of a forest;*

*(ii) land which is part of a forest or lies within it or was part of a forest or was lying within a forest on the first day of July, 1952;*

*(iii) such pasture land, waterlogged or cultivable or non-cultivable land, lying within, or adjacent to, a forest, as may be declared to be a forest by the State Government.*

*(c) 'Forest land' means a land covered by a forest or intended to be utilized as a forest;"*

65. Section 3 of the Forest Act as it applies to U.P., provides that: -

*"3.* ***Power to reserve forests****–The State Government may constitute any forest-land or waste-land which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled, a reserved forest in the manner hereinafter provided."*

66. The learned Counsel for the petitioner has relied upon a judgment rendered by a Division Bench of this Court in **Jyoti Bhushan Mishra versus Divisional Forest Officer**: 2006 SCC OnLine All 2022 = (2006) 100 RD 613, wherein it was held that the land comprised in any holding or grove or in any village abadi could not be notified as reserve forest under Section 4 of the Indian Forest Act. However, in that case, it was undisputed that the original tenure holders were the bhumidhars and the land in question was their holding and the disputed land was never notified under Section 20 of the Indian Forest Act. In the present case, the petitioner's rights as Seerdar are seriously disputed and a Notification under Section 20 was issued on 17.09.1970. Therefore, the judgment in the case of **Jyoti Bhushan Mishra** (Supra) would not apply to the facts of the present case.

67. The petitioner has filed a third Supplementary Affidavit before this Court stating that she has procured the Khewat of 1345 Fasli, wherein the name of Rajkumari Kaniz Baquar was recorded as Zamindaria. The petitioner is raising claim in respect of land bearing Gata Nos.225/22.43, 228/2-11.80 acre, 302/4-37.5 acre, 379/5-70.40 acre, 940/1-13.10 acre and 980-20.40 acre. In the copy of Khewat annexed with the third Supplementary Affidavit, lands bearing Gata Nos. 225/24-63 and 228/13-10 are recorded as "partee kadeem" i.e., old waste land. The type of land is recorded as "banjar kabile jaraat" i.e., barren or waste land which may be made cultivable. Lands bearing Gata nos. 302/35-85, 379/71-34, 940/13-28 and 980/20-50 are recorded as "banjar mazkoor" i.e. barren or waste lands, as aforesaid. From the aforesaid entries made in the Khewat filed by the petitioner herself, the lands in question were waste lands and the same could be reserved as Forest Land under provisions of the Forest Act.

68. In **Raghunath Singh versus State of Uttar Pradesh:** 1961 RD 337 = 1961 SCC OnLine All 57, placed by the learned Counsel for the petitioner, a Division Bench of this Court held that: -

*"12...the power of the State Government to constitute any land as a reserved forest is circumscribed by three conditions as laid down in Sec. 3. Firstly, it can constitute such forest land or waste*

*land to be a reserved forest as is the property of Government. Secondly it can do so if the proprietary rights in the land vest in the Government, or thirdly where it (the Government) is entitled to the whole or any part of the forest produce of any land. The sections of the Act after Sec. 3 prescribe the manner in which any land can be constituted a reserved forest.*

* * *

*17.Bhumidhars possess the right also to transfer by sale or otherwise lands held by them as such. There are, no doubt, restrictions on this power in certain directions still the basic fact remained that they can deal with the lands held by them as their property. The right of disposal also belonged to them. This right assured to them under sec. 152 of the Zamindari Abolition and Land Reforms Act will entitle a bhumidhar to affect alienations. As a matter of fact, section 161 allows to the bhumidhars and Seerdars to effect exchange of lands held by them. A bhumidhar can make a mortgage also so long as he does not part with possession. In certain conditions a bhumidhar and Seerdar also can transfer lands by way of lease. It is true that the law has not recognised any restricted right to transfer in favour of these persons but the limitations on that power do not dislodge the conclusion that the plots are really their, property. The State Government may in view of the abolition of the right, title, and interest of the intermediary and the vesting of the same in the State claims superior rights in the lands but for the purpose of Sec. 3 of the Forest Act a bhumidhar and similarly a Seerdar, must in our opinion be held to possess, the lands, as their property. They should further be deemed to possess proprietary rights also in them. These tenure holders are for all practical purposes entitled to the plots as their property while the right to exclusive possession and the right of disposal essential incidents proprietary rights also belonged to them."*

69. However, in **Mahendra Lal Jaini versus State of U.P.**: 1962 SCC OnLine SC 55, the Hon'ble Supreme Court held that: -

*"29. It is next urged that even if Sections 38-A to 38-G are ancillary to Chapter II, they would not apply to the petitioner's land, as Chapter II deals inter alia with waste land or forest land, which is the property of the Government and not with that land which is not the property of the Government, which is dealt with under Chapter V. That is so.* ***But unless the petitioner can show that the land in dispute in this case is his property and not the property of the State, Chapter II will apply to it.*** *Now there is no dispute that the land in dispute belonged to the Maharaja Bahadur of Nahen before the Abolition Act and the said Maharaja Bahadur was an intermediary. Therefore, the land in dispute vested in the State under Section 6 of the Abolition Act and became the property of the State. It is however, contended on behalf of the petitioner that if he is held to be a bhumidhar in proper proceeding, the land would be his property and therefore Chapter V-A, as originally enacted, if it is ancillary to Chapter II would not apply to the land in dispute. We are of opinion that there is no force in this contention.* ***We have already pointed out that under Section 6 of the Abolition Act all property of intermediaries including the land in dispute vested in the State Government and became its property. It is true that under Section 18, certain lands were deemed to be settled as bhumidhari lands, but it is clear that after land vests in the***

***State Government under Section 6 of the Abolition Act, there is no provision therein for divesting of what has vested in the State Government.*** *It is, however, urged on behalf of the petitioner that he claims to be the proprietor of this land as a bhumidhar because of certain provisions in the Act. There was no such proprietary right as bhumidhari right before the Abolition Act. The Abolition Act did away with all proprietary rights in the area to which it applied and created three classes of tenure by Section 129; bhumidhar, Seerdar and asami, which were unknown before****. Thus bhumidhar, Seerdar and asami are all tenure-holders under the Abolition Act and they hold their tenure under the State in which the proprietary right vested under Section 6. It is true that bhumidhars have certain wider rights in their tenure as compared to Seerdars; similarly Seerdars have wider rights as compared to asamis, but nonetheless all the three are mere tenure-holders-with varying rights under the State which is the proprietor of the entire land in the State to which the Abolition Act applied.*** *It is not disputed that the Abolition Act applies to the land in dispute and therefore the State is the proprietor of the land in dispute and the petitioner even if he were a bhumidhar would still be a tenure-holder. Further, the land in dispute is either waste land or forest land (far it is so for not converted to agriculture) over which the State has proprietary rights and therefore Chapter II will clearly apply to this land and so would Chapter V-A. It is true that a bhumidhar has got a heritable and transferable right and he can use his holding for any purpose including industrial and residential purposes and if he does so that part of the holding will be demarcated under Section 143. It is also true that generally speaking, there is no ejectment of a bhumidhar and no forfeiture of his land. He also pays land revenue (Section 241) but in that respect he is on the same footing as a Seerdar, who can hardly be called a proprietor because his interest is not transferable except as expressly permitted by the Act. Therefore, the fact that the payment made by the bhumidhar to the State is called land revenue and not rent would not necessarily make him a proprietor, because Seerdar also pays land-revenue, though his rights are very much lower than that of a bhumidhar. It is true that the rights which the bhumidhar has to a certain extent approximate to the rights which a proprietor used to have before the Abolition Act was passed; but it is clear that rights of a bhumidhar are in many respects less and in many other respects restricted as compared to the old proprietor before the Abolition Act. For example, the bhumidhar has no right as such in the minerals under the subsoil. Section 154 makes a restriction on the power of a bhumidhar to make certain transfers. Section 155 forbids the bhumidhar from making usufructuary mortgages. Section 156 forbids a bhumidhar, Seerdar or asami from letting the land to others, unless the case comes under Section 157. Section 189(aa) provides that where a bhumidhar lets out his holding or any part thereof in contravention of the provisions of this Act, his right will be extinguished****. It is clear therefore that though bhumidhars have higher rights than Seerdars and asamis, they are still mere tenure-holders under the State which is the proprietor of all lands in the area to which the Abolition Act applies.*** *The petitioner therefore even if he is presumed to be a bhumidhar cannot claim to be a proprietor to whom Chapter II of the Forest Act does not apply, and therefore Chapter V-A, as originally*

*enacted, would not apply : (see in this connection, Mst Govindi v. State of Uttar Pradesh [AIR [1952] All 88] . As we have already pointed out Sections 4 and 11 give power for determination of all rights subordinate to those of a proprietor, and as the right of the bhumiidhar is that of a tenure-holder, subordinate to the State, which is the proprietor of the land in dispute, it will be open to the Forest Settlement Officer to consider the claim made to the land in dispute by the petitioner, if he claims to be a bhumidhar. This is in addition to the provision of Section 229-B of the Abolition Act. The petitioner therefore even if he is a bhumidhar cannot claim that the land in dispute is out of the provisions of Chapter II and therefore Chapter V-A, even if it is ancillary to Chapter II, would not apply. We must therefore uphold the constitutionality of Chapter V-A, as originally enacted, in the view we have taken of its being supplementary to Chapter II, and we further hold that Chapter II and Chapter V-A will apply to the land in dispute even if the petitioner is assumed to be the bhumidhar, of that land."*

(Emphasis added)

70. Following **Mahendra Lal Jaini** (Supra), a coordinate Bench of this Court held in **State of U.P. versus IV Additional District Judge**, 2012 SCC OnLine All 709, that: -

*"30. Thus, it will be seen that the Supreme Court has laid down that bhumidhars have certain wider rights in their tenure-holding as compared to Seerdars. Similarly, Seerdars have wider rights as compared to Asamis, but nonetheless all three are mere tenure-holders with holding rights over the land, the proprietary right whereof is with the State. The Apex Court has gone on to hold that although Bhumidhars have higher rights than Seerdars and Asamis, they are still mere tenure-holders under the State, which is proprietor of all lands in the area to which Abolition Act applies i.e. Act, 1950. Petitioner even if presumed to be bhumidhar cannot claim to be proprietor of the land to whom Chapter II of the Forest Act does not apply."*

71. In the following paragraphs of the judgment in the case of **State of U.P. versus IV Additional District Judge** (Supra), this Court referred to the Division Bench judgment of in the case of **Raghu Nath Singh** (Supra) relied upon by the learned Counsel for the petitioner: -

*"26. Conclusion so drawn by this Court is well supported by a Division Bench judgment of this Court in the case of Raghu Nath Singh v. The State of Uttar Pradesh, reported in 1960 (RD) 337, wherein after reproducing the provisions of Act, 1927, it has been explained as follows:*

*"A careful examination of the provisions of the Indian Forest Act would show that the power of the State Government to constitute any land as a reserved forest is circumscribed by three conditions as laid down in Section 3. Firstly, it can constitute such forest land or waste land to be reserved forest as is the property of Government. Secondary it can do so if the proprietary rights in the land vest in Government, or thirdly where it (the Government) is entitled to the whole or any part of the forest produce of any land. The Sections of the Act after Section 3 prescribe the manner in which any land can be constituted a reserved forest."*

*27. The Division Bench has further held that the action of the State Government in constituting the leased*

*lands as reserved forest can be upheld, if any, of the three conditions are proved to exist.*

*28. In respect of the land in question with the enforcement of the Act, 1950, proprietary rights have vested in the State Government. It is admitted on record that most of the land qua which notification under Section 4 of Act, 1927 had been issued was forest and waste land. Therefore, condition No. 1, as pointed by the Division Bench stands satisfied."*

72. In **State of U.P. versus Kamal Jeet Singh**, 2017 SCC OnLine All 4733, a Division Bench of this Court held that: -

*"23. As regard the third question, the assertion of the private respondents is that the land included in holding of a tenure-holder cannot be declared as reserved forest as such notifications under the Forest Act are without jurisdiction. As noted above,* ***Section-3 gives power to the State Government to constitute any forest land or waste land, which is the property of the Government or over which the Government has proprietary right as the reserved forest.*** *Section 4 contemplates issue of notification with regard to land which is to be declared as reserved forest. Emphasis has been laid with regard to amended provision of Section 3 as substituted by the U.P. Act, 23 of 1965, on the basis of the amended definition, it has been submitted that the land which comprised of any holding or grove or in any village abadi cannot be declared as reserved forest. The Division Bench of this Court in Om Singh v. State of U.P., 1980 All LJ 78 summary of cases (77), had considered the provisions of Forest Act, 1927, including amended Section 3 of Forest Act. The Division Bench in the aforesaid case has held that even according to the amended definition, the third category of land, namely, "or any other land not being land for the time being comprised in any holding or any village abadi" does not control the first two categories, namely, forest land or waste land Section-3 covers forest land and waste land irrespective of whether the same comprise in a holding or not. The forest land or waste land, if it comprised in a holding, can always be declared as reserved forest exercising the powers under Section 3. The provision of Section 3 of the Forest Act cannot be read to the effect that a forest land or waste land included in any holding cannot be declared reserved forest. The said interpretation will run contrary to the object of Forest Act. A tenure-holder may have a forest land or waste land in his holding but if the said holding is to be excluded from declaration of reserved forest, the same will become beyond the power of the State to declare it reserved forest. The provision of Section 11 of Forest Act which contemplates that the land included under Section 4, even if it belongs to a claimant, can be acquired under Land Acquisition Act, clearly contemplates that the forest land or waste land included in the holding of tenure-holder can also be included in reserved forest.*

*24. The word "forest land" has not been defined under the Forest Act. The definition of forest land was added by Section 38(b) by U.P. Act No. 23 of 1965. Section 38A(b) defines forest and Sub-section (c) defines forest land which are quoted below:*

*"Section 38A(b) "forest" means a tract of land covered with trees, shrubs, bushes or woody vegetation whether of natural growth or planted by human agency, and existing or being maintained with or without human effort, or such tract*

*of land on which such growth is likely to have an effect on the supply of timber, fuel, forest produce, or grazing facilities, or on climate, stream-flow, protection of land from erosion, or other such matters and shall include:*

*(i) land covered with stumps of trees of a forest;*

*(ii) land which is part of a forest or was lying within a forest on the first day of July, 1952 ;*

*(iii) such pasture land, waterlogged or cultivable or non-cultivable land, lying within, or adjacent to, a forest as may be declared to be a forest by the State Government;*

*(c) "forest land" means a land covered by a forest or intended to be utilised as a forest."*

*25. The definition of word "forest" is very wide which also includes a tract of land - covered with trees, shrubs, bushes or woody vegetation whether of natural growth or planted by human agency. Section 38A(b)(iii) further clarifies that cultivable or non-cultivable land, lying within, or adjacent to, a forest may be declared to be a forest by the State Government. The word "claimant" has also been defined in Section 38A(a) which is extracted below:*

*"(a) "Claimant" as respects any land means a person claiming to be entitled to the land or any interest therein acquired, owned, settled or possessed or purported to have been acquired, owned, settled or possessed whether under, through or by any lease or licence executed prior to the commencement of the U.P. Zamindari Abolition and Land Reforms Act, 1950, or under and in accordance with any provision of any enactment. Including the said Act."*

*26. The word "forest" came for consideration before the Apex Court in T.N. Godauarman Thirumulkpad v. Union of India, (1997) 2 SCC 267. The Apex Court said that the word 'forest' must be understood according to its dictionary meaning and will not only include forest as understood in the dictionary sense but also any area recorded as the forest in the Government record irrespective of the ownership. In paragraph 4. It was laid down by the Apex Court:*

*"4. ..... The word "forest" must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 20(1) of the Forest Conservation Act. The term "forest land" occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership."*

*27. Thus, if any area of land is in nature of forest and is recorded in the tenure of any tenure-holder or in the name of intermediary/proprietor thekedar (as before abolition of zamindari), the land can be declared as reserved forest irrespective of the ownership of land. Under Indian Forest Act, 1927, power is given to declare the forest land/waste land as reserved forest irrespective of its ownership. Thus, even if forest land or waste land is included in a tenure-holder's tenure, there is no prohibition in any law from declaring the said land as forest land. The third category apart from forest land and waste land which has been added by the U.P. Act 23 of 1965, i.e., any other land (not being land for the time being comprised in any holding or grove or in any village abadi] refers to any other land other than forest land or waste land. Thus, if the land is neither forest nor waste land, the same cannot be declared as reserved forest if it is*

*comprised in any holding or grove or in village abadi. Thus, in fact the U.P. Act 23 of 1965 added one more category of land which can be declared apart from forest or waste land. The scope of Section 3 as applicable in U.P. after U.P. Act 23 of 1965 is wider than the original Section 3 of the Forest Act. This view has already been expressed by the Division Bench in Om Singh v. State of U.P., 1980 Ald. 78 summary of cases (73).*

*28.* ***From the above discussion, it is clear that forest land or waste land included in holding of a tenure-holder can also be declared as reserved forest and there is no prohibition even in amended Section 3 vide U.P. Act 23 of 1965.*** *The prohibition which has been created by amended Section-3 is with regard to only any other land not being land for time being comprised in any holding or grove or in any village abadi. The words not being land for the time being comprised in any holding or grove or any village abadi do not control the word forest land or waste land used in Section 3. A Constitution Bench of the Apex Court considered the provisions of Indian Forest Act, 1927, in Mahendra Lal Jaini v. State of Uttar Pradesh, 1962 SCC OnLine SC 55 : AIR 1963 SC 1019. The Apex Court laid down in paragraph 29 as under:"29. It is next urged that even if Sections 38A to 38C are ancillary to Chapter II, they would not apply to-the petitioner's land, as Chapter II deals inter alia with waste land or forest land, which is the property of the Government, which is dealt with under Chapter V. That is so. But unless the petitioner can show that the land in dispute in this case is his property and not the property of the State. Chapter II will apply to it. Therefore, the land in dispute vested in the State under Section 6 of the Abolition Act and became the property of the State. It is however, contended on behalf of the petitioner that if he is held to be a Seerdar in proper proceeding, the land would be his property and therefore, Chapter V-A, as originally enacted, if it is ancillary to Chapter II would not apply to the land in dispute. We are of opinion that there is no force in this contention. We have already pointed out that under Section 6 of the Abolition Act all property of intermediaries including the land in dispute vested in the State Government and became its property. It is true that under Section 18, certain lands were deemed to be settled as holder of lands, but it is clear that after land vests in the State Government under Section 6 of the Abolition Act, there is no provision therein for divesting of what has vested in the State Government. It is, however, urged on behalf of the petitioner that he claims to be the proprietor of this land as a bhumidhar, or Seerdar because of certain provisions in the Act. There was no such proprietary right as bhumidhari right before the Abolition Act. The Abolition Act did away with all proprietary rights in the area to which it applied and created three classes of tenure by Section 129; bhumidhar, Seerdar and asami, which were unknown before. Thus, bhumidhar, Seerdar and asami are all tenure-holders under the Abolition Act and they hold their tenure under the State in which the proprietary right vested under Section 6."*

(Emphasis added)

73. Thus the law is settled beyond doubt that waste land included in holding of a tenure-holder can also be declared as reserved forest and the submission to the contrary made by the learned Counsel for the petitioner cannot be accepted.

74. The learned Counsel for the petitioner has relied upon the judgment in

the case **Committee of Management Versus Deputy Direction of Education**: 2006 LCD 1328, in which a Division Bench of this Court had relied upon a decision of the Hon'ble Supreme Court in **Dhirajlal Girdharlal versus CIT**: 1954 SCC OnLine SC 46, wherein it was held that: -

*"8. ...It is well established that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises."*

75. However, the aforesaid proposition of law has no application to the facts of the present case, where the findings of the Courts below are based on relevant material and the same do not suffer from any perversity or illegality, as is apparent from the discussion made in the preceding paragraphs.

76. Thus even if the petitioner had become a lessee of the land through the lease-deed dated 06.07.1951 – which she could not establish, the State continued to be the proprietor of the land in question, which was recorded as waste land in the Khewat, and the State had the power to notify the land as a reserve forest.

77. In view of the foregoing discussion, I am of the considered view that the impugned judgment and order dated 23.06.1982 passed by the Forest Settlement Officer, Gonda in Case No.1129 under Section 6 of the Forest Act and the judgment and order dated 28.03.1985 passed by the District Judge, Gonda in Misc. Revenue Appeal No.11 of 1982 do not suffer from any illegality or infirmity warranting any interference by this Court. The Writ Petition filed challenging the validity of the aforesaid orders lacks merits and the same is **dismissed**. The parties will bear their own costs of litigation.

78. Before parting with the case, the Court puts on record its appreciation for the assistance provided by the learned Counsel for the parties in this case, specially the assistance provided by the learned Additional Chief Standing Counsel for the State Sri. Arya Shreshth Tiwari, who has placed the relevant provisions of the law in an elaborate manner and has his submissions with relevant case-laws, enabling the Court to arrive at this decision.

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**(2024) 7 ILRA 712**
**REVISIONAL JURISDICTION**
**ORIGINAL SIDE**
**DATED: LUCKNOW 15.07.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Sales/Trade Tax Revision No. 31 of 2023

**M/S Rajdhani Arms Corporation, Lucknow ...Revisionist**

**Versus**

**Commissioner of Commercial Tax U.P., Lucknow ...Opp. Party**

**Counsel for the Revisionist:**
Anand Dubey

**Counsel for the Opp. Party:**
C.S.C.

**A. Civil Law-(Code of Civil Procedure-1908-Order 9 Rule 6(1)(a), Order 9 Rule 8, Order 41 Rule 17)-** The word 'ex parte' occurs in Order IX Rule 6 (a) of the CPC, where only the plaintiff appears and defendant does not

appear and accordingly in the aforesaid circumstances, the proceedings are conducted "ex parte". The word 'ex parte' does not appear in Order IX Rule 8, which in a situation where defendant only appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof. Accordingly the word 'ex parte' can be given its natural meaning as appearing in the CPC and certainly the Tribunal can proceed to consider and decide the case ex parte in a situation where only the appellant appears, but the respondent/State does not appear, while in a case, where the appellant does not appear, the only consequence of such a situation would be to dismiss the appeal for want of prosecution and not to enter and decide the case on merits of the controversy.

B. In absence of the appellant, the Commercial Tax Tribunal had the authority to dismiss the appeal in default as provided in the Order XLI Rule 17 of the Code of Civil Procedure, 1908 rather than hearing it ex parte and deciding it on merits. **(Para 12 & 13)**

**Impugned order set aside matter remanded**. (E-15)

**<u>List of Cases cited:-</u>**

1.Benny D'Souza & ors. Vs Melwin D'Souza & ors.; S.L.P. (C) No.23809 of 2023

2.Siemens Engineering & Manufacturing Co. of India Ltd. Vs U.O.I., (1976) 2 SCC 981

3.M/s Ram Sewak Coal Depot, Deori, Mirzapur Vs The Commissioner of Trade Tax, U.P, Lko.; 2003 NTN (Vol.22)- 341

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

1. Heard Shri Anand Dubey, learned counsel for the revisionist as well as learned Standing Counsel for the opposite party and perused the record.

2. By means of the present revision, the revisionist has challenged the order dated 07.09.2017 passed by the Commercial Tax Tribunal, Lucknow, whereby the Tribunal has rejected the second appeal of the revisionist and upheld the order of first appellate authority dated 11.02.2016.

3. Learned counsel for the revisionist has submitted that the revisionist has assailed the order dated 07.09.2017 passed by the Tribunal on the ground that on the date fixed, the counsel of the revisionist/appellant could not appear before the Tribunal and only on hearing the representative of the State, the second appeal was decided. The Tribunal has further recorded that despite information and service being sufficient upon the revisionist, no one had appeared and accordingly the Tribunal was proceeding to decide the case on merits.

4. The question raised by the revisionist in the present revision is as to whether in absence of counsel of the revisionist/appellant, the Commercial Tax Tribunal can proceed to consider and decide the appeal 'ex parte' in absence of the revisionist/appellant. He submits that the principles with regard to appearance of the plaintiff or defendant and order to be passed thereon and as to how the court could proceed in the matter of suits and appeals has been provided under the Code of Civil Procedure.

5. He submits that according to Order IX, Rule 6(1)(a) of the Code of Civil Procedure, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then when summons duly served, if it is proved that the summons was duly served, the Court may make an order that the suit shall be heard ex parte. He submits that it is open

for the court to continue the hearing of the proceedings in absence of defendant on the merit of the case and suit may proceed ex parte, but according to the Order IX Rule 8 of the Code of Civil Procedure, where defendant only appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof.

6. He further placed reliance on the Order XLI Rule 17 of the Code of Civil Procedure, where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

7. It is in the aforesaid circumstances, it was submitted that in case the appellant does not appear and only the State appeared before the Commercial Tax Tribunal, the Tribunal should have dismissed the appeal in default rather to proceed to pass an order on merits of the case only after hearing the State - opposite parties. He further relied upon the judgement of the Supreme Court in the case of ***Benny D'Souza & Ors. Vs. Melwin D'Souza & Ors.;*** S.L.P. (C) No.23809 of 2023, wherein though the Supreme Court was interpreting the provisions of Order XLI Rule 17 of the Code of Civil Procedure, and was of the view that where the appellant does not appear, the court can only dismiss the appeal for want of prosecution and not consider the case on merits.

8. The observation of the Supreme Court in the aforesaid judgement is quoted herein-below:

*"Leave granted.*

*The appellants herein are the plaintiffs who were the appellant in RSA No.196/2022. The only grievance of the appellants herein is with regard to the dismissal of the said appeal vide order dated 26.09.2023 on merits although the appellants were not represented inasmuch as there was no counsel who appeared for the appellants and the junior counsel for the appellants submitted that the senior counsel engaged in the matter, was not available as his cousin had passed away. Therefore, on account of a bereavement in the family of the arguing counsel there was no representation on behalf of the appellants before the High Court.*

*Learned senior counsel appearing for the appellants submitted that the High Court could have dismissed the appeal for non prosecution in terms of the order XLI Rule 17 CPC and particularly the Explanation thereto instead of dismissing the appeal on merits by stating that no substantial question of law was made out. Therefore, the learned senior counsel submitted that the impugned judgment may be set aside and the matter may be remanded to the High Court for consideration on the merits of the appeal.*

*Per contra, learned counsel appearing for the respondent supported the impugned judgment and contended that the appellants consistently failed to appear before the High Court and therefore, the High Court had no option but to pass the impugned judgment and that there is no merit in the appeal.*

*Having heard learned senior counsel for the appellants and learned counsel for the respondents, at the outset, we extract Order XLI Rule 17 of the CPC which reads as under:*

*"17. Dismissal of appeal for appellant's default :- (1) Where on the day fixed, or on any other day to which the*

*hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.*

*Explanation. - Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits."*

*The Explanation categorically states that if the appellant does not appear when the appeal is called for hearing it can only be dismissed for non-prosecution and not on merits.*

*However, the impugned judgment is a dismissal of the appeal on merits which is contrary to the aforesaid provisions and particularly the Explanation thereto. On that short ground alone the appeal is allowed the impugned order is set aside.*

*The RSA No.196/2022 is restored on the file of the High Court.*

*The parties are at liberty to advance arguments on the merits of the case.*

*All contentions are left open. The appeal is allowed and disposed of in the aforesaid terms.*

*No costs.*

*Pending application(s), if any, shall stand disposed of."*

9. Learned Standing Counsel on the other hand has opposed the writ petition. He has submitted that the Value Added Tax Rules, 2008 itself provides for the situation and conditions for hearing in absence of appearance of the appellant. He submits that according to Rule 63(4) and (5) of the U.P. Value Added Tax Rules, 2008 provides as follows:

*"(4) On the date of hearing, if all the relevant records of appeal have been received, the parties shall be given reasonable opportunity of being heard and the appellate authority or the Tribunal, as the case may be, may after examining all the relevant records, decide the appeal:*

*Provided that if, despite proper service of the notice either party is not present, the appeal may be heard and decided ex prate.*

*(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."*

10. He relying upon Rule 63 (4) of the U.P. Value Added Tax Rules, 2008 submits that if despite proper service of the notice either party is not present, the appeal may be heard and decided ex parte and it was submitted that considering the Rules 63(4) of the U.P. Value Added Tax Rules, 2008, it was open for the Tribunal to proceed to consider and decide the appeal preferred by the revisionist ex parte in accordance with the U.P. Value Added Tax Rules, 2008 and hence, no illegality was committed by the Tribunal while considering and deciding the appeal preferred by the revisionist in his absence.

11. Considering the rival submissions of learned counsel for the parties, it is noticed that on one hand, the general law of land enshrined in the Code of Civil Procedure provides that in absence of plaintiff/appellant, the suit or appeal should be dismissed for want of prosecution, while it was contended by learned Standing Counsel that as per Rule 63 of the U.P. Value Added Tax Rules, 2008, it is open for the Tribunal to consider and decide the appeal on merits even where despite of service of summons, the appellant does not appear before the Tribunal. This Court has given due consideration to the rival

contentions and for the reasons given below, this Court is of the considered view that where the appellant does not appear before the Tribunal, the appeal should be dismissed for want of prosecution rather than deciding the same on merits. Proviso to Rule 63 (4) of the U.P. Value Added Tax Rules, 2008 provides that if despite proper service of the notice either party is not present, the appeal may be heard and decided ex parte.

12. The aforesaid proviso though on the face of it provides that in absence of a party to the proceedings, the appeal can be decided by the Tribunal on merits, but the word 'ex parte' used in the proviso can be interpreted as "want of appearance on behalf of the opposite party/defendant" and not the appellant/plaintiff. The word 'ex parte' has not been defined under the U.P. Value Added Tax Rules, 2008 and accordingly its meaning and definition can be taken from the Code of Civil Procedure. The word 'ex parte' occurs in Order IX Rule 6 (a) of the Code of Civil Procedure, where only the plaintiff appears and defendant does not appear and accordingly in the aforesaid circumstances, the proceedings are conducted "ex parte". The word 'ex parte' does not appear in Order IX Rule 8, which in a situation where defendant only appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof. Accordingly the word 'ex parte' can be given its natural meaning as appearing in the Code of Civil Procedure and certainly the Tribunal can proceed to consider and decide the case ex parte in a situation where only the appellant appears, but the respondent/State does not appear, while in a case, where the appellant does not appear, the only consequence of such a situation would be to dismiss the appeal for want of prosecution and not to enter and decide the case on merits of the controversy.

13. Even otherwise, deciding a case ex parte on merits without giving reasonable opportunity to the parties is blatant violation of rule of "Audi alterum partem". In absence of the appellant, the Commercial Tax Tribunal had the authority to dismiss the appeal in default as provided in the Order XLI Rule 17 of the Code of Civil Procedure, 1908 rather than hearing it ex parte and deciding it on merits.

14. In this regard, the Supreme Court in the case of ***Siemens Engineering & Manufacturing Company of India Ltd. v. Union of India***, (1976) 2 SCC 981, gave directions to the administrative authority and tribunals exercising quasi-judicial powers. The Court observed as under:

*"If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process."*

15. The other concern raised before us was that there is no provision for setting aside the ex parte order in such a situation

where the Tribunal proceeds to allow the appeal ex parte in absence of the defendant. In this regard, reliance was placed upon a judgement of a Coordinate Bench of this Court passed in ***M/s Ram Sewak Coal Depot, Deori, Mirzapur Vs. The Commissioner of Trade Tax, U.P, Lucknow***; 2003 NTN (Vol.22)- 341, wherein interpreting the provisions of Section 22 of the U.P. Value Added Tax Act, 2008, which is pari materia with provision of Section 31 of the U.P. Value Added Tax Act, 2008, which provides for rectification, this Court has held that wherein an appeal is decided ex parte, it shall be open for moving an application for rectification of such a situation. Accordingly, adequate reasons are given for the defendant for non appearance and judgement is rendered ex parte, but recall of order, exercise of rectification has been provided under Section 31 of the U.P. Value Added Tax Act, 2008.

16. In light of the above, the impugned order dated 07.09.2017, whereby the Tribunal has proceeded to decide the appeal preferred by the revisionist in his absence, is held to be illegal and arbitrary and accordingly set aside and the matter is remitted back to the Tribunal to decide the matter afresh after affording an opportunity of hearing to the parties and considering the fact that much time due to pendency of the aforesaid proceedings, has elapsed, the Tribunal is directed to expedite the appeal and decide the same within three months from the date of production of a certified copy of this order, in accordance with law.

17. With the aforesaid observations, the revision is **disposed of.**

18. The revisionist undertakes to cooperate in the proceedings before the Tribunal.

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**(2024) 7 ILRA 717**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 05.07.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**

Appeal U/S 37 of Arbitration And Conciliation Act 1996 No. 210 of 2023

**Smt. Savitri Devi ...Appellant**
**Versus**
**Union of India & Ors. ...Respondents**

**Counsel for the Appellant:**
Sri Rahul Agarwal, Ms. Akashi Agarwal

**Counsel for the Respondents:**
Sri Vaibhav Tripathi

**A. Arbitration and Conciliation Act, 1996-Section 37-challenged to-patent illegality-Fair compensation – In the present case, the appellant's arguments regarding the valuation of land were crucial to determining the appropriate compensation-the arbitrator ignored the arguments and awarded compensation only for building despite recording the argument-The award suffers from patent illegality the arbitrator overlooked this error and deprived the appellant of a fair and just resolution-Since the award was granted in the year 2008, the latest Apex Court judgment in Tarsem Singh cannot be allowed to claim solatium or interest-The matter is remitted back to recalculate the compensation for land in accordance with law.(Para 1 to 30)**

**B. When an arbitral tribunal fails to consider the issue raised by the parties and provides no reason, it erodes the credibility of arbitral award. The concept of patent illegality, in the context of arbitral awards, refers to an evident and manifest error that goes to the very root of the matter. It implies a fundament flaw**

**that is apparent on the face of the record and affects the substantive rights of the parties.(Para 13, 14)**

**C. The case of Tarsem Singh introduced specific interpretations and guidelines that impacted the awarding of solatium and interest. However, applying these guidelines retrospectively to arbitrations that concluded prior to the judgment would create an untenable situation. The retroactive application of judicial decision to arbitral awards would create legal and procedural chaos. When an arbitrator passes an award based on the law in existence at the time of proceedings, the said findings cannot be held to be patently illegal on the ground of a subsequent Apex Court ruling. Holding such a finding to be patently illegal would in fact be against the public policy of India.(Para 27,28)**

**The appeal is disposed of.** (E-6)

**List of Cases cited:**

1. Ssanyong Engg. & Cons. Co. Ltd. Vs NHAI (2019) 15 SCC 131

2. U.O.I. Vs Tarsem Singh & ors.(2019) 9 SCC 304

3. NHAI Vs Nagaraju @ Cheluvaiah & Anr.(2022) 15 SCC 1

4. Sunita Mehra Vs U.O.I. (2019) 17 SCC 672

5. Golden Iron & Steel Forging Vs U.O.I. (2008) Mar. 28

6. Kusum Ingots & Alloys Ltd. Vs U.O.I. & ors.(2004) 6 SCC 254

7. ONGC Ltd. Vs Saw Pipes Ltd. (2003) 5 SCC 705

8. Asso. Builders Vs DDA (2015) 3 SCC 49

9. P.V. George Vs St. of Ker. (2007) 3 SCC 557

10. Manoj Parihar Vs St. of J. & K. (2022) 14 SCC 72

11. CBI Vs R.R. Kishore (2023) SCC OnLine SC 1146

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

1. The instant application under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been preferred by Smt. Savitri Devi (hereinafter referred to as the 'Appellant') against the order dated October 21, 2022 passed by the Additional District Judge, Basti under Section 34 of the Act.

**FACTS**

2. I have laid down the factual matrix of the instant case below:

a. Appellant was the owner of plot number 294 (later re-numbered as plot number 323) having an area of 0.038 ha, located in Mauja Madwanagar, District Basti. The aforesaid plot, along with the residential building standing thereon, was acquired for construction of National Highway No. 28 under the National Highways Act, 1956 (hereinafter referred to as the 'NH Act, 1956').

b. The total value of the plot and building was computed at Rs. 14,87,493.70/-, out of which the value of the building/house was determined at Rs. 8,44,440/-, the value of trees, hand-pipe etc. was determine at Rs. 27,203/- while the value of the land was determined at Rs. 4,80,624/- by treating it to be agricultural land. Additional compensation of 10% of the value was payable on these components.

c. The amount of Rs. 14,87,493.70/- was paid on December 2, 2008 to the Appellant. Aggrieved by the said valuation, the Appellant submitted an

application before the District Magistrate on February 15, 2008. After receiving the said application, the District Magistrate directed the Special Land Acquisition Officer (hereinafter referred to as the 'SLAO') to examine the matter and take necessary action.

d. The SLAO on February 23, 2008, directed the Provincial Block PWD, Basti to inspect the site and send a fresh valuation report. The Executive Engineer, PWD, after examining the valuation report, calculated the total cost of the building as Rs. 19,27,003/- as per the PWD schedule rate dated January 1, 2006.

e. The SLAO, on August 14, 2008, wrote a letter to the Executive Engineer, PWD to submit the valuation report to the building standing on the land of the Appellant in the year 2008, to which the Executive Engineer of PWD estimated the value of the building to be Rs. 23,37,500/- in terms of the PWD Schedule Rate dated June 15, 2008.

f. The SLAO vide order dated September 23, 2008 held that both the reports sent by the PWD were contradictory to each other. The SLAO eventually held that because the construction of the National Highway was being conducted by the NHAI, therefore the valuation of the Project Director, NHAI would be considered to be appropriate one.

g. Aggrieved by the order dated September 23, 2008, the Appellant approached the District Magistrate, Basti and filed an application for arbitration under Section 3G(5) of the NH Act, 1956.

h. The Arbitrator vide order dated December 11, 2008, re-determined the valuation of the building only, and awarded Rs. 18,67,881/- to the Appellant towards the value of the building.

i. NHAI, being aggrieved by the award of enhanced compensation of Rs. 18,67,881/- moved an application under Section 34 of the Act before the Court of Additional District Judge under Section 34 of the Act challenging the order dated December 11, 2008. The Appellant also challenged the order dated December 11, 2008 under Section 34 of the Act.

j. The Court of Additional District Judge, dismissed the application preferred by the NHAI and the Appellant vide order dated October 21, 2022.

k. Aggrieved by the order of the Additional District Judge dated October 21, 2022, the Appellant has preferred the instant application under Section 37 of the Act before this Court.

**CONTENTIONS BY THE APPELLANT**

3. The learned counsel appearing on behalf of the Appellant has made the following submissions before this Court:

a. The impugned order suffers from patent illegality. Hon'ble Supreme Court in ***Ssanyong Engineering and Construction Co. Ltd. -v- NHAI*** reported in **(2019) 15 SCC 131** held that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

b. The Hon'ble Supreme Court in **National Highways Authority of India -v- Nagaraju alias Cheluvaiah and Anr.** reported in **(2022) 15 SCC 1** has held that in such cases while examining the award in the limited scope under Section 34 of the Act, the Court is required to take note as to whether the evidence available on record has been adverted to and has been taken note by the Arbitrator in determining the just compensation failing which it will fall

foul of Section 31(3) of the Act and amount to patent illegality.

c. In the instant case, the Arbitrator even after recording the arguments advanced by the Appellant regarding the valuation of the land, only awarded the compensation for the building.

d. The Learned Lower Court overlooked the fact that though the scope of Section 34 is limited, yet the Court has to take note as to whether the evidence available on record has been adverted to by the arbitrator, whether all submissions of the parties have been dealt with on merits by the arbitrator and findings returned thereon. As such it is submitted that both the award passed by the Arbitrator as also the order impugned passed by the Learned Lower Court suffer from patent illegality, attracting the applicability of Section 37 of the Act.

e. In 2011, the land in question was valued at Rs. 4,04,920/- by treating it to be a residential property. This value was computed as per the prevailing circle rate of Rs. 2,000/- per square meter for residential land. However, after 6 years, the land was valued at Rs. 1,26,48,000/- per hectare considering it to be an agricultural land. Since 1 hectare has 10,000 sq. mtrs., the value comes to Rs. 1,264.80 per sq. mtr. of land.

f. The value of land barring an exceptional situation (not shown to exist in the instant case), only appreciates and does not come down. The very fact that the land of the appellant had a building standing thereon demonstrates that it was not being put to agricultural use, but was used for residential purposes by the Appellant. It was not a large tract of land with the building standing on one corner and the rest of the land being utilized for the agricultural purposes. Being a small parcel of land, it was not possible to carry out any agricultural activity over the land which abutted the building, particularly when, it stood at the intersection of two roads.

g. As submitted earlier, neither the District Magistrate in the award, nor the Learned Lower Court below, has returned any finding that the land of the Appellant was not situated at the intersection of two roads as contended or the exemplar of adjoining land was for any reason not acceptable and could not apply to value the land of the Appellant.

h. The Hon'ble Supreme Court in **Union of India -v- Tarsem Singh and Ors.** reported in **(2019) 9 SCC 304** held that solatium and interest would be granted for cases between 1997 and 2015 even though plea regarding the payment of solatium and interest may not have been taken in Section 34 petitions filed under the Act by the landowners and such arbitration awards not providing for solatium and interest.

i. The declaration in **Tarsem Singh (supra)** by the Hon'ble Supreme Court is of general application. If the principle of law laid down in **Tarsem Singh (supra)** was to be confined to the cases before the Hon'ble Supreme Court and decided alongside **Tarsem Singh (supra)**, or applied prospectively, it would render the decision to be of merely academic importance and confined to decision inter-partes.

j. It is a settled law that unless the Hon'ble Supreme Court so expressly declares, its decisions are not applicable prospectively, but cover the whole sphere of cases that are pending as on the date of the declaration of law by the Hon'ble Supreme Court. It may also be noted that the Land Acquisition Act, 1894 was repealed and replaced by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and

Resettlement Act, 2013 and as such, w.e.f. January 1, 2015 the provisions of the new Act of 2013 were made applicable to all acquisitions carried out under the NH Act, 1956. If the decision in **Tarsem Singh (supra)** were not to apply to pending proceedings, it would mean that the judgment is applicable only **inter-partes** as there would be no other case arising subsequent to 2019 where the benefit of Land Acquisition Act, 1894 on account of the inconsistencies of the Land Acquisition Act, 1894 can be claimed.

k. The Hon'ble Supreme Court in **Sunita Mehra -v- Union of India** reported in **(2019) 17 SCC 672** held that the award of solatium and interest on solatium should be made effective only to proceedings pending on the date of the High Court order in **Golden Iron & Steel Forging -v- Union of India** that is March 28, 2008. Concluded cases should not be opened as propounded by the Hon'ble Supreme Court. As for future proceedings, the position would be covered by the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

l. It may be noted that the judgment of the Punjab & Haryana High Court in **Golden Iron and Steel Forging (supra)** had struck down Section 3G and 3J of the NH Act, 1956 as arbitrary and irrational and violative of Article 14 of the Constitution of India, as they denied payment of solatium and interest. The judgment further held that land owners compulsorily divested of the property under the NH Act, 1956 would henceforth be entitled to solatium and interest, as envisaged under Section 23 and Section 28 of the NH Act, 1956.

m. The Hon'ble Supreme Court in **Kusum Ingots and Alloys Ltd. -v- Union of India and Ors.** reported in **(2004) 6 SCC 254** has observed that any order passed in a writ petition filed in any High Court questioning the constitutionality of a Parliamentary Act will have effect throughout the territory of India. The NH Act, 1956 being a parliamentary enactment, the declaration of law in **Golden Iron and Steel Forging (supra)** by the Punjab and Haryana High Court on March 28, 2008 would apply to the instant proceedings as well.

n. Applying the dicta of the Hon'ble Supreme Court in **Sunita Mehra (supra)** is yet another reason as to why the declaration of law made in **Tarsem Singh (supra)** would benefit the Appellant in the instant case. Accordingly, apart from the claims made by the Appellant, the Appellant would be entitled to the benefit of Section 23(1A), Section 23(2) and Section 28 of the Land Acquisition Act, 1894.

o. Under Section 23(1A) of the Act, the Appellant would be entitled for interest @12% per annum from the date of publication of initial acquisition notification till the date of the award or of taking possession (whichever is earlier). Under Section 23(2) of the Land Acquisition Act, 1894, the Appellant would be entitled to solatium @30% of the award amount as opposed to 10% under the provisions of the NH Act, 1956. Under Section 28 of the Land Acquisition Act, 1894, the Appellant would be entitled to receive interest @9% per annum for the first year from the date on which possession was taken and @15% per annum from the 2nd year from which the possession of the land was taken.

p. Based on the aforesaid, it is prayed that this Court may be allow the instant appeal with costs and direct the Arbitrator to re-determine the compensation payable to the Appellant.

**CONTENTIONS BY THE RESPONDENT NO. 3**

4. Learned counsel appearing for the Respondent No. 3 has made the following submissions before this Court:

a. It is necessary to bring on record that **Golden Iron (supra)** has been clarified by the Hon'ble Supreme Court in **Sunita Mehra -v- Union of India** reported in **2016 SCC OnLine SC 1128**. The Hon'ble Supreme Court held that the award of solatium and interest would be made effective only to the proceedings pending on the date of **Golden Iron (supra)** and concluded cases cannot be reopened. It is noteworthy to mention here that **Sunita Mehra (supra)** has also been relied upon and referred in **Tarsem Singh (supra).** However, despite reference to the cut-off date/reopening of pending cases, no specific finding has been given in **Tarsem Singh (supra)** with regard to the fate of the cases where the compensation already stands deposited by the NHAI. Such a judgment cannot give any fresh cause of action to the landowners who have never challenged the compensation awarded on the ground of non-grant of solatium and interest.

b. It is trite law that the law only helps the vigilant. Any person, having slept over their rights due to which valuable rights have accrued to the other side, cannot later seek to raise claims. It is a well settled principle of law embodied in the maxim *'interest reipublicaeut sit finis litium'* which means the interest of the State lies in that there should be a limitation to law suits. It is further a cardinal principle of law that *'Vigilantibus non dormeintubus jura subveniunt'*. This principle has been followed by Courts in a catena of judgments that law helps the vigilant and not those who have slept over their rights.

c. Appellant is trying to mislead this Court by praying for solatium and interest thereof. It is pertinent to mention here that the proceeding of the land acquisition was completed in the year 2009 and the Appellant have received the amount of compensation, Therefore, there is no occasion for granting of solatium and other benefit.

d. The valuation report dated November 27, 2008 was never served upon the answering respondent and the appointment of the Independent Valuer was objected to by the answering respondent at each stage of the proceeding as the report was prepared in a mechanical manner by a private valuer which was prepared for the sole benefit of the Appellant and the PWD had only certified the said report on per item basis. The answering respondent had objected to the same before the Arbitrator, but it was not considered. The Arbitrator, and the Learned Lower Court, have overlooked facts, available documents and submissions of the answering respondents and have erroneously decided the matter.

**ANALYSIS**

5. I have heard the learned counsel appearing for the parties and perused the materials on record.

6. For better adjudication of the issue at hand, I have divided the instant judgment into two issues:

**ISSUE NO. 1**

Whether there is any patent illegality or perversity in the Arbitral Award dated December 11, 2008 or the order of the Learned Lower Court under

Section 34 of the Act dated November 21, 2022 which would warrant the exercise of this Court's power under Section 37 of the Act?

**ISSUE NO. 2**

Whether the benefit of Hon'ble Supreme Court's judgment in **Tarsem Singh (supra)** can be claimed by the Appellant?

**ISSUE NO. 1**

7. Since the Arbitral Award in the instant case dates back to December 11, 2008, the law as applicable then will have to be applied that is the Act without any of its amendment. Section 34 of the Act originally allowed for an award to be set aside if it was found to be against the public policy of India.

8. Hon'ble Supreme Court in its judgment in **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.**, reported in, **(2003) 5 SCC 705** espoused that the phrase "public policy of India" must be accorded a wider and not a narrower meaning. Furthermore, the Supreme Court also outlined the grounds on which a court can set aside an arbitral award under Section 34 of the Act. Relevant paragraphs have been extracted below:

*"28. From this discussion it would be clear that the phrase "public policy of India" is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation. Hence, the award which is passed in contravention of Sections 24, 28 or 31 could be set aside. In addition to Section 34, Section 13(5) of the Act also provides that constitution of the Arbitral Tribunal could also be challenged by a party. Similarly, Section 16 provides that a party aggrieved by the decision of the Arbitral Tribunal with regard to its jurisdiction could challenge such arbitral award under Section 34. In any case, it is for Parliament to provide for limited or wider jurisdiction to the court in case where award is challenged. But in such cases, there is no reason to give narrower meaning to the term "public policy of India" as contended by learned Senior Counsel Mr Dave. In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice. This Court in Rattan Chand Hira Chand v. Askar Nawaz Jung [(1991) 3 SCC 67] observed thus: (SCC pp. 76-77, para 17)*

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

*29. Learned Senior Counsel Mr Dave submitted that the purpose of giving limited jurisdiction to the court is obvious*

*and is to see that the disputes are resolved at the earliest by giving finality to the award passed by the forum chosen by the parties. As against this, learned Senior Counsel Mr Desai submitted that in the present system even the arbitral proceedings are delayed on one or the other ground including the ground that the arbitrator is not free and the matters are not disposed of for months together. He submitted that the legislature has not provided any time-limit for passing of the award and this indicates that the contention raised by the learned counsel for the respondent has no bearing in interpreting Section 34.*

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

*(a) fundamental policy of Indian law; or*

*(b) the interest of India; or*

*(c) justice or morality, or*

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

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

9. In **Associate Builders -v- DDA** reported in **(2015) 3 SCC 49**, the Supreme Court propounded on the meaning of patent illegality and regarded it as the fourth head of public policy. Relevant paragraphs are extracted below:

*"**Patent Illegality***

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

*"Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to*

*resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means (see Statutes 9 and 10 Will. III, C. 15). At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob [(1802) 3 East 18 : 102 ER 502] , that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] , but is now well established."*

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

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

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

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*Now the regret expressed by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in Their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned Judges have arrived at finding what the mistake was is by saying: 'Inasmuch as the arbitrators awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Rule 52.' But they were entitled to give their own interpretation to Rule 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, Their Lordships think that the judgment of Pratt, J. was right and the*

*conclusion of the learned Judges of the Court of Appeal [Jivraj Baloo Spg. and Wvg. Co. Ltd. v. Champsey Bhara and Co., ILR (1920) 44 Bom 780. The judgment of Pratt, J. may be referred to at ILR p. 787.] erroneous."*

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

*42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:*

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

*"28.Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India— (a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"*

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

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

*"28.Rules applicable to substance of dispute.—*

*(1) ...*

*(2) ...*

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

*This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."*

10. What emerges from above is that public policy can encompass a wide range of principles, including justice, equity, and morality. In arbitration, invoking public policy aims to prevent arbitral awards from violating these fundamental principles, thereby maintaining the integrity of the legal system. However, applying public policy in arbitration is inherently complex and subjective, as its definition can vary based on the context of each case. Therefore, courts must carefully balance upholding public policy with respecting party autonomy and the finality of arbitration when using this ground to set aside awards.

11. Challenging arbitral awards on the basis of public policy is difficult due to its inherent complexity and subjectivity. While this flexibility can be advantageous in addressing severe cases where awards violate fundamental principles of justice or morality, it also allows for judicial intervention based on unclear or poorly defined notions of public policy.

12. Despite these challenges, public policy remains essential in protecting the integrity and legitimacy of the arbitration process. It acts as a safeguard against arbitral awards that are fundamentally unjust or that violate core principles of justice. To mitigate the risks associated with its application, courts must adopt a careful and principled approach when determining if an arbitral award conflicts with public policy.

13. In the instant case, it has been contended by the Appellant that despite recording the arguments advanced by the Appellant regarding the valuation of land, the Arbitrator awarded compensation for building only. The concept of patent illegality, in the context of arbitral awards, refers to an evident and manifest error that goes to the very root of the matter. It implies a fundamental flaw that is apparent on the face of the record and affects the substantive rights of the parties. The failure of an arbitral tribunal to consider an issue raised by the parties, without providing reasons, constitutes such a flaw.

14. When an arbitral tribunal fails to consider an issue raised by the parties and provides no reason for such omission, it creates a situation where the affected party is left without a clear understanding of why their argument was disregarded. This lack of reasoning can lead to a perception of arbitrariness and bias, further eroding the credibility of the arbitral award. In such cases, the affected party is left with no option but to challenge the award on the grounds of patent illegality.

15. In the context of the present case, the Appellant's arguments regarding the valuation of land were crucial to determining the appropriate compensation. By ignoring these arguments and awarding compensation only for the building, the Arbitrator not only failed to address a critical issue but also potentially deprived the Appellant of a fair and just resolution.

16. The failure to provide reasons for not considering an issue raised by the parties also raises concerns about the potential for arbitrariness in the arbitral process. Arbitral tribunals are expected to exercise their discretion judiciously and in accordance with the principles of natural justice. When a tribunal disregards an issue without providing reasons, it creates an impression of partiality or neglect, which can seriously damage the credibility of the arbitration process. The parties to arbitration expect a fair hearing, where their arguments are duly considered and reasoned decisions are made. Any deviation from this expectation erodes the trust that parties place in the arbitral process and undermines the efficacy of arbitration as a dispute resolution mechanism.

17. In light of the aforesaid Issue No.1 is answered as follows:

"The Arbitral Award dated December 11, 2008 suffers from patent illegality to the limited aspect of non-consideration of compensation for land as raised by the Appellant. Section 34 Court having overlooked this error, warrants interference by this Court under Section 37 of the Act."

**ISSUE NO. 2**

18. It has been argued by the Appellant that the judgment in **Tarsem Singh (supra)** will apply to all pending cases. Furthermore, it has been argued that

unless expressly specified, the judgments of the Hon'ble Supreme Court cover the whole sphere of cases that are pending as on the date of the declaration of the judgment.

19. In many legal systems, including India, the default position is that the judgments of the Hon'ble Supreme Court apply to all cases pending as on the date of declaration unless expressly stated otherwise. This principle is rooted in the notion that the Court's role is to interpret the law as it has always been, rather than create new law. Therefore, when the Hon'ble Supreme Court declares a particular interpretation of a statute or a constitutional provision, it is considered to have always been the correct interpretation. However, the Hon'ble Supreme Court has also developed the doctrine of prospective overruling, which allows it to limit the application of a new judgment to future cases only.

20. When the Hon'ble Supreme Court interprets a statute or constitutional provision, it clarifies the meaning and scope of the law as it should always have been understood. Therefore, applying this interpretation to all pending cases aligns with the notion that the Court's interpretation was always the correct one, even if it had not been previously articulated. The principle that the judgments of the Hon'ble Supreme Court apply to all pending cases also promotes fairness to litigants. Individuals and entities involved in legal disputes have a legitimate expectation that the law, as interpreted by the Hon'ble Supreme Court, will be applied to their cases. Denying them the benefit of a new judgment could result in unjust outcomes, particularly if the previous interpretation was found to be erroneous.

21. Coming to the judgment in **Tarsem Singh (supra)**, it was espoused by the Hon'ble Supreme Court that the provisions of the Land Acquisition Act as far as solatium and interest are concerned will apply to acquisitions under the National Highways Act. The Hon'ble Supreme Court also noted the submission of the Government that solatium and interest should be granted even in cases that arise between 1997 and 2015. Relevant paragraph is extracted below:

*"52. There is no doubt that the learned Solicitor General, in the aforesaid two orders, has conceded the issue raised in these cases. This assumes importance in view of the plea of Shri Divan that the impugned judgments should be set aside on the ground that when the arbitral awards did not provide for solatium or interest, no Section 34 petition having been filed by the landowners on this score, the Division Bench judgments that are impugned before us ought not to have allowed solatium and/or interest. Ordinarily, we would have acceded to this plea, but given the fact that the Government itself is of the view that solatium and interest should be granted even in cases that arise between 1997 and 2015, in the interest of justice we decline to interfere with such orders, given our discretionary jurisdiction under Article 136 of the Constitution of India. We therefore declare that the provisions of the Land Acquisition Act relating to solatium and interest contained in Sections 23(1-A) and (2) and interest payable in terms of Section 28 proviso will apply to acquisitions made under the National Highways Act. Consequently, the provision of Section 3-J is, to this extent, violative of Article 14 of the Constitution of India and, therefore, declared to be unconstitutional.*

*Accordingly, appeal arising out of SLP (C) No. 9599 of 2019 is dismissed."*

22. The Hon'ble Supreme Court in **P.V. George -v- State of Kerala** reported in **(2007) 3 SCC 557** clarified that the doctrine of prospective overruling will not apply unless specified expressly. Relevant paragraphs are expressed below:

*"19. It may be true that when the doctrine of stare decisis is not adhered to, a change in the law may adversely affect the interest of the citizens. The doctrine of prospective overruling although is applied to overcome such a situation, but then it must be stated expressly. The power must be exercised in the clearest possible term. The decisions of this Court are clear pointer thereto.*

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*29. Moreover, the judgment of the Full Bench has attained finality. The special leave petition has been dismissed. The subsequent Division Bench, therefore, could not have said as to whether the law declared by the Full Bench would have a prospective operation or not. The law declared by a court will have a retrospective effect if not otherwise stated to be so specifically. The Full Bench having not said so, the subsequent Division Bench did not have the jurisdiction in that behalf."*

23. Making a reference to its judgment in **P.V. George (supra)**, the Hon'ble Supreme Court in **Manoj Parihar -v- State of J&K** reported in **(2022) 14 SCC 72** reiterated that a declaration of law by the Hon'ble Supreme Court will have retrospective effect. Relevant paragraphs are extracted below:

*"26. What was done in Bimlesh Tanwar [Bimlesh Tanwar v. State of Haryana, (2003) 5 SCC 604 : 2003 SCC (L&S) 737] was actually a declaration of law. Therefore, the same will have retrospective effect. In P.V. George v. State of Kerala [P.V. George v. State of Kerala, (2007) 3 SCC 557 : (2007) 1 SCC (L&S) 823] , this Court held that "the law declared by a court will have retrospective effect, if not otherwise stated to be so specifically".*

*27. This Court was conscious of the fact, as could be seen from para 19 of the Report in P.V. George [P.V. George v. State of Kerala, (2007) 3 SCC 557 : (2007) 1 SCC (L&S) 823] , that when the doctrine of stare decisis is not adhered to, a change in the law may adversely affect the interest of the citizens. But still this Court held that the power to apply the doctrine of prospective overruling (so as to remove the adverse effect) must be exercised in the clearest possible term."*

24. In **Tarsem Singh (supra)**, the Hon'ble Supreme Court had struck down certain provisions of Section 3-J of the NHAI Act as unconstitutional. Recently, in **CBI -v- R.R. Kishore,** reported in **2023 SCC OnLine SC 1146,** a Constitution Bench of the Hon'ble Supreme Court held that whenever a law is declared unconstitutional, it is held to be void ab initio. Relevant paragraph is extract below:

*"96. From the above discussion, it is crystal clear that once a law is declared to be unconstitutional, being violative of Part-III of the Constitution, then it would be held to be void ab initio, still born, unenforceable and non est in view of Article 13(2) of the Constitution and its interpretation by authoritative pronouncements. Thus, the*

*declaration made by the Constitution Bench in the case of Subramanian Swamy (supra) will have retrospective operation. Section 6A of the DSPE Act is held to be not in force from the date of its insertion i.e. 11.09.2003."*

25. What emerges from the aforesaid is that the law laid down by the Hon'ble Supreme Court in **Tarsem Singh (supra)** which declared that the provisions of the Land Acquisition Act concerning solatium and interest are to be applied to acquisitions made under the National Highways Act will apply to all pending cases where the arbitration process has not concluded since there is no specification in **Tarsem Singh (supra)** contrary to the same. Any departure from retrospective application and applicability of the doctrine of prospective overruling must be clearly articulated as laid down in **P.V. George (supra)**. The same was reiterated in **Manoj Parihar (supra)**. These judgments collectively reinforce the principle that the Hon'ble Supreme Court's judgments are inherently retrospective unless specified to the contrary, ensuring that all affected parties benefit from the Hon'ble Supreme Court's authoritative interpretations, thereby promoting uniformity and justice across the judicial spectrum.

26. The principle of unconstitutionality being void ab initio implies that the legal landscape is retroactively altered to reflect the Hon'ble Supreme Court's interpretation, thereby nullifying any actions or decisions based on the now-invalidated provision. This reinforces the importance of retrospective application, ensuring that justice is served by rectifying past injustices perpetuated under the unconstitutional provision. By applying the provisions of the Land Acquisition Act concerning solatium and interest to acquisitions under the National Highways Act, the Hon'ble Supreme Court ensured that affected landowners receive fair compensation.

27. However, since the arbitration in the instant case concluded on December 11, 2008, and the judgment in **Tarsem Singh (supra)** was delivered later on, the Appellant cannot claim solatium or interest on account of **Tarsem Singh (supra)**. Opening concluded arbitrations would be akin to opening a Pandora's box. The case of **Tarsem Singh (supra)** introduced specific interpretations and guidelines that impacted the awarding of solatium and interest. However, applying these guidelines retroactively to arbitrations that concluded prior to the judgment would create an untenable situation. The arbitrators, the parties, and the legal community operate within the legal framework and judicial precedents available at the time of the arbitration. Imposing future judicial decisions on past arbitrations would disrupt the stability and predictability that arbitration aims to provide.

28. If parties were allowed to reopen concluded arbitrations based on new judicial rulings, it would lead to a flood of claims seeking to modify or overturn arbitral awards. Moreover, the retroactive application of judicial decisions to arbitral awards would create legal and procedural chaos. Arbitrators make decisions based on the legal framework and precedents available at the time of the arbitration. Expecting them to foresee and apply future judicial decisions is unreasonable and impractical. Such a practice would erode the confidence that parties have in arbitration as a reliable and predictable

method of dispute resolution. When an arbitrator passes an award correctly based on the law in existence at the time of the proceedings, the said findings cannot be held to be patently illegal on the ground of a subsequent Apex Court ruling. Holding such a finding to be patently illegal would in fact be against the public policy of India.

29. In light of the above, Issue No. 2 is answered as follows:

"Given that the Arbitration in the instant case concluded on December 11, 2008 and the Hon'ble Supreme Court's judgment in **Tarsem Singh (supra)** was delivered later, the Appellant cannot be allowed to claim solatium or interest on account of **Tarsem Singh (supra)**."

## CONCLUSION AND DIRECTION

30. In light of the aforesaid discussion and law, it becomes apparent that the judgment of the Learned Lower Court dated October 21, 2022 cannot be sustained. Furthermore, the Arbitral Award dated December 11, 2008 suffers from patent illegality as far as non-consideration of the compensation for land is concerned and is accordingly set aside to that limited extent only. The instant matter is remitted back to the Arbitrator with a direction to recalculate the compensation to be paid to the Appellant for land in accordance with the law.

31. With the above directions, the instant appeal under Section 37 of the Act is disposed of. There shall be no order as to the costs.

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**(2024) 7 ILRA 731**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 18.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Crl. Misc. Bail Application No. 4769 of 2022

**Mahfooz** ...**Applicant**
**Versus**
**State of U.P.** ...**Opp. Party**

**Counsel for the Applicant:**
Vijay Pratap Singh, Nagendra Mohan, Vivek Pandey

**Counsel for the Opp. Party:**
G.A., Masood Ali, Sushil Kumar Singh

**Criminal Law - Indian Penal Code, 1860 – Sections 302 & 120-B - Modification application – By way of application, applicant seeking modification of order, in spite of having been ordered to be released on bail, he couldn't be released on bail, as whosoever comes forward to stand surety for release of applicant, is threatened by police - Two sureties filed bail bonds, but when it reached police station for verification, they were threatened by police, they withdraw their sureties - Held, order for release of applicant on bail was passed way back on 26.05.2023, the applicant couldn't secure his release for a period of more than one year - During this long period, the Superintendent of Jail has not sent any information to Secretary, DLSA and also Secretary, DLSA has not deputed any para legal volunteer to interact and assist him for his release - Violation of directions issued by Hon'ble Supreme Court in Policy Strategy for Grant of Bail, In re - Thus, applicant was ordered to be released on bail upon submission of a personal bond to satisfaction of trial Court, without any other surety. (Para 2, 5, 7)**

**Bail application allowed.** (E-13)

**List of Cases cited:**

Policy Strategy for Grant of Bail, In re, 2023 SCC OnLine SC 483

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

**(I.A. No.9 of 2024-modification application)**

1. This is an application seeking modification of the order dated 26.05.2023 passed by this Court in Criminal Misc. Bail Application No.4769 of 2022, whereby the applicant was ordered to be released on bail in Case Crime No.02 of 2022, under Sections 302, 120-B IPC, Police Station Tulsipur, District Balrampur, subject to the conditions that the applicant be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of magistrate/court concerned.

2. It has been stated in the application seeking modification of the order that in spite of having been ordered to be released on bail, the applicant could not be released on bail as whosoever comes forward to stand surety for release of the applicant, is threatened by the police. Two sureties namely, Saud Ahmad and Saad Imani had filed bail bonds but when the bail bonds reached the police station for verification, those persons were threatened by the police and they wrote applications withdrawing their sureties.

3. The applicant has stated that he is ready to deposit cash amount in lieu of sureties.

4. In Policy Strategy for Grant of Bail, In re, 2023 SCC OnLine SC 483, the Hon'ble Supreme Court has issued the following directions: -

*"1) The Court which grants bail to an undertrial prisoner/convict would be required to send a soft copy of the bail order by e-mail to the prisoner through the Jail Superintendent on the same day or the next day. The Jail Superintendent would be required to enter the date of grant of bail in the e-prisons software [or any other software which is being used by the Prison Department].*

***2) If the accused is not released within a period of 7 days from the date of grant of bail, it would be the duty of the Superintendent of Jail to inform the Secretary, DLSA who may depute para legal volunteer or jail visiting advocate to interact with the prisoner and assist the prisoner in all ways possible for his release.***

*3) NIC would make attempts to create necessary fields in the e-prison software so that the date of grant of bail and date of release are entered by the Prison Department and in case the prisoner is not released within 7 days, then an automatic email can be sent to the Secretary, DLSA.*

*4) The Secretary, DLSA with a view to find out the economic condition of the accused, may take help of the Probation Officers or the Para Legal Volunteers to prepare a report on the socio-economic conditions of the inmate which may be placed before the concerned Court with a request to relax the condition(s) of bail /surety.*

*5) In cases where the undertrial or convict requests that he can furnish bail bond or sureties once released, then in an appropriate case, the Court may consider granting temporary bail for a specified period to the accused so that he can furnish bail bond or sureties.*

***6) If the bail bonds are not furnished within one month from the date of grant bail, the concerned Court may***

***suo moto take up the case and consider whether the conditions of bail require modification/relaxation***.

*7) One of the reasons which delays the release of the accused/convict is the insistence upon local surety. It is suggested that in such cases, the courts may not impose the condition of local surety."*

*(Emphasis added)*

*11. We order that the aforesaid directions shall be complied with."*

5. The order for release of the applicant on bail was passed way back on 26.05.2023 and in spite of an order passed by this Court for his release, the applicant could not secure his release for a period of more than one year. It appears that during this long period of more than one year, the Superintendent of Jail has not sent any information of this fact to the Secretary, DLSA and consequently the Secretary DLSA has also not deputed any para legal volunteer or jail visiting advocate to interact with the applicant and assist him for his release, which inaction is a violation of the directions issued by the Hon'ble Supreme Court in **Policy Strategy for Grant of Bail, In re** (Supra).

6. Keeping in view the fact that the applicant was ordered to be released on bail on 26.05.2023 and he could not be released for want of sureties even after expiry of more than one year, it appears to be just that the condition for submission of two sureties imposed in the order dated 26.05.2023 be revoked.

7. Accordingly, the order dated 26.05.2023 is modified to the extent that the applicant shall be released on bail upon submission of a personal bond to the satisfaction of the trial Court, without submission of any other surety. The other conditions of the order dated 26.05.2023 passed in Criminal Misc. Bail Application No.4769 of 2022 shall remain the same.

8. The Registrar Compliance of this Court is directed to ensure circulation of the directions issued by the Hon'ble Supreme Court in **Policy Strategy for Grant of Bail, In re**, 2023 SCC OnLine SC 483 amongst the Presiding Officers of the District Courts through the District Judges and amongst the Police and Jail Authorities through the Additional Chief Secretary – Home, Government of Uttar Pradesh to ensure proper compliance of the same.

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**(2024) 7 ILRA 733**

**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 04.07.2024**

**BEFORE**

**THE HON'BLE PANKAJ BHATIA, J.**

Criminal Revision No. 529 of 2024

**Sanjaya Dikshit ...Revisionist**
**Versus**
**C.B.I. ...Opposite Party**

**Counsel for the Revisionist:**
Sri Chandra Bhushan Pandey, Sri Asim Kumar Singh

**Counsel for the Opposite Party:**
Sri Anurag Kumar Singh

**A. Criminal Law - Criminal Procedure Code, 1973-Section 397/401- Prevention of Corruption Act, 1988-Section 19-FIR lodged against the revisionist with the allegation that Rs, 6 lacs was paid to the**

**revisionist for showing undue favours to accused firm--In the present case, the sanction order granted by the authority not empowered and thus without jurisdiction, thus, the discharged application filed by the revisionist ought to have been allowed-Initiating prosecution on the foundation of an invalid/ non est sanction order will be in the teeth of restrictions imposed under section 19 of the PC Act and would clearly occasion failure of justice.(Para 1 to 29)**

**The revision is allowed**. (E-6)

**List of Cases cited:**

1. CBI Vs R. Bhuvaneswari & anr. (2024) SCC OnLine Bom 123

2. Sreenivasa Reddy Vs CBI , WP No. 33297 of 2016

3. Dinesh Kumar Vs Chairman, AAI & anr. (2012) 1 SCC 532

4. St. of Bih. & ors.Vs Rajmangal Ram (2014) 11 SCC 388

5. Vivek Batra Vs U.O.I. & ors.(2017) 1 SCC 69

6. Abhai Ranjan Vs St. of U.P. & ors. MANU/UP/2797/2021

7. St. of Karn.Vs Ameerjan (2007) 11 SCC 273

8. Prakash Singh Badal Vs St. of Punj. (2007) 1 SCC 1

9. Vijay Rajmohan Vs St. Rrtd. By Insp. Of Police, CBI ACB, Chennai, T.N. CRLA No. 001746 of 2022

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

1. Present revision has been filed challenging the order dated 20.04.2024 passed by learned Special Judge, Anti Corruption, Central Bureau of Investigation (Central) Lucknow in Criminal Case No.01 of 2012 (Union of India through C.B.I. v. Sanjaya Dikshit and ors.) whereby the discharge application preferred by the revisionist came to be dismissed.

2. The facts, in brief, leading to filing of the present revision are as under:

(i) The revisionist joined State Bank of India as a Probationary Officer and subsequently promoted to the post of Deputy General Manager in the year 2008; he joined as Branch Head of the Kanpur Branch on 17.05.2008. The appointing authority of the revisionist is the Executive Committee of the Central Board of the State Bank of India. While the revisionist was working as a Branch Head of the Bank at Kanpur, a First Information Report came to be lodged against the revisionist and 11 other persons on the basis of a complaint dated 13.08.2009 lodged by the General Manager, State Bank of India, Lucknow. After investigation, a charge-sheet came to be filed on 25.03.2011. As regards the revisionist, the allegation against him was that an amount of Rs.6 Lacs was paid by the co-accused to the revisionist as a motive or reward for showing undue favours to accused firm M/s SRS Investment Company. After the filing of the charge-sheet, the revisionist moved an application seeking discharge under Section 227 of the Cr.P.c. mainly on the ground that no case was made out against the revisionist. He also challenged that there was no sanction for prosecuting the revisionist which was required in pursuance to the mandate of Section 19 of the Prevention of Corruption Act (hereinafter referred to as 'the PC Act'). It has been brought on record that initially the sanction was refused by the Board which is on record as Annexure – 5. In terms of the refusal of sanction by the appointing authority, an opinion was sought from the

Central Vigilance Commission (hereinafter referred to as 'the CVC') through communication dated 30.08.2011 (Annexure – 5). Subsequently, when a challenge was made by the revisionist that there is no sanction for prosecution, the CBI which is the prosecuting agency, filed before the trial Court a Sanction Order dated 17.04.2012 according sanction under Section 19 of the PC Act. The said sanction order is on record as Annexure – 6.

(ii) It also bears from record that during trial, the initial refusal to grant sanction in case of the revisionist was sought by the revisionist before the trial Court by moving an appropriate application under Section 91 of the Cr.P.C. which is contained in Annexure – 7. In pursuance to the application filed by the revisionist seeking to bring on record the refusal to Sanction Order dated 30.08.2011, an order came to be passed by the trial Court on 04.01.2012 calling upon the Chief Vigilance Officer, State Bank of India to produce a copy of the letter dated 30.08.2011 before the date fixed.

(iii) It also bears from record that in pursuance to the said order passed by the trial Court, the refusal to sanction order dated 30.08.2011 was produced before the trial Court and is part of the record. The trial Court vide impugned order dated 20.04.2024 rejected the discharge application filed by the revisionist through an extensive order. In the said order, the trial Court had noticed that the competent authority had given the sanction for prosecution in respect of the revisionist, and based upon the said, the discharge application came to be rejected.

3. While arguing the present revision, Shri Chandra Bhushan Pandey, learned counsel assisted by Shri Asim K. Singh, learned counsel for the revisionist confines his challenge to the impugned order only insofar as it is on the basis of a sanction which, according to the counsel for the revisionist, is not a sanction order prescribed under Section 19 of the PC Act. He has not pressed any other point in the present revision.

4. To buttress his submission, my attention is drawn by the counsel for the revisionist to the order dated 30.08.2011 whereby a communication was addressed to Secretary, Central Vigilance Commission stating that CBI has requested for grant of sanction of prosecution of the officials of the State Bank of India, including the present revisionist. It was further informed that the appointing authority has declined sanction for prosecution for the reasons disclosed. The reasons and the comments of the appointing authority with regard to the revisionist are part of the note appended to the communication dated 30.08.2011 whereby the appointing authority was of the clear view that as there is no criminal act on the part of the revisionist, the Executive Committee of the Central Board have decided to decline the sanction. The record, including the trial Court record which were summoned by this Court, does not indicate or include any response of the CVC. In response to the said communication dated 30.08.2011, however, a fresh sanction order came to be passed in the case of revisionist on 17.04.2012 (Annexure – 6). A perusal of the said sanction order reveals that one Shri A. Krishna Kumar, Managing Director & Group Executive, National Banking recorded that he was the officer authorized to sign the sanction order on behalf of the authority competent to remove the said Shri

Sanjaya Dikshit. The complete extract is recorded hereunder:

*"AND WHEREAS, 1, (A. Krishna Kumar, Managing Director & Group Executive, National Banking), being the officer authorized to sign this sanction order on behalf of the authority competent to remove the said Shri Sanjaya* ***Dikshit after fully and carefully examining, the material, including the statements of witnesses recorded by the invesigating officer recorded under the provisions of Sec. 161 of Criminal Procedure Code 1973 respectively placed before me, in regard to the said allegations and the circumstances of the case, consider that the said Shri Sanjaya Dikshit should be prosecuted in the court of law for the said offences.***

*AND WHEREAS, I, CA. Krishna Kumar, Managing Director & Group Executive, Nation. banking) do hereby accord sanction under section 19 of the Prevention of Corruption Act, 1988 (Act II of 1988) for the prosecution of the said Shri Sanjaya Dikshit for the said offences and any other offence under any other provisions of law in respect of the acts, aforesaid and for taking cognizance of the said offences by the court of competent jurisdiction."*

5. The submission of learned counsel for the revisionist is that the Sanction Order dated 17.04.2012 is not by a competent authority; he further argues that in the entire order dated 17.04.2012, there is no reference to the earlier order refusing to grant sanction by the appointing authority and thus, on these two counts itself, the trial Court ought to have allowed the discharge application as it is well settled in terms of the mandate of Section 19 of The PC Act, that without sanction, the prosecution cannot take place. It is also argued that the reference by the trial Court in the impugned order,that the competent authority has granted sanction for prosecuting the revisionist is wholly without application of mind and without even referring to the earlier refusal order dated 30.08.2011. He places reliance on a judgment of the Supreme Court in the case of ***State of Himachal Pradesh v. Nishant Sareen1*** and particularly emphasises on Paragraphs – 11, 12, 13, 14 & 15, which are to the following effect:

*"11. This Court in Bhatti Case then noticed the opinion of the High Court which was recorded as follows : (SCC p. 96, para 9)*

*"9. ... 'Once the Government passes the order under Section 19 of the Act or under Section 197 of the Code of Criminal Procedure, declining the sanction to prosecute the official concerned, reviewing such an order on the basis of the same material, which already stood considered, would not be appropriate or permissible."*

*While affirming the above opinion of the High Court, this Court held in paragraphs 20 and 21 of the Report as under : (Bhatti Case, SCC p. 99)*

*"20. It was, therefore, not a case where fresh materials were placed before the sanctioning authority. No case, therefore, was made out that the sanctioning authority had failed to take into consideration a relevant fact or took into consideration an irrelevant fact. If the clarification sought for by the Hon'ble Minister had been supplied, as has been contended before us, the same should have*

*formed a ground for reconsideration of the order. It is stated before us that the Government sent nine letters for obtaining the clarifications which were not replied to."*

*"21. The High Court in its judgment has clearly held, upon perusing the entire records, that no fresh material was produced. There is also nothing to show as to why reconsideration became necessary. On what premise such a procedure was adopted is not known. Application of mind is also absent to show the necessity for reconsideration or review of the earlier order on the basis of the materials placed before the sanctioning authority or otherwise."*

*12. It is true that the Government in the matter of grant or refusal to grant sanction exercises statutory power and that would not mean that power once exercised cannot be exercised again or at a subsequent stage in the absence of express power of review in no circumstance whatsoever. The power of review, however, is not unbridled or unrestricted. It seems to us sound principle to follow that once the statutory power under Section 19 of the 1988 Act or Section 197 of the Code has been exercised by the Government or the competent authority, as the case may be, it is not permissible for the sanctioning authority to review or reconsider the matter on the same materials again. It is so because unrestricted power of review may not bring finality to such exercise and on change of the Government or change of the person authorised to exercise power of sanction, the matter concerning sanction may be reopened by such authority for the reasons best known to it and a different order may be passed. The opinion on the same materials, thus, may keep on changing and there may not be any end to such statutory exercise.*

*13. In our opinion, a change of opinion per se on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, in a case where fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to prosecute the public servant may be granted, there may not be any impediment to adopt such course."*

*14. Insofar as the present case is concerned, it is not even the case of the appellant that fresh materials were collected by the investigating agency and placed before the sanctioning authority for reconsideration and/or for review of the earlier order refusing to grant sanction. As a matter of fact, from the perusal of the subsequent order dated March 15, 2008 it is clear that on the same materials, the sanctioning authority has changed its opinion and ordered sanction to prosecute the respondent which, in our opinion, is clearly impermissible.*

*15. By way of foot-note,* ***we may observe that the investigating agency might have had legitimate grievance about the order dated November 27, 2007 refusing to grant sanction, and if that were so and no fresh materials were necessary, it ought to have challenged the order of the sanctioning authority but that was not done****. The power of the sanctioning*

*authority being not of continuing character could have been exercised only once on the same materials."*

6. He also strongly relies upon the judgment of the Bombay High Court in the case of Central Bureau of Investigation v. R. Bhuvaneswari and Anr.2 and on the judgment in the case of A. Sreenivasa Reddy v. C.B.I.3.

7. He lastly argues that in view of the mandate of Section 401 of Cr.P.C., this Court can decide the issue without remanding the matter as while exercising the power of revision, the High Court in its discretion can exercise all the powers conferred on a Court of Appeal.

8. Shri Anurag Kumar Singh, learned counsel appearing for the CBI has strongly opposed the revision by arguing that the validity of the sanction or the correctness can be seen only at the time of trial and not at the time of discharge sought. He further argues that the order impugned has not occasioned a failure of justice which is a sine qua non for exercising the revisional power and on that count, this Court while exercising its revisional power should not interfere. He further argues that any order of sanction has to be sent to the CVC for its opinion which is duly empowered to exercise the power vested in it by virtue of Section 8(g) of The Central Vigilance Commission Act, 2003 (hereinafter referred to as 'the CVC Act') and thus, it is the final order - which in the present case is the sanction order dated 17.04.2012 - which has to be taken into consideration to form a view whether the sanction was there or not, and any act done prior to the same, including the sending of a view by the appointing authority to the CVC and the view of the CVC, are steps in process of reaching a final conclusion and cannot be taken into consideration by the trial Court for examining the factum of sanction.

9. He further argues that in terms of the powers conferred under the CVC Act, an office memorandum has been issued by the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training being Office Memorandum No.372/6/2017-AVD-III, Dated 02nd December, 2020, relevant portion of which is to the following effect:

...

*3. Recently, CVC has observed that some Ministries/Department, specifically CPSUs and Public Sector Banks, are not following the said guidelines/instructions in true spirit. Further, in certain cases the Competent Authority formally declined the sanction for prosecution and then referred the matter to the CVC for advice.*

*4. As once the Competent Authority takes a decision and communicates it to the CBI, the matter of grant of sanction for prosecution cannot be reviewed, it is important that the requisite consultation with CVC, etc. is completed before the Competent Authority takes a decision in such matters."*

10. Learned counsel for the CBI places reliance on the following judgments:

***Dinesh Kumar v. Chairman, Airport Authority of India and Anr.4***

***State of Bihar and ors. v. Rajmangal Ram5***

***Vivek Batra v. Union of India and Ors.6***

***Abhai Ranjan v. State of U.P. & Ors.7***

11. He, thus, concludes his argument by arguing that on the point of sanction, the submission of counsel for the revisionist merits rejection and should be rejected.

12. To appreciate the arguments raised at the Bar, it is essential to note the scheme of the PC Act, particularly Section 19, which is as under:

*"19. Previous sanction necessary for prosecution.- (1) No court shall take cognizance of an offence punishable under sections 7, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014) –*

*(a) in the case of a person who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;*

*(b) in the case of a person who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;*

*(c)* ***in the case of any other person, of the authority competent to remove him from his office:***

*Provided that no request can be made, by a person other than a police officer or an officer of an investigation agency or other law enforcement authority, to the appropriate Government or competent authority, as the case may be, for the previous sanction of such Government or authority for taking cognizance by the court of any of the offences specified in this sub-section, unless –*

*(i) such person has filed a complaint in a competent court about the alleged offences for which the public servant is sought to be prosecuted; and*

*(ii) the court has not dismissed the complaint under section 203 of the Code of Criminal Procedure, 1973 (2 of 1974) and directed the complainant to obtain the sanction for prosecution against the public servant for further proceeding:*

*Provided further that in the case of request from the person other than a police officer or an officer of an investigation agency or other law enforcement authority, the appropriate Government or competent authority shall not accord sanction to prosecute a public servant without providing an opportunity of being heard to the concerned public servant:*

*Provided also that the appropriate Government or any competent authority shall, after the receipt of the proposal requiring sanction for prosecution of a public servant under this sub-section, endeavour to convey the decision on such proposal within a period of three months from the date of its receipt:*

*Provided also that in case where, for the purpose of grant of sanction for prosecution, legal consultation is required, such period may, for the reasons to be recorded in writing, be extended by a further period of one month:*

*Provided also that the Central Government may, for the purpose of sanction for prosecution of a public servant, prescribe such guidelines as it considers necessary.*

*Explanation.- For the purposes of sub-section (1), the expression "public servant" includes such person –*

*(a) who has ceased to hold the office during which the offence is alleged to have been committed; or*

*(b) who has ceased to hold the office during which the offence is alleged to have been committed and is holding an office other than the office during which the offence is alleged to have been committed.*

*(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.*

*(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-*

*(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;*

*(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;*

*(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.*

*(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.*

*Explanation.--For the purposes of this section,-*

*(a) error includes competency of the authority to grant sanction;*

*(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."*

13. On a plain reading of Section 19 of the PC Act, it is clear that the said section was inserted to ensure that there are no unnecessary prosecutions specifically in respect of public servants and thus, the provision for grant of sanction was prescribed. In short there cannot be ant prosecution of any public servant under The PC Act without an order of sanction by the empowered Authority in accordance with law.Section 19(1)(c) which is applicable to the facts of the present case prescribes for a sanction from the authority competent to remove him from his offence which in the present case is the Executive Committee of the Central Board of the State Bank of India.

14. It is clear from the records (communication dated 30.8.2011 )that the said Executive Committee of Central Board of the State Bank of India had clearly declined the sanctioned for prosecution in case of the revisionist and the said decision was communicated to the CVC. It appears that the subsequent sanction order dated 17.04.2012 must have been in pursuance to any opinion given by the CVC in pursuance to the communication dated 30.08.2011, however, the same is not on record. The sanction order dated 17.04.2012 is signed by Managing Director & Group Executive (National Banking) Corporate Centre, Mumbai and the perusal of the said order, specifically the portion extracted herein above, demonstrates that the said Shri A. Krishna Kumar claims to be authorized by the authority competent to remove the revisionist. It is also clear that the said person had examined the materials including the statement of witnesses recorded by the Investigating Officer recorded under Section 161 Cr.P.C. and had also considered the circumstances of the case, and based upon the said observation,(as recorded in the sanction order dated 17.4.12) he proceeded to grant the sanction. Although, it has not been argued before this Court that in terms of the mandate of Section 19(1)(c) of the PC Act, the power of sanction vests only in the authority competent to remove him from the office, and there is no provision to further delegate the power in favour of anyone which appears to be the case in the present case.

15. The subsequent sanction order dated 17.04.2012 based upon which the Revisionist is proposed to be prosecuted, is admittedly by an officer claiming to be a delegatee of the appointing authority and not by the appointing authority/authority specified under section 19(1)(c) of the PC Act . The delegation of powers by a person empowered is neither permissible under The PC Act nor can be done by the authority empowered as the same would violate the well settled principles "Delegatee non potest delegare".

16. The said sanction order dated 17.04.2012 prima-facie does not even disclose any application of mind while granting the sanction insofar as it records that it has carefully examined the material, including the submissions, however, there is no reference whatsoever to the earlier refusal of sanction order dated 30.08.2011 whereby the appointing authority had specifically refused the sanction for prosecuting the revisionist. There is no mention whatsoever of any opinion/advice received by the CVC under Section 8(1)(g) of the CVC Act, based upon which the sanction for prosecution is founded, thus, on the face of it, the sanction was clearly without any application of mind and by an authority which is claiming itself the delegatee of the appointing authority

without there being any provision of delegation of the authority prescribed under the PC Act.

17. To analyze the judgments placed by the learned counsel(s), it is important to refer to the judgment of the Supreme Court in the case of ***Nishant Sareen (supra)*** wherein the Supreme Court after analyzing the scheme of Section 19 of the PC Act recorded the underlying object of Section 19 as under:

*"7. The object underlying Section 19 is to ensure that a public servant does not suffer harassment on false, frivolous, concocted or unsubstantiated allegations. The exercise of power under Section 19 is not an empty formality since the Government or for that matter the sanctioning authority is supposed to apply its mind to the entire material and evidence placed before it and on examination thereof reach conclusion fairly, objectively and consistent with public interest as to whether or not in the facts and circumstances sanction be accorded to prosecute the public servant. In Mansukhlal Vithaldas Chauhan vs. State of Gujarat, this Court observed: (SCC p.631, para 17)*

*"17. ... Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecution and is a safeguard for the innocent but not a shield for the guilty'.*

*8. Section 19 or for that matter Section 197 of Code of Criminal Procedure, 1973 (for short, `the Code') does not make any express provision regarding review or reconsideration of the matter by the sanctioning authority once such power has been exercised. In Gopikant Choudhary v. State of Bihar and Ors., initially the Minister concerned refused to accord sanction to prosecute the public servant therein and an order was passed to that effect. Subsequently, after retirement of the public servant, the matter was taken up by the Chief Minister and he granted sanction for prosecution of the public servant concerned. The question that arose for consideration before this Court was the correctness of the order passed by the Chief Minister. This Court set aside the order of the Chief Minister granting sanction to prosecute the public servant, inter alia, on the ground that the Chief Minister did not have any occasion to reconsider the matter and pass fresh order sanctioning the prosecution.*

*9. In Romesh Lal Jain v. Naginder Singh Rana & Ors. , it was held by this Court that : (SCC p. 303 para 14)*

*"14. ... an order granting or refusing sanction must be preceded by application of mind on the part of the appropriate authority. If the complainant or accused can demonstrate such an order granting or refusing sanction to be suffering from nonapplication of mind, the same may be called in question before the competent court of law."*

And ultimately concluded as under:

*"12. It is true that the Government in the matter of grant or refusal to grant sanction exercises statutory power and that would not mean that power once exercised cannot be exercised again or at a subsequent stage in the absence of express power of review in no circumstance whatsoever. The power of review, however, is not unbridled or unrestricted. It seems to us sound principle to follow that once the*

*statutory power under Section 19 of the 1988 Act or Section 197 of the Code has been exercised by the Government or the competent authority, as the case may be, it is not permissible for the sanctioning authority to review or reconsider the matter on the same materials again. It is so because unrestricted power of review may not bring finality to such exercise and on change of the Government or change of the person authorised to exercise power of sanction, the matter concerning sanction may be reopened by such authority for the reasons best known to it and a different order may be passed. The opinion on the same materials, thus, may keep on changing and there may not be any end to such statutory exercise.*

*13. In our opinion, a change of opinion per se on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, in a case where fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to prosecute the public servant may be granted, there may not be any impediment to adopt such course."*

18. In the next judgment cited by learned counsel for the revisionist i.e. R. Bhuvaneswari (supra), the High Court of Bombay was hearing a matter arising out of an order of discharge allowed by the trial Court. In the said case, on three different occasions, the sanction was refused by the appointing authority and was sent for opinion to the CVC and ultimately, on the basis of the views expressed by the CVC, a sanction order came to be passed. The said manner of exercise was not accepted by the trial Court and the said view was affirmed in the revision.

19. It is also essential to notice the judgment cited by learned counsel for the CBI, particularly in the case of ***Rajmangal Ram (supra)*** wherein it was held that the error, omission or irregularity should be coupled with failure of justice. Paragraph – 9 of the said judgment reads as under:

*"9. In the instant cases the High Court had interdicted the criminal proceedings on the ground that the Law Department was not the competent authority to accord sanction for the prosecution of the respondents. Even assuming that the Law Department was not competent, it was still necessary for the High Court to reach the conclusion that a failure of justice has been occasioned. Such a finding is conspicuously absent rendering it difficult to sustain the impugned orders of the High Court."*

20. It is also essential to note the judgment of the Supreme Court in the case of ***Dinesh Kumar (supra)*** wherein the Supreme Court noticed the earlier judgments of the Supreme Court in the case of ***State of Karnataka v. Ameerjan8*** and ***Parkash Singh Badal v. State of Punjab9*** to the following effect:

*"11. In a later decision, in the case of Ameerjan, this Court had an occasion to consider the earlier decisions of this Court including the decision in the case of Parkash Singh Badal. Ameerjan was a case where the Trial Judge, on consideration of the entire evidence including the evidence of sanctioning authority, held that the accused Ameerjan*

*was guilty of commission of offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act. However, the High Court overturned the judgment of the Trial Court and held that the order of sanction was illegal and the judgment of conviction could not be sustained.*

*12. Dealing with the situation of the case wherein the High Court reversed the judgment of the conviction of the accused on the ground of invalidity of sanction order, with reference to the case of Parkash Singh Badal, this Court stated in Ameerjan in para 17 of the Report as follows: (SCC p. 280)*

*"17. Parkash Singh Badal, therefore, is not an authority for the proposition that even when an order of sanction is held to be wholly invalid inter alia on the premise that the order is a nullity having been suffering from the vice of total non-application of mind. We, therefore, are of the opinion that the said decision cannot be said to have any application in the instant case."*

*13. In our view, having regard to the facts of the present case, now since cognizance has already been taken against the appellant by the Trial Judge, the High Court cannot be said to have erred in leaving the question of validity of sanction open for consideration by the Trial Court and giving liberty to the appellant to raise the issue concerning validity of sanction order in the course of trial. Such course is in accord with the decision of this Court in Parkash Singh Badal and not unjustified."*

21. The emphasis of Shri Anurag Kumar Singh, learned counsel for the CBI, is on the observation made in Paragraph – 13 of ***Dinesh Kumar's (supra)*** judgment, as extracted above, however, the Supreme Court itself had observed that having regard to the facts of the present case, since the cognizance has already been taken against the appellant by the trial judge, the High Court cannot be said to have erred in leaving the question of validity of sanction opened for consideration by the trial Court during the trial.

22. In the other judgment cited by Shri Anurag Kumar Singh in the case of ***Vivek Batra (supra)***, prima-facie, there is no issue akin to the issue in the present revision, decided in the said judgment.

23. The judgment of the Supreme Court in the case of ***Vijay Rajmohan v. State Represented by the Inspector of Police, CBI, ACB, Chennai, Tamil Nadu10*** - although not cited by any of the parties - is an important judgment which deals with the issues as raised in the present revision; the Supreme Court framed two questions of law in Paragraph – 2 to the following effect:

"2. Two important questions of law arise for consideration in this appeal. The first question is whether an order of the Appointing Authority granting sanction for prosecution of a public servant under Section 19 of the Prevention of Corruption Act, 1988, would be rendered illegal on the ground of acting as per dictation if it consults the Central Vigilance Commission for its decision. The second question is whether the period of three months (extendable by one more month for legal consultation) for the Appointing Authority to decide upon a request for sanction is mandatory or not. The further question in this context, is whether the criminal proceedings can be quashed if the decision is not taken within the mandatory period."

24. We are not concerned in the present case with regard to the second question framed by the Supreme Court, however, the first question completely arises in the present case.

25. The Supreme Court noticed the scheme of the Act and the legislative changes made in the CVC Act; the Supreme Court also noticed that the five legislations on the subject of corruption, operate as integrated scheme. The observations of the Supreme Court are as under:

*"18. It is evident from the above referred formulation that the position of law and the legal regime obtained by virtue of the five legislations on the subject of corruption, operates as integrated scheme. The five legislations being the Cr.P.C, DSPE Act, PC Act, CVC Act, and Lokpal Act, must be read together to enable the authorities to sub-serve the common purpose and objectives underlying these legislations. The Central Vigilance Commission, constituted under the CVC Act is specifically entrusted with the duty and function of providing expert advice on the subject. It may be necessary for the appointing authority to call for and seek the opinion of the CVC before it takes any decision on the request for sanction for prosecution. The statutory scheme under which the appointing authority could call for, seek and consider the advice of the CVC can neither be termed as acting under dictation nor a factor which could be referred to as an irrelevant consideration. The opinion of the CVC is only advisory. It is nevertheless a valuable input in the decision-making process of the appointing authority. The final decision of the appointing authority must be of its own by application of independent mind. The issue is, therefore, answered by holding that there is no illegality in the action of the appointing authority, the DoPT, if it calls for, refers, and considers the opinion of the Central Vigilance Commission before it takes its final decision on the request for sanction for prosecuting a public servant."*

26. The Supreme Court in the facts of the said case, after examining the records recorded as under;

*"19. Returning to the case facts, we have examined the correspondence and the long-drawn communications between the CBI, the DoPT, and the CVC. We found that the inquiry made by the appointing authority, the DoPT, was only for soliciting further information, and particularly the opinion given by CVC is also advisory. The sanction order of the DoPT dated 24.07.2017 is an independent decision of the department that was taken based on the material before it. Under these circumstances, we are not inclined to accept the first submission made on behalf of the Appellant that the order of sanction suffers from illegality due to non-application of mind or acting under dictation."*

27. Thus, from the law as explained after considering the five legislations and holding them to be operating as an integrated scheme, the Supreme Court clearly held that the power of the CVC is only an advisory power, however, it is a valuable input in the decision making process of the appointing authority; the final decision is to be that of the appointing authority after application of independent mind and the order of sanction should not suffer from illegality due to non-application of mind or acting under dictation.

28. Thus on analysis of the precedents referred above and on interpretation of the Section 19 of The PC Act what can be culled is as under:

28.1. No authority can initiate prosecution of the officers covered under the PC Act unless a sanction is granted by the appointing authority or the Authority empowered to remove the public servant,as the case may be.

28.2. The sanction should be granted/refused by the competent authority after application of mind and after considering the advice given by the CVC.

28.3. The role of CVC as prescribed under the CVC Act is only advisory and merits consideration by the competent Authority but does not have any binding effect.

28.4. The Authority empowered to grant /refuse sanction under Section 19 (1) of the PC Act alone can consider granting/refusing to grant sanction and is not empowered to delegate the powers vested in it.

28.5. An order granting sanction/refusing to grant sanction by any authority not empowered under Section 19(1) of The PC Act is a nullity being without jurisdiction.

28.6. Initiating prosecution on the foundation of an invalid/non est sanction order will be in the teeth of restrictions imposed under Section 19 of The PC Act and would clearly occasion failure of justice.

29. In the present case, the sanction order, based upon the which the CBI intends to proceed against the revisionist, is the sanction order dated 17.04.2012, which, as already discussed above, is by an authority not empowered and thus without jurisdiction, it also suffers from the vice of non-application of mind insofar as it does not consider the earlier refusal of sanction order dated 30.08.2011 passed by the competent authority i.e. the Executive Committee of the Central Board. The sanction order dated 17.04.2012 also does not consider any input/opinion expressed by the CVC (if any) with regard to sanction for prosecuting the revisionist. The said order is also by a person who claims to be a delegatee of the appointing authority, whereas there is no power of delegation which vests either in the appointing authority to delegate its power or otherwise by virtue of the PC Act and thus without jurisdiction.

30. The rejection of the discharge application filed by the revisionist by observing and founding the same on the sanction order dated 17.04.2012 has clearly occasioned the failure of justice as now the revisionist is to be tried on the foundation of a sanction order which is without jurisdiction and suffers from the vices, as recorded above. Thus, based upon the sanction order dated 17.04.2012, the revisionist cannot be prosecuted. The discharge application filed by the revisionist ought to have been allowed and was wrongly rejected by the trial Court by means of the impugned order.

31. In view of the aforesaid discussion, the present criminal revision is ***allowed.***

32. Impugned Order dated 20.04.2024 passed in Criminal Case No.01

of 2012 (Union of India through C.B.I. v. Sanjaya Dikshit and ors.) is hereby quashed and the discharge application filed by the revisionist is allowed only on the ground that there was no valid sanction for prosecuting the revisionist.

33. I have not remanded the matter in view of the fact that I had called for the entire trial Court record by means of an order dated 16.05.2024 and 21.05.2024 and there is no material to be re-appreciated apart from the findings recorded above for which the matter should be remanded.

34. The original record be transmitted back to the Court concerned at the earliest.

35. This Court records its appreciation for the assistance provided by Ms. Rajshree Lakshmi, Research Associate/Law Clerk in deciding the case.

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**(2024) 7 ILRA 747**
**CRIMINAL JURISDICTION**
**ORIGINAL SIDE**
**DATED: ALLAHABAD 23.07.2024**

**BEFORE**

**THE HON'BLE ARVIND SINGH SANGWAN, J.**
**THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.**

Capital Cases No. 7 of 2023

**Prem Naresh ...Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Rajiv Lochan Shukla

**Counsel for the Respondent:**
A.G.A.

**(A) Criminal Law – Criminal Procedure Code,1973 - Sections 161, 164 & 313 - Indian Penal Code, 1860 - Section 376-B – Prevention of Child from Sexual Offences Act, 2012 - Sections 5 & 6: -** Conviction and Sentenced - Capital sentence - reference and appeal - offence of rape with a three years old girl child -– arrest – recovery - forensic examination – charge-sheet - Appreciation of evidence - Court finds that, trial court has rightly recorded the finding holding the accused guilty of offence – Hence, the conviction under section 376-AB of IPC r/w 5/6 POCSO Act, are upheld - However, it is not a 'rarest of rare' case where death penalty could be awarded and Trial court has not recorded any mitigating circumstances in which only death penalty should be awarded to the accused – held, sentence of capital punishment be commuted to life imprisonment as the trial court while awarding death sentence has not recorded any mitigating circumstances, though the accused has committed the gravest offence - therefore, capital punishment awarded to the appellant should be commuted to life imprisonment for a fixed term of 25 years without any remission – Appeal qua conviction is dismissed, however, Appeal qua sentence is partly allowed - sentence is modified – directions issued accordingly. (Para –33, 34, 36, 37, 38)

**Appeal against conviction Dismissed but, against punishment partly allowed.** (E-11)

**List of Cases cited:**

1. Dharma Deo Yadav Vs St. of U.P. (2014 vol. 3 Apex Court Judgments (SC) 125),

2. Mukesh & anr. Vs St. of NCT of Delhi (2017 AIR (SC) 2161),

3. Ravi S/o Ashok Ghumare Vs St. of Mah. (2019 AIR SC 5170),

4. Manoj & ors. Vs St. of M.P. (2022 SCC Online SC 677),

5. Navas @ Mulanavas Vs St. of Kerala (2024 SCC Online SC 315),

6. Bachchan Singh Vs St. of Pun. (AIR 1980 SC 898),

7. Ravinder Singh Vs St. Govt. of NCT of Delhi (2024 2 SCC 323),

8. Sunder Vs St. by Inspector of Police (2023 SCC Online SC 310),

9. Madan Vs St. of U.P. (2023 SCC Online SC 1473),

10. Shiva Kumar Vs St. of Karn. (2023 9 SCC 817),

11. Irappa Siddappa Murgannavar Vs St. of Karn. (2022 2 SCC 801),

12. X Vs St. of Mah. (2019 7 SCC 1),

13. Raju Jagdish Paswan Vs St. of Mah. (2019 16 SCC 380),

14. Swapan Kumar Jha Vs St. of Jharkhand & anr. (2019 13 SCC 579),

15. Haru Ghosh Vs St. of W. B. (2009 15 SCC 551),

16. Mulla & Another Vs St. of U.P. (2010 3 SCC 508),

17. Ramraj Vs St. of Chhatisgarh (2010 1 SCC 573),

18. Swamy Shraddananda Vs St. of Karn. (2008 13 SCC 767).

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. Reference No. 06 of 2023 has been made by the Court of Special Judge (POCSO Act), Auraiya for confirmation of capital punishment awarded to appellant Prem Naresh in Special Sessions Trial No. 1276 of 2021. The Jail Appeal being Capital Case No.7 of 2023 has been filed by the appellant challenging the judgment of conviction dated 09.02.2023 holding the appellant guilty of offence under Section 376 AB of IPC and Section 5/6 of POCSO Act and the order of sentence dated 14.02.2023, vide which the appellant was awarded death sentence to be hanged till death with fine of Rs.5,00,000/- (five lacs). In the even of non payment of fine, additional rigorous imprisonment for one year. It is directed that 50% of the payment of fine will be payable to the victim.

2. The Reference and Appeal were admitted. The Trial Court's record is received and paper books are ready.

3. Heard Sri Rajiv Lochan Shukla, learned Amicus Curiae assisted by Sri Sarvesh Kumar Dubey, Advocate for the appellant, Sri Saurabh Pathak, learned counsel for victim/informant and Sri Patanjali Mishra, learned A.G.A. for the State.

4. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

5. Facts of the case as per the informant/PW-1 who is the maternal grandfather of the victim (name not disclosed and referred as 'Victim S') are as under :

*"सेवा में, श्रीमान प्रभारी निरीक्षक महोदय*
*कोतवाली विधूना जनपद औरैया।*

*महोदय निवेदन है कि प्रार्थी मिथलेख पुत्र कठोरीलाल शंखवार (कोरी) निवासी ग्राम रतनपुर बन्यरा थाना विधूना जनपद औरैया का निवासी है आज दिनांक 20.10.2021 को समय करीब 2.30 बजे दिन मेरी नातिन S...... उम्र करीब 03 वर्ष अपने दरवाजे पर खेल रही थी मेरे गांव के निवासी शिवप्रेम का साला प्रेमनरेश पुत्र भजनलाल शंखवार (कोरी) निवासी ग्राम धनवाली थाना विधूना जनपद औरैया में मेरी नातिन S...... उपरोक्त को बिस्कुट खिलाए जाने का लालच देकर ले गया कुछ देर बाद मेरी नातिन S...... की रोने की आवाज सुनकर मैं व मेरा पुत्र*

*करन सिंह भागकर गये तो मेरी नातिन शिवप्रेम के कमरे के अन्दर नगिन अवस्था में पडी थी हम लोगो के देखकर प्रेमनरेश मौके से भाग गया मेरी नातिन के साथ प्रेमनरेश उपरोक्त ने बलात्कार किया है मैं अपनी नातिन को लेकर थाने पर आया हूं मेरी नातिन के पेशाब के रास्ते से खून भी निकला है।*

*श्रीमान जी से निवेदन है रिपोर्ट लिखकर कानूनी कार्यवाही करने की कृपा करें।*

*ह० मिथलेश कुमार प्रार्थी*
*लेखक मिथलेश पुत्र कठोरीलाल*
*करन सिंह निवासी रतनपुर वन्थरा*
*पुत्र मिथलेश निवासी थाना विधूना जिला औरैया*
*रतनपुर वन्थरा 789784343*
*थाना विधूना, जिला औरैया*
*दिनांक 20.10.2021"*
*8126547379 "*

6. On the basis of the written complaint given by Mithalesh (PW-1), Chick F.I.R. was registered as Case Crime No. 516 of 2021 on 20.10.2021 at 17.53 hrs under Section 376 AB of IPC and Section 5/6 of Prevention of Child from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act')

7. The F.I.R. was registered against the appellant-Prem Naresh aged about 29 years.

8. The victim was sent for medical examination and as per the Medico Legal Examination conducted by Dr. Seema Gupta (PW-2), the injuries found on the body of the victim as reported in the Medico Legal Report are as under :

*"Vaginal tear of size 3 x 3 cm at 6 O clock position involvement of anal sphincter and anal canal at upper side fresh bleeding present. Clotted blood and fresh blood present over perineal region.*

*Hymen torn.*

*Perineum tear.*

*Blood clot present IV degree perineal tear 3 x 3 cm.*

*Vagina, valva anal sphinceter and anus tear fresh bleeding present"*

During medical examination of the victim, Dr. Seema Gupta (PW-2) reported as under :

*"Injury present at vagina valva anus vaginal tear present with anal sphinter tear bleeding present from anus and vagina. This may be due to sexual assault."*

On completing the medical examination, PW-2 gave her final opinion which is as under :

*"A case of sexual assault vaginal and anus tear, bleeding present. This may be due to sexual assault."*

9. Thereafter, the police got recorded the statement of mother of the victim under Section 164 of Cr.P.C. (Ex.Ka-4) which reads as under :

*"ब्यान मेरा नाम सुमन देवी है। मेरी उम्र 27 साल है। मैं पढी-लिखी नहीं हूं। Dt 20.10.2021 को सुबह 11 बजे मेरी बेटी S...... खेलने के लिए निकल गयी थी। जब 2-3 घण्टे हो गये तो उसके भाई-बहन आ गये तो उन्होने पूछा कि मम्मी बिट्टी कहां है। फिर सब लोग ढूढंने लगे। हमारे घर के बराबर में जो घर है वहां देखा तो एक अंदर कमरे में कुण्डी लगी थी। बेटी के बाबा और चाचा गये और धक्का मारा तो दरवाजा खुला उसमें मेरी बेटी मिली और वहां प्रेमनरेश मिला। जब बेटी मिली तो उसके ऊपर की बनियान नहीं थी,गले में चांदी का हाय पहने थी वह भी नहीं मिली, नीचे के कपडे खून में सने थे और उसकी पेशाब वाली जगह से खून निकल रहा था। प्रेम नरेश जब मिला तब वह अपना कपडा बदल रहा था। मुझे और कुछ नहीं कहना है।"*

10. The statement of victim-S under Section 164 Cr.P.C. was also recorded on

the same date i.e. on 20.11.2021 which reads as under :

*"ब्यान-प्र० (1) तुम्हारा नाम क्या है?*
*उ० S……*
*प्र० (2) सच बोलना चाहिये या झूठ?*
*उ०- सच्ची*
*प्र० (3) क्या हुआ था तुम्हारे साथ?*
*उ० बोरी में डाल लिया था। पकड लिया था। वहां पर ले गये थे। कुण्डी लगा ली थी। आंखे बंद कर दी थी। गाल नोच रहे थे। गला बांध लिया था। बाबा को बुलाय मैंने। मुंह नोच रहे थे। मुंह में हाथ रख कर दबाया ( पीडिता ने इशारा करके बताया)। पीडिता ने पिशाब की जगह पे इशारा करके बताया कि यहां पर मारा था। उलटा लिटाया था। बोरी पे लिटाया।"*

11. The police arrested the accused and on his pointing out effected the recovery of blue coloured underwear and army coloured lower concealed in a plastic bag. Thereafter, the Investigating Officer sent the vaginal swab which was handed to him by PW-2 along with other articles to Forensic Science Laboratory for DNA examination.

12. During the investigation, statements of other prosecution witness under Section 161 Cr.P.C. were also recorded. On completion of the investigation, charge-sheet against accused-appellant, Prem Naresh, was submitted under Section 376 AB of IPC read with Section 5/6 of the POCSO Act. A copy of the charge-sheet was supplied to the accused. Later on, the Trial Court framed the charges under the aforesaid sections which were read over to the accused. The accused did not plead guilty and claimed trial. The accused, as per the request, was provided assistance with a Assistant Legal Defence Counsel by the Trial Court.

13. In the prosecution evidence, Mithalesh Kumar (PW-1)/Informant appeared and stated on the line of information given in the complaint forming basis of the F.I.R. This witness stated that at about 2.00 PM, he was present in his house and his maternal grandson and granddaughter, Yash and Sakshi, returned from the school and enquired about the victim. Finding that she is missing, they started searching for her, for about one and a half hours. In the mean time, they heard cries of the victim from the abutting house. When they entered the house by breaking the door, the saw that the victim was lying on a plastic bag in a room where fodder was stored. Accused-Prem Naresh was also sitting there and on seeing him ran away from the spot. The victim was in a very bad condition and was not in her senses. She was bleeding from her vagina. The abutting house was of Shiv Prem who is brother-in-law of the accused, and accused used to visit. The victim knew the accused as maternal uncle of Himanshu (Mama of Himanshu). On the pretext of giving her biscuits, the accused took her in the fodder room and caused injuries on her sexual organs. Thereafter, PW-1 gave the complaint, which was scribed by his son-Karan Singh, to the police which is Ex.Ka-1. Thereafter, the police took the victim to Government Hospital, Auraiya for medical examination. Considering the poor condition of the victim, she was referred to Saifai Hospital where she remained admitted for one night and from there she was referred to S.G.P.G.I., Lucknow where she remained admitted for 10-12 days.

14. This witness proved the birth certificate of the victim, according to which, her date of birth is 3.10.2018. PW-1 stated that the victim has already undergone one operation and is still under treatment and the Doctor has advised for one more operation. In cross examination,

this witness stated that at the time of incident, the victim was wearing underwear and banyan. He stated that in the complaint, he has not mentioned about breaking open the door and has not shown broken latch to the Investigating Officer. He further stated that he has normal relationship with his neighbour-Shiv Prem and both families frequently visit each other.

15. In further cross examination, he stated that when the accused was running away from the spot, he was caught hold by the villagers. He was wearing a green coloured shirt and white coloured pant. The shirt of the accused was blood-stained. The villagers gave beatings to the accused. A suggestion was given to this witness that due to enmity with his neighbour-Shiv Prem, a false case of rape was planted on the accused. It was also suggested that when his daughter-in-law, Suman (mother of the victim) had taken the victim for answering the call of the nature, she slipped and suffered injury on her sexual organs from a peg installed for tying the cattle.

16. Dr. Seema Gupta, Medical Officer, Government Hospital, Auraiya (PW-2) stated that on 20.10.2021, the victim was brought for her medical examination along with her family members who had given the following information which is as under :

*"दिनांक 20.10.2021 समय दोपहर 1.30 गली में खेल रही थी S……..। लगभग 2 बजे दोपहर में अनार कली ने बहोसी हालत में खून से लस्तपत S……… को आशा को दिया उसने बताया कि यह वरोसी में डली थी। मुझे S……… मुझे ताऊ भूस में उठाकर ले गया था। पिसाब के रास्ते से खून आ रहा है। और दर्द हो रहा है। पीडिता ने जो बताया वही लिखा*

*करन सिंह (चाचा)*
*आशादेवी(दादी)*
*मिथलेश कुमार (बाबा)"*

This witness further stated as under :

*"पीडिता की योनी का रास्ता लैट्रिन के रास्ते तक फटा हुआ था। चोट से ताजा खून आ रहा था। पीडिता गुप्तागों पर तथा चारों तरफ ताजा जमा हुआ खून था। पीडिता की योनि का स्राव का स्लाइड बनाकर शुक्राणु परीक्षण हेतु पैथालाजी भेजा था। पीडिता की योनि का मुख और लैट्रिन के रास्ते और छाती का स्वाब बनाकर डी०एन०ए० परीक्षण हेतु विधि विज्ञान प्रयोगशाला भिजवाया था। पीडिता के रक्त का नमूना लेकर विधि विज्ञान प्रयोगशाला भिजवाया था। पीडिता के योनि तथा लैट्रिन के रास्ते की चोटे पीडिता के साथ लैगिंक हमले के कारण आयी थी। पीडिता के परिवारीजनों के अनुसार पीडिता की उम्र तीन वर्ष थी। दिनांक 27.11.2021 को मेरे द्वारा पीडिता की पूरक चिकित्सीय आख्या तैयार की गयी थी जिसके अनुसार पीडिता के गुप्तांगों पर जो चोटे आयी थी वह लैगिंक हमले के कारण आयी थी। पीडिता की हालत ज्यादा खराब होने की वजह से पीडिता को प्राथमिक उपचार देकर 108 ऐम्बूलेन्स द्वारा सैफई भेजा गया था। पूरब चिकित्सीय आख्या पत्रावली में कागज संख्या 11क/1 व 11क/2के रूप में संलग्न है। जो मेरे द्वारा तैयार की गयी है। मेरे द्वारा हस्ताक्षरित है। जिसकी मैं पहचान व पुष्टि करती हूं। जिस पर प्रदर्श क 2 डाला गया।पत्रावली में शामिल कागज संख्या 9क/1 लगायत 9क/8 पीडिता की चिकित्सीय आख्या है। जो मेरे द्वारा तैयार की गयी है मेरे द्वारा हस्ताक्षरित है जिसकी मैं पहचान पुष्टि करती हूं। जिस पर प्रदर्श क 3 डाला गया। "*

This witness proved the MLC Report as Ex.Ka-2 & 3. She has also made a sketch regarding injuries sustained by victim as Ex.Ka-3. In cross examination, this witness stated about clothes worn by the victim at the time of the examination. On a specific question, the following reply was given :

*"प्रश्न- पीडिता की उम्र पीडिता के माता-पिता के बताने पर आपने लिखी थी*

*उत्तर- जी,मैंने पीडिता की उम्र माता-पिता के बताने पर नाम पता के साथ कालम नं०-4 में लिखी थी। पीडिता की उम्र जन्म प्रमाण पत्र के आधार पर नहीं लिखी थी, क्योंकि वो जन्म प्रमाण पत्र लेकर नहीं आये थे। पीडिता के गुप्तांग पर ताजा खून आ भी रहा था, और कुछ जमा हुआ था। पीडिता के नुकीले चीज पर*

*गिरने की बात नहीं बताई थी। इसलिये मैं नहीं बता सकती,कि गिरने से चोट आ सकती है या नहीं। यदि कोई नुकीली चीज पर गिरे तो उसके गुप्तांगो में चोट आयेगी लेकिन गुप्तांग और लेट्रिन का रास्ता एक साथ नहीं फटेगा।"*

17. Suman (PW-3), the mother of the victim, also deposed on the line of PW-1 and stated that the victim knew the accused as uncle of Himanshu (Mama of Himanshu) and when they broke open the door, she saw that her daughter, Victim-S, is lying naked on a plastic bag in fodder room and accused Prem Naresh was also in the room and, thereafter, he ran away.

This witness also stated that when she asked from the victim, she stated that accused took her on the pretext of giving biscuits and by taking her in fodder room, he caused injuries on her sexual organs by tying her hands. This witness also stated that her statement as well as the statement of the victim was recorded by the Magistrate under Section 164 of Cr.P.C. which she proved as Ex.Ka-4.

In cross examination, she stated that many people gathered at the place of occurrence and with regard to catching hold of the accused she stated as under :

*"जिस समय घटना स्थल वाले कमरे के किबाड तोडे जा रहे थे उस समय भीड में करीब दो सौ लोग वही खडे थे। जैसे ही दरवाजा टूटा मुल्जिम भागा वैसे ही दरवाजे पर पकड लिया। उस समय वह लोअर व बनियान पहने हुए था। उस कमरें में दो दरवाजे थे। ये दोनो दरवाजे मैंने देखे थे। कमरा के आगे बरामदा बना है। उसमें आगे भैस बंधी थी, अलमारी में कपडे रखे थे, बरोसी बनी हुई थी। इसके अलावा मैंने और कुछ नहीं देखा। "*

She denied a suggestion that on account of some enmity with the sister of the accused, a false case was registered.

Victim S appeared as PW-4 and her statement read as under :

*"ब्यान धारा 164 सी०आर०पी०सी० न्यायालय की अनुमति से खोला गया और उसमें रखा ब्यान पीडिता पीडिता की मां को दिखाया और पढकर सुनाया गया तो पीडिता की मां ने कहा कि यह वही ब्यान है जो पीडिता के बताने पर मजिस्ट्रेट साहब ने मेरे समक्ष लिखा था, जिस पर पीडिता की फोटो चस्पा है। जिसकी मैं पहचान व पुष्टि करती हूं। ब्यान को पत्रावली में कागज संख्या 29क/1के रूप में संलग्न किया गया जिस पर प्रदर्श क 4 डाला गया। ब्यान U/S 164 CRPC प्रदर्श क-4 को मुख्य परीक्षा के रूप में पढा जाय बचाव पक्ष के अधिवक्ता को जिरह की अनुमति दी गयी।*

X X Cross by Defence.

*मुझे खाने में टॉफी अच्छी लगती है। हिमांशू के मामा ने मुझे टॉफी दी थी।*

*To Court*

हिमांशू के मामा ने मुझे पकड लिया था और आंख पर पट्टी बाँध दी और नोंच लिया था और पीडिता ने हाथ के इशारे से बताया कि पेशाब की जगह चोट पहुँचाई थी।"

18. Parveen Kumar (PW-5) stated that on receiving complaint, he recorded G.D. No.44 as Ex.Ka-5 and Chick F.I.R. as Ex.Ka-6. In cross examination, this witness was put a question whether he had seen the watch at the time when G.D. and F.I.R. was registered. This witness stated that since the time was visible on the computer screen, it was recorded from there.

19. Rajesh Kumar Singh (PW-6), the first Investigating Officer, stated that on 20.10.2021, he received the information on which F.I.R. was registered, statements of victim, her mother and one Renu Devi were recorded in CD. He prepared the naksha nazri which is Ex.Ka-7. He further stated that the forensic team reached at the spot and recovered one packet, one red coloured doll made of cloth, one pair of hawai slippers, one torn piece of *masala* and 10-12 hairs and by sealing these articles, the

same were handed over to him. Thereafter, vide CD No. 2 dated 20.10.2021, the accused was arrested by S.H.O. Shashi Bhushan Mishra and the confession statement of accused was recorded in CD (Ex.Ka-8). Vide CD No.3 dated 27.10.2021, medical report of the victim and, for DNA test, blood samples of victim and accused were taken and sent to Forensic Science Laboratory, Agra.

In his cross examination, the witness stated that on receiving the chik FIR on 20.10.2021, he had gone to village Ratanpur but accused was not arrested in his presence and was arrested on next day from near a canal by S.H.O. and other police officials. This witness stated that at the spot, inside the fodder room no rapper of toffee or biscuit was found. There was a wooden door in the room and there was only one door which was not broken. He had not seen the broken latch. This witness also stated about the recovery effected by the Forensic Team and stated that during his examination, he has not mentioned about the bloodstaines on the plastic bag. This witness further stated about the recovery of an army coloured lower and blue coloured underwear from the house of the accused which was 15 km away from the place of occurrence. A suggestion was given to this witness that he has prepared a wrong site plan and has conducted the investigation while sitting in the police station, which he denied.

20. Mohd. Shakir ( PW-7), the second Investigating Officer, stated that after the transfer of previous investigating officer, he collected the date of birth certificate of the victim showing her date of birth as 3.10.2018. Thereafter, application was given before the Court for extending the remand of the accused. Vide C.D. dated 20.11.2021, the statement of the victim and her mother-Suman was recorded by the Court under Section 164 of Cr.P.C. and he also recorded the statement of Panchayat Officer who issued the date of birth certificate. Thereafter, on 27.11.2021, on receiving the medical report from King George's Medical University, Lucknow, a supplementary report was recorded in C.D-14 dated 28.11.2021 and statement of Dr. Seema Gupta was also recorded. Thereafter, the charge sheet under Section 376 AB of IPC and Section 5/6 POCSO Act was submitted against accused-Prem Naresh which is exhibited Ka-9.

In cross examination, this witness stated that the informant did not tell him about breaking open the door and he has not seen plastic bag from where the victim was found in naked condition. This witness also denied a suggestion that he has prepared the document while sitting in the police station and has recorded false statement under Section 161 Cr.P.C.

21. Thereafter, the statement of accused under Section 313 Cr.P.C. was recorded and all incriminating evidence was put to him. Question No.3 and its reply read as under : -

*"**प्रश्न** – आपने अभियोजन साक्षी संख्या–2 डा0 सीमा गुप्ता, जिला चिकित्सालय औरैया के बयान सुने। यह साक्षी पीड़िता का चिकित्सीय परीक्षण करने वाली डाक्टर है तथा इस साक्षी ने पत्रावली में शामिल कागज सं0– 11क/1 त 11क/2 पीड़िता की पूरक चिकित्सीय आख्या प्रदर्श क–2 एवं पत्रावली में शामिल कागज सं0 9क/1 लगायत 9क/8 पीड़िता की चिकित्सीय आख्या प्रदर्श क–3 को अपने लेख व हस्ताक्षर में होना साबित किया है। इस सम्बन्ध में आपको क्या कहना है ?*

***उत्तरः**– गलत है। पीड़िता के चोट गिर जाने की बजह से आई थी।"*

In reply to the question no.11 regarding the explanation by the accused, the accused replied that he is innocent and how the victim has suffered the injuries only she knew about it. No defence evidence was led by the accused.

22. The Trial Court, thereafter, vide impugned judgment of conviction, held the appellant guilty of offences and vide order of sentence, awarded him death sentence with fine.

23. Learned counsel for the appellant has argued that the case of the prosecution is based on circumstantial evidence as it is not a case of eye witness account.

24. Learned counsel for appellant has raised the following arguments : -

(A) It is submitted that there is delay of four hours in lodging an FIR. Mithalesh-PW-1 has stated that the incident is of around 2:30 p.m. on 20.10.2021 however, the FIR has been registered at 17:53 hrs on the same date and the distance between the place of occurrence and the police station is around four km., therefore, the prosecution has failed to give any plausible explanation for the delay in giving the information to the police station.

(B) It is next argued that as per deposition of Mithalesh-PW-1 (informant), the maternal grandfather of the victim, on hearing the cries of victim, he alongwith his son Karan Singh broke open the door of the fodder room, however, the same was not corroborated by the Investigating Officer.

(C) Learned counsel further argued that even it has come in the statement of Suman-PW-3, mother of the victim that his son Karan Singh has broken the door and, therefore, both PW-1 & PW-3 are consistent that by breaking the door, they entered the fodder room. However, in the cross examination, PW-6, the Investigating Officer has stated that he had not seen any mark on the door of making any forced entry and the lock of the door was attached.

(D) Learned counsel submits that even in the FIR/ complaint, the informant has not stated regarding breaking open the door and son of the informant Karan Singh is examined as a witness.

(E) Learned counsel submits that place of incident is not proved by the prosecution and the survival (victim) was found from some other place and place of occurrence is shown in house of the neighbour just to rope in the accused being his brother-in-law.

(F) Learned counsel has next argued that PW-1 & PW-3 has stated that many people had gathered at the place of incident but statement of no independent witness was recorded, only family members of the victim have recorded their statement under Section 161 Cr.P.C. as well as Section 164 Cr.P.C..

(G) Learned counsel submits that statement of PW-3 (Suman) that about 200 people have gathered at the spot when they recovered the minor victim, is not supported by the Investigating Officer and, therefore, the version given by PW-1 & PW-3 are contradictory.

(H) Learned counsel next argued that there are contradiction in the statement of PW-1 & PW-3 regarding hearing of cries of the victim and efforts made to locate her.

(I) Learned counsel submits that in the FIR, it is stated that only after hearing the cries of the victim from a room, of abutting house of the informant, they could locate the victim whereas PW-1 in his statement has stated that he heard the cries of the victim, when he entered the

house and when he entered in the room, the victim was unconscious whereas PW-3 has stated that first she heard the cries of the victim and then they could locate her.

(J) It is next argued that contradiction in the statement of both PW-1 & PW-3 shake the foundation of prosecution version regarding recovery of the child and the presence of the accused at the spot.

(K) It is further argued that as per PW-6, the Investigating Officer, he recovered the clothes of the accused at the pointing out of the accused on 22.10.2021, from the house of the accused vide a recovery memo. However, PW-1 stated that after the incident, he has handed over the accused to the police officials on the date of incident and at that time the accused was wearing green coloured shirt which was bloodstained and a trouser whereas, the recovery of a blue coloured underwear and army coloured lower was effected as per the recovery memo. It is also submitted that PW-6 stated that the accused Prem Naresh was arrested one day after the incident from near a canal by the S.H.O. whereas PW-1 & PW-3 have stated that they have handed over the accused to the police officials when they reached at spot and, therefore, the arrest of accused and the clothes worn by him creates doubt about the alleged recovery of clothes and the Investigating Officer has in fact planted the recovery by showing it from the house of the accused.

(L) It is next argued that PW-3 has stated that there were two doors in the room but PW-6, Investigating Officer has stated that there was only one wooden door of the fodder room and there was no other door. It is submitted that PW-3 being an eye witness has clearly stated that there were two doors in the fodder room where the incident has occurred and, therefore, the place of occurrence is not proved as the place where the victim was allegedly sexually assaulted.

(M) Learned counsel submits that PW-6, the Investigating Officer, stated that when he visited the place of occurrence, there was only one door which was not broken and thus PW-3 is not an eye witness and if she is an eye witness then the place of recovery of victim is not one as stated by the Investigating Officer. It is next argued that the discrepancies in the statements of eye witnesses regarding the clothes of the accused makes the case doubtful.

(N) Learned counsel has argued that PW-1-Mithalesh and PW-3- Suman deposed themselves to be an eye witness of the incident but there are discrepancies about the clothes worn by the accused-appellant.

(O) It is next argued that in the statement given under Section 164 Cr.P.C. by PW-3, the mother of the victim stated that she has seen the accused changing his clothes inside the room where the incident took place. PW-1 has stated that he has seen the accused hiding himself behind the bricks when he entered the room and thereafter the accused on seeing him, ran away. PW-1 has also stated that accused was wearing a green coloured shirt having blood stains. However, PW-3 has stated that when she noticed the accused running away from the room, he was wearing lower and vest and there is no mentioning of any blood on the same. The counsel argued that both PW-1 and PW-3 are at variance regarding the clothes worn by the accused at the time of the incident which makes the prosecution case doubtful. It is next argued that there is no eye-witness who had seen the victim being taken away by the accused or accused committing the alleged sexual assault on her.

(P) The counsel has referred to the statement of both PW-1 and PW-3 who

have not stated that they had seen the victim being taken away by the accused and they are not the witnesses to the sexual assault by the accused. It is next argued that in the statement of the victim recorded under Section 164 Cr.P.C, she has not named the accused. The counsel submits that in this statement, the victim stated that she was put on a sack in the room, the door was closed. She deposed that her eyes were closed, her cheeks were scratched and hands and legs were tied. Baba assaulted her at sexual organs and used his hand to press her mouth. The counsel submits that the victim has not named the accused and therefore, his identity is not established. It is next argued that PW-1 has stated that the accused has taken away the victim by luring her to give biscuit whereas the victim stated that she was lured on the pretext of giving a toffee. The counsel submits that no wrapper either of biscuit or toffee was found by the I.O. at the spot. It is next argued that in the medico-legal-examination of Prem Naresh- accused, no injuries were found on his body. The counsel submits that both PW-1 and PW-3 have deposed that after the accused was apprehended at the spot, lot of people gathered and they gave beatings to the accused, however, in his medico legal examination, no injuries was found which belies the version of prosecution.

(Q) Learned counsel, contrary to the argument raised at point (A) that there is delay of four hours in lodging the F.I.R. further argued that the FIR is ante-time. As PW-1 has stated that after the incident, he had handed over the accused to the police on the very date of incident which occurred around 2:30 PM and FIR was registered at 5:53 PM. PW-6, the first I.O. has stated that accused Prem Naresh was arrested on the next day i.e. 21.10.2021 by the SHO from the distant place i.e. a canal. Therefore, it is argued that FIR is ante-time and the investigation was conducted in a manner to indict the appellant as an accused. It is argued that the contradiction in the statement of the witnesses as well as I.O. again raises a suspicion about the credibility of the prosecution witnesses and the appellant was kept in illegal detention by the police.

(R) The counsel has next argued that it has come in the statement of PW-2 Dr. Seema Gupta who conducted the medico-legal-examination of the victim and as she has stated that she is not sure whether the injury can only be caused due to sexual assault. It is submitted that this witness has stated that she has kept the clothes which were worn by the survivor in the bag and do not remember if there were blood staines. It is next argued that the memo which was prepared by the F.S.L. team at the time of visiting the place of occurrence is not placed on record of the trial court. It is also argued that as per the PW-1 and PW-3 the offence was committed on a plastic sack which was found at the place of incident and the victim was found lying on the sack in semi unconscious condition. However, PW-6- the I.O. has stated that when he reached the spot he had found a sack amongst other articles and had seen blood spots on the plastic sack but it was not recovered by the forensic team from the place of incident. The counsel has referred to the F.S.L. report, in which there is no mention of a plastic sack recovered from the place of incident. The counsel has thus argued that appellant has been convicted in the aid of Section 5/6 of POCSO Act though the prosecution has failed to dispel the proof of the prosecution evidence beyond doubt.

(S) Learned counsel has argued that even the F.S.L. report does not prove the commission of crime by the appellant.

For a reference, F.S.L. report is reproduced as under:

"विधि विज्ञान प्रयोगशाला, उ०प्र०, आगरा

संयुक्त निदेशक,

विधि विज्ञान प्रयोगशाला, उ०प्र०,

15 ताज रोड, आगरा-282001

सेवा में,

पुलिस अधीक्षक औरैया

औरैया।

पत्रांकः 5507-DNA-312/21

अप०सं०ः:516/21

राज्य बनाम- प्रेम नरेश

धाराः 376AB IPC व 5/6 POCSO Act थाना- बिधूना

उपर्युक्त मामले से सम्बन्धित प्रदर्श प्रयोगशाला में दिनाँक 26/10/2021 को विशेष वाहक द्वारा प्राप्त हुये।

सील का विवरण

कुल ग्याराह (नौ समुद्रित लिफाफा व एक वस्त्रावत समुद्रित बण्डल तथा एक समुद्रित थर्माकॉल बॉक्स जिन पर (DCH AURAIYA) मुद्रा लिफाफा (1) से (9) व मुद्रा थर्माकॉल बॉक्स (11) पर (Signature UPP) मुद्रा बण्डल (10) पर नमूनानुसार की छाप अक्षत थी।

प्रदर्शों का विवरण

01- वजाइनल स्वैबस्टिक। पीड़िता S.. से एक समुद्रित लिफाफा में

02- वलवल स्वैबस्टिक। पीड़िता S.. से एक समुद्रित लिफाफा में

03- एनल स्वैबस्टिक।

पीड़िता S.. से एक समुद्रित लिफाफा में

04- ब्रेस्ट स्वैबस्टिक।

पीड़िता S.. से एक समुद्रित लिफाफा में

05- रक्त नमूना। पीड़िता S.. से एक समुद्रित लिफाफा में

06- स्कर्ट। पीड़िता S.. से एक समुद्रित लिफाफा में

07- टॉप। पीड़िता S.. से एक समुद्रित लिफाफा में

08- प्युबिक हेयर।

अभियुक्त प्रेम नरेश से एक समुद्रित लिफाफा में

09- टुकड़े नाखुन I

अभियुक्त प्रेम नरेश से एक समुद्रित लिफाफा में

10- अण्डरवियर I

अभियुक्त प्रेम नरेश से एक समुद्रित बण्डल में

11- लोअर I

अभियुक्त प्रेम नरेश से एक समुद्रित लिफाफा में

12- रक्तनमूना I

अभियुक्त प्रेम नरेश से एक समुद्रित थर्माकॉल बॉक्स में

परीक्षण परीणाम

प्राप्त प्रदर्शो (1) से (12) का डी०एन०ए० परीक्षण किया गया।

स्त्रोत प्रदर्श (11) (प्रेम नरेश से) पर उपस्थित बायोलाजिकल द्रव्य का स्त्रोत प्रदर्श (5) ( S...) के समान पाया गया।

(HID-STR KITS)

स्त्रोत प्रदर्श (1) से (3)व (6) ( S….. से) में पुरुष विशिष्ट एलील की उपस्थिति पायी गयी परन्तु आंशिक डी०एन०ए० प्रोफाइल जनरेट होने के कारण स्त्रोत प्रदर्श (12) (प्रेम नरेश से) से मिलान के सम्बन्ध में अभिमत दिया जाना सम्भव न हो सका। (HID & Y-STR KITS)

स्त्रोत प्रदर्श (4) व (7), का डी०एन०ए० प्रोफाइल स्त्रोत प्रदर्श (5) (S….. से) के समान व स्त्री मूल का पाया गया।
(HID- STR KIT)

स्त्रोत प्रदर्श (8) से (10) का डी०एन०ए० प्रोफाइल स्त्रोत प्रदर्श (12) ( प्रेम नरेश से) के समान व पुरूष मूल का पाया गया।। (HID&Y-STR KIT)

डी०एन०ए० परीक्षण मे जैनेटिक एनालाइजर व जीन मैपर साफ्टवेयर का प्रयोग किया गया।

उक्त परीक्षण में मानक विधियाँ प्रयोग में लायी गयी।

नोटः- समस्त प्रदर्शो को परीक्षण उपरान्त एक समुद्रित बण्डल में वापस लौटाया जा रहा है।

आवश्यक कार्यवाही हेतु अग्रसारित

ह० अप०

ह० अप०

| 03/01/23 | 03/01/23 |
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| संयुक्त निदेशक | उप निदेशक |

डी० एन० ए० अनुभाग

विधि विज्ञान प्रयोगशाला

आगरा, उ० प्र०"

(T) The counsel has argued that the articles from S.Nos.1 to 7 belong to the victim and were handed over by PW-2 to the I.O. whereas articles at S.Nos.8 to 12 belong to the accused-Prem Naresh.

(U) The counsel submits that as per the final conclusion drawn in the report, it is stated that Ex.1 to 12 were subjected to DNA examination. From the source Ex.11, which was lower worn by Prem Naresh, the source of biological fluid matched with the source at Ex.5 of the victim i.e. blood sample. The counsel submits that this is not sufficient to hold the appellant guilty of offence as from the source (Ex. 1 to 3 and 6) of the victim which are vaginal swab stick, vulval swab stick, anal swab stick and skirt, the presence of male allele was found but because of partial generation of DNA profile, it was found that it is not possible to match the same with Ex.12 i.e. blood sample of accused- Prem Naresh. The counsel submits that in view of this FSL report, it cannot be held that the appellant has committed the offence.

(V) Lastly, learned counsel has argued that the legal-aid-counsel appointed by the trial court to defend the accused has not properly conducted the trial as neither the material questions were put to the prosecution witnesses nor proper reply was given to the questions put while recording the statement under Section 313 Cr.P.C. and in order to prove innocence, the defence counsel failed to examine defence witness about his plea of alibi.

25. In reply, the learned AGA assisted by the Amicus Curiae/ Legal-Aid-Counsel appointed by the court on behalf of the victim has argued that the victim was subjected to aggravated penetrative sexual assault.

(B) The counsel has referred to MLC Report of the victim which is proved by Dr. Seema Gupta wherein, she has stated that on the sexual organs of the victim, fresh blood was seen and there was long tear from the vagina upto anus of the victim, as reflected in the sketch attached on the MLC Report.

(C) It is argued that doctor has clearly opined that the victim who is aged about three years at the time of incident was sexually assaulted and therefore, the medical evidence proved the charge against the appellant.

(D) It is next argued that during the cross-examination, PW-2 has clearly stated that if the victim had fallen on sharp end article, she may suffer injury on her sexual organs but the injury on the vagina and the anus cannot be caused simultaneously.

(E) The counsel submits that it is a case where PW-1 and PW-3 have witnessed the occurrence and they have recovered the child from the accused, who was also found present at the spot where the occurrence has taken place.

(F) The counsel submits that both the witnesses PW-1 and PW-3 are consistent in making statement that when they entered fodder room the victim was lying on plastic bag in nude condition and told that the accused on pretext of giving biscuit took her inside the fodder room and committed the offence.

(G) It is next argued that immediately after the incident, the statement of the victim as well as PW-3, the mother of the victim, was recorded by the police and the Magistrate. The statement was duly proved by PW-3. Learned AGA has submitted that in both the statements, the involvement of the appellant is duly proved.

(H) It is argued that the statement under Section 164 Cr.P.C. was recorded in accordance with law and even the victim has stated that the manner in which, the offence was committed and she called her Baba (grandfather). It is next argued that after the arrest of the accused, he himself pointed out the place from where, the blue colour underwear and army coloured lower were kept concealed in a plastic bag and were recovered.

(I) Learned counsel submits that even at the first instance when the I.O. recorded the brief history of the incident, in which the victim has stated that Bau has taken her to the fodder room and therefore, neither there is any improvement nor there is any doubt about the first version given to the doctor as well as the police.

(J) It is also argued that the victim has identified the accused as maternal uncle of one Himanshu who is son of Shiv Prem, a next door neighbour of the informant-PW-1. The accused is brother-in-law (sala) of Shiv Prem and therefore, his presence in the house is duly proved.

(K) Learned AGA has next argued that except giving a suggestion to PW-1- informant as well as to PW-3- mother of the victim that on account of strained relation with Shiv Prem, the accused has been falsely implicated, no evidence has been led to prove to the contrary. Learned AGA has referred to the earlier part of the cross-examination of both these witnesses where they have stated that they are having cordial relationship with Shiv Prem and both the families have visiting terms with each other. The counsel further submitted that no such suggestion was given to PW-6 and PW-7 that the accused has been falsely implicated. It is next argued that F.S.L. report duly proved that the DNA profile of the accused matched with the blood sample of the victim

(L) The counsel submits that if the F.S.L. report regarding the DNA examination is read in entirety, it proves the commission of offence. The counsel submits that as per the DNA report, Ex.4 and 7 which is breast swab stick, top of the victim matched with her blood sample and similarly from Ex.8 to 10, the pubic hair, pieces of nails and underwear matched with the blood sample of Prem Naresh at Ex.12 and therefore, the commission of offence by the accused is duly proved.

26. At this stage, the counsel referred to some relevant judgments of Supreme Court of India on scientific investigation of DNA.

27. In **Dharam Deo Yadav vs. State of U.P., 2014 (3) Apex Court Judgements (SC) 125,** it is observed as under :

*"33. We are in this case concerned with the acceptability of the DNA report, the author of which (PW21) was the Chief of DNA Printing Lab, CDFD, Hyderabad. The qualifications or expertise of PW21 was never in doubt. The method he adopted for DNA testing was STR analysis. Post-mortem examination of the body remains (skeleton) of Diana was conducted by Dr. C.B. Tripathi, Professor and Head of Department of Forensic Medical I.M.S., B.H.U., Varanasi. For DNA analysis, one femur and one humerus bones were preserved so as to compare with blood samples of Allen Jack Routley. In cases where skeleton is left, the bones and teeth make a very important source of DNA. Teeth, as often noticed is an excellent source of DNA, as it forms a natural barrier against exogenous DNA*

*contamination and are resistant to environmental assaults. The blood sample of the father of Diana was taken in accordance with the set up precept and procedure for DNA isolation test and the same was sent along with taken out femur and humerus bones of recovered skeleton to the Centre for D.N.A. Fingerprinting and Diagnostics (CDFD), Ministry of Science and Technology, Government of India, Hyderabad. PW21, as already indicated, conducted the DNA Isolation test on the basis of samples of blood of Routley and femur and humerus bones of skeleton and submitted his report dated 28.10.1998. DNA Fingerprinting analysis was carried out by STR analysis and on comparison of STR profile of Routley. When DNA profile of sample found at the scene of crime matches with DNA profile of the father, it can be concluded that both the samples are biologically the same.*

*34. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by DNA profiling. DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court.* ***DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory****. Close relatives have more genes in common than individuals and various procedures have been proposed for dealing with a possibility that true source of forensic DNA is of close relative. So far as this case is concerned, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings. We have, therefore, no reason to discard the evidence of PW19, PW20 and PW21. Prosecution has, therefore, succeeded in showing that the skeleton recovered from the house of the accused was that of Diana daughter of Allen Jack Routley and it was none other than the accused, who had strangulated Diana to death and buried the dead body in his house.*

28. Similar View is taken in **Mukesh and Anr. Vs. State of NCT of Delhi, 2017 AIR (SC) 2161.** The operative portion of the order read as under :

*"443. Before considering the above findings of DNA analysis contained in tabular form, let me first refer to what is DNA, the infallibility of identification by DNA profiling and its accuracy with certainty. DNA – De- oxy-ribonucleic acid,*

*which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA profiling is an extremely accurate way to compare a suspect's DNA with crime scene specimens, victim's DNA on the blood-stained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match. A DNA finger print is identical for every part of the body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred per cent precise. Using this i.e. chemical structure of genetic information by generating DNA profile of the individual, identification of an individual is done like in the traditional method of identifying finger prints of offenders. Finger prints are only on the fingers and at times may be altered. Burning or cutting a finger can change the make of the finger print. But DNA cannot be changed for an individual no matter whatever happens to a body.*

*444. We may usefully refer to Advanced Law Lexicon, 3rd Edition Reprint 2009 by P. Ramanatha Aiyar which explains DNA as under:-*

> ***"DNA.- De-oxy-ribonucleic acid**, the nucleoprotein of chromosomes. The double-helix structure in cell nuclei that carries the genetic information of most living organisms.*
>
> *The material in a cell that makes up the genes and controls the cell. (Biological Term)*
>
> ***DNA finger printing**. A method of identification especially for evidentiary purposes by analyzing and comparing the DNA from tissue samples. (Merriam Webster)"*

> *In the same Law Lexicon, learned author refers to DNA identification as under:*

> ***DNA identification.** A method of comparing a person's deoxyribonucleic acid (DNA) – a patterned chemical structure of genetic information – with the DNA in a biological specimen (such as blood, tissue, or hair) to determine if the person is the source of the specimen. – Also termed DNA finger printing; genetic finger printing (Black, 7th Edition, 1999)*

*445. DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes etc. recovered from the accused or from witnesses. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. The sophisticated technology of DNA finger printing makes it possible to obtain conclusive results.* Section 53A *Cr.P.C. is added by the Code of Criminal Procedure (Amendment) Act, 2005. It provides for a detailed medical examination of accused for an offence of rape or attempt to commit rape by the registered medical practitioners employed in a hospital run by the Government or by a local authority or*

*in the absence of such a practitioner within the radius of 16 kms. from the place where the offence has been committed by any other registered medical practitioner.*

*446. Observing that DNA is scientifically accurate and exact science and that the trial court was not justified in rejecting DNA report, in* ***Santosh Kumar Singh v. State*** *through CBI (2010) 9 SCC 747, the Court held as under:-*

> *"65. We now come to the circumstance with regard to the comparison of the semen stains with the blood taken from the appellant. The trial court had found against the prosecution on this aspect. In this connection, we must emphasise that the court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development.*
>
> *66. Dr. Lalji Singh in his examination-in-chief deposed that he had been involved with the DNA technology ever since the year 1974 and he had returned to India from the UK in 1987 and joined CCMB, Hyderabad and had developed indigenous methods and techniques for DNA finger printing which were now being used in this country. We also see that the expertise and experience of Dr. Lalji Singh in his field has been recognised by this Court in* ***Kamalanantha v. State of T.N.*** *(2005) 5 SCC 194 We further notice that CW 1 Dr. G.V. Rao was a scientist of equal repute and he had in fact conducted the tests under the supervision of Dr. Lalji Singh. It was not even disputed before us during the course of arguments that these two scientists were persons of eminence and that the laboratory in question was also held in the highest esteem in India.*
>
> *67. The statements of Dr. Lalji Singh and Dr. G.V. Rao reveal that the samples had been tested as per the procedure developed by the laboratory, that the samples were sufficient for the purposes of comparison and that there was no possibility of the samples having been contaminated or tampered with. The two scientists gave very comprehensive statements supported by documents that DNA of the semen stains on the swabs and slides and the underwear of the deceased and the blood samples of the appellant was from a single source and that source was the appellant.*
>
> *68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In* ***Bhagwan Das v. State of Rajasthan*** *AIR 1957 SC 589 it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert.*
>
> *71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by*

*this Court in **Kamti Devi v. Poshi Ram** (2001) 5 SCC 311. In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9." [emphasis added].*

*447. …………xxx…………….*

*448. DNA profile generated from the blood samples of accused Ram Singh matched with the DNA profile generated from the rectal swab of the victim. Blood as well as human spermatozoa was detected in the underwear of the accused Ram Singh (dead) and DNA profile generated therefrom was found to be female in origin, consistent with that of the victim. Likewise, the DNA profile generated from the breast swab of the victim was found consistent with the DNA profile of the accused Akshay."*

29. In **Ravi s/o of Ashok Ghumare Vs. State of Maharashtra, 2019 AIR (SC) 5170**, the Supreme Court has observed as under :

*"34. The unshakable scientific evidence which nails the appellant from all sides, is sought to be impeached on the premise that the method of DNA analysis "Y-STR" followed in the instant case is unreliable. It is suggested that the said method does not accurately identify the accused as the perpetrator; and unlike other methods say autosomal-STR analysis, it cannot distinguish between male members in the same lineage.*

*35. We are, however, not swayed by the submission. The globally acknowledged medical literature coupled with the statement of P.W.11 – Assistant Director, Forensic Science Laboratory leaves nothing mootable that in cases of sexual assualt, DNA of the victim and the perpetrator are often mixed. Traditional DNA analysis techniques like "autosomal-STR" are not possible in such cases. Y-STR method provides a unique way of isolating only the male DNA by comparing the Y-Chromosome which is found only in males. It is no longer a matter of scientific debate that Y-STR screening is manifestly useful for corroboration in sexual assault cases and it can be well used as excalpatory evidence and is extensively relied upon in various jurisdictions throughout the world. 1&2. Science and Researches have emphatically established that chances of degradation of the `Loci' in samples are lesser by this method and it can be more effective than other traditional methods of DNA analysis. Although Y-STR does not distinguish between the males of same lineage, it can, nevertheless, may be used as a strong circumstantial evidence to support the prosecution case. Y-STR techniques of DNA analysis are both regularly used in various jurisdictions for identification of offender in cases of sexual assault and also as a method to identify suspects in unsolved cases. Considering the perfect match of the samples and there being nothing to discredit the*

*1"Y-STR analysis for detection and objective confirmation of child sexual abuse", authored by Frederick C. Delfin – Bernadette J. Madrid – Merle P. Tan – Maria Corazon A. De Ungria.*

*2"Forensic DNA Evidence: Science and the Law", authored by Justice Ming W. Chin, Michael Chamberlain, A,y Roja, Lance Gima.*

*DNA analysis process, the probative value of the forensic report as well as the statement of P.W.11 are very high. Still further, it is not the case of the appellant that crime was committed by some other close relative of him. Importantly, no other person was found present in the house except the appellant.*

***36. There is thus overwhelming eye-witness account, circumstantial evidence, medical evidence and DNA analysis on record which conclusively proves that it is the appellant and he alone, who is guilty of committing the horrendous crime in this case. We, therefore, unhesitatingly uphold the conviction of the appellant."***

30. In **Manoj and others vs. State of Madhya Pradesh, (2022) SCC Online SC 677,** the Supreme Court has observed as under :

*"138. During the hearing, an article published by the Central Forensic Science Laboratory, Kolkata40 was relied upon. The relevant extracts of the article are reproduced below:*

*"Deoxyribonucleic acid (DNA} is genetic material present in the nuclei of cells of living organisms. An average human body is composed of about 100 trillion of cells. DNA is present in the nucleus of cell as double helix, supercoiled to form chromosomes along with Intercalated proteins. Twenty- three pairs of chromosomes present In each nucleated cells and an individual Inherits 23 chromosomes from mother and 23 from father transmitted through the ova and sperm respectively. At the time of each cell division, chromosomes replicate and one set goes to each daughter cell. All Information about Internal organisation, physical characteristics, and physiological functions of the body is encoded in DNA molecules in a language (sequence) of alphabets of four nucleotides or bases: Adenine (A), Guanine (G}, Thymine (T} and Cytosine (C) along with sugar-phosphate backbone. A human haploid cell contains 3 billion bases approx. All cells of the body have exactly same DNA but it varies from individual to Individual in the sequence of nucleotides. Mitochondrial DNA (mtDNA} found in large number of copies in the mitochondria is circular, double stranded, 16,569 base pair in length and shows maternal inheritance. It is particularly useful in the study of people related through the maternal line. Also being in large number of copies than nuclear DNA, it can be used in the analysis of degraded samples. Similarly, the Y chromosome shows paternal inheritance and is employed to trace the male lineage and resolve DNA from males in sexual assault mixtures. Only 0.1 % of DNA (about 3 million bases} differs from one person to another. Forensic DNA Scientists analyse only few variable regions to generate a DNA profile of an individual to compare with biological clue materials or control samples.*

*…… DNA Profiling Methodology DNA profile is generated from the body fluids, stains, and other biological specimen recovered from evidence and the results are compared with the results obtained from reference samples. Thus, a link among victim(s) and/or suspect(s) with one another or with crime scene can be established. DNA Profiling Is a complex process of analyses of some highly variable regions of DNA. The variable areas of DNA are termed Genetic Markers. The current genetic markers of choice for forensic purposes are Short Tandem Repeats (STRs). Analysis of a set of 15 STRs employing Automated DNA*

*Sequencer gives a DNA Profile unique to an Individual (except monozygotic twin). Similarly, STRs present on Y chromosome (Y- STR) can also be used in sexual assault cases or determining paternal lineage. In cases of sexual assaults, Y-STRs are helpful in detection of male profile even in the presence of high level of female portion or in case of azoo11permic or vasectomized" male. Cases In which DNA had undergone environmental stress and biochemical degradation, min lSTRs can be used for over routine STR because of shorter amplicon size.*

*DNA Profiling is a complicated process and each sequential step involved in generating a profile can vary depending on the facilities available In the laboratory. The analysis principles, however, remain similar, which include:*

*1. isolation, purification & quantitation of DNA*

*2. amplification of selected genetic markers*

*3. visualising the fragments and genotyping*

*4. statistical analysis & interpretation.*

*In DNA analysis, variations in Hypervariable Region I & II (HVR I & II) are detected by sequencing and comparing results with control samples:....*

***Statistical Analysis***

*A typical DNA case involves comparison of evidence samples, such as semen from a rape, and known or reference samples, such as a blood sample from a suspect. Generally, there are three possible outcomes of profile comparison:*

*1) Match: If the DNA profiles obtained from the two samples are indistinguishable, they are said to have matched.*

*2) Exclusion: If the comparison of profiles shows differences, it can only be explained by the two samples originating from different sources.*

***3) Inconclusive: The data does not support a conclusion Of the three possible outcomes, only the "match" between samples needs to be supported by statistical calculation. Statistics attempt to provide meaning to the match. The match statistics are usually provided as an estimate of the Random Match Probability (RMP) or in other words, the frequency of the particular DNA profile in a population.***

*In case of paternity/maternity testing, exclusion at more than two loci is considered exclusion. An allowance of 1 or 2 loci possible mutations should be taken Into consideration while reporting a match. Paternity of Maternity Indices and Likelihood Ratios are calculated further to support the match.*

***Collection and Preservation of Evidence If DNA evidence is not properly documented, collected, packaged, and preserved, It will not meet the legal and scientific requirements for admissibility in. a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be Identified, preserved, packed and sent for DNA Profiling."***

*139. In an earlier judgment, **R v Dohoney & Adams** the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials: (1) the scientist should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the Crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.*

*140. The Law Commission of India in its report, observed as follows:*

*"DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not 'match', then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1 person in every 100,000: This is described as the 'random occurrence ratio' (Phipson 1999).*

***Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law."***

31. The Trial Court framed the following legal points for adjudication :

(a) Whether the accused committed the aggravated penetrative assault on the victim by luring her to give biscuits?

(b) Whether from the statement of informant (PW-1), PW-3 and PW-4, the commission of offence is proved ?

(c) Effect of non examination of independent witnesses.

(d) The description and place of occurrence in the F.I.R.

(e) The DNA result regarding commission of offence with the victim.

(f) The injuries sustained by the victim on her body.

(g) Determination of age of the victim and

(h) statement of accused under section 313 Cr.P.C. and the defence witness, if any.

32. After hearing the counsel for the parties and on re-appreciation of the entire evidence on record, this Court finds limited scope of interference in the present appeal for the following reason :

(I) At point (a), the credibility of the prosecution witness could not be shattered despite lengthy cross-examination.

Informant-Mithalesh (PW-1), who is the maternal grand father of victim, stated that on 20.10.2021, when his other grandson and daughter came from the school and enquired about the victim, they searched for her. After about one and a half hours, they heard the cries of the victim from the abutting house. By breaking open the door, when they entered the fodder room, they saw that the victim was lying in naked condition on a plastic sack and

accused-Ram Naresh was also sitting hiding himself behind the heap of bricks. On seeing them, the accused ran away. The condition of the victim was very bad and she was bleeding from her sexual organs. This witness stated that the victim knew the accused as maternal uncle (Mama) of Himanshu. Himanshu is the son of Shiv Prem whose house abuts the house of informant (PW-1) and accused is the brother-in-law of Shiv Prem.

Similar is the statement of Suman (PW-3), the mother of the deceased, who had also seen the victim when she along with PW-1 and Karan Singh broke open the door. Both PW-1 and PW-3 have stated that when they asked from the victim, she told that accused Prem Naresh, on the pretext of giving biscuits, took her to the fodder room and committed the offence by tying her hands and closing her eyes. Both the witnesses have further stated about the medico legal examination of the victim from the Government Hospital, Auraiya where PW-2 conducted the medico-legal-examination of the victim and referred her to Government Hospital, Saifai. From there, she was referred to S.G.P.G.I. Lucknow. It has also come in the statement of both the prosecution witnesses that the victim has undergone one operation and she is still under treatment on the date of their examination before the Court i.e. about one year after the date of incident and as per the opinion of the Doctor, the victim has still to undergo one more operation. In cross examination, only suggestion given to PW-1 and PW-3 was that due to their enmity or strained relationship with Shiv Prem, accused has been falsely implicated though in the earlier part of cross examination, both PW-1 and PW-3 have clearly stated that they were having cordial relationship with family of Shiv Prem and they have visiting terms with each other.

Therefore, the prosecution has been able to prove by leading cogent and corroborating evidence that the victim was subjected to aggravated penetrative assault and thus finding recorded by the Trial Court is upheld.

(II) At point (b), on a careful perusal of the statement of PW-1, PW-3 & PW-4 and on re-appreciation of the entire evidence, it is proved that PW-1 stated that at about 2.00 PM on 20.10.2021 when his other grandson and granddaughter came back from the school and enquired about the victim, they searched for the victim for about 1 & ½ hours. They heard the cries from the abutting house. When PW-1 along with PW-3 broke open the door and went to the fodder room, the victim was found lying in naked condition on a plastic sack and accused-Prem Naresh was also sitting there hiding himself behind a heap of bricks and on seeing them, he ran away. The victim was bleeding from her sexual organs and was not in senses.

PW-1 has also stated that his abutting house is of Shiv Prem who is brother-in-law (jija of the accused). He frequently visits his house. Therefore, the victim identified him as maternal uncle (mama) of Himanshu who is son of Shiv Prem. The victim informed him that the accused has enticed her away by luring her to give biscuits and by taking her in the fodder room, he committed the offence. This witness also stated that the condition of the victim was very bad and she was taken to Government Hospital, Auraiya, from where the Doctor after conducting medico legal examination, referred her to Government Hospital, Saifai. From there, she was referred to S.G.P.G.I. Lucknow. One operation of the victim was conducted and the the victim is still under treatment

and one more operation is required to be done.

PW-3 duly supported the version of PW-1 regarding identification of accused; the manner in which the accused committed the offence and about recovery of the victim from the fodder room as well as treatment of her daughter.

PW-3 also deposed that her statement under Section 164 Cr.P.C. along with the victim was recorded in which she has given the same version as deposed in the Court.

PW-4, the victim, stated that maternal uncle of Himanshu gave her toffee, caught hold of her and by closing her eyes, caused injuries on her sexual organs. She has also stated the manner in which the accused had committed the crime by throwing her on a sack after closing the door.

Thus, the informant and maternal grandfather of victim, PW-3, the mother of the victim and PW-4, the victim herself, have clearly given the description of the incident naming Prem Naresh as the accused person.

Similarly, Dr. Seema Gupta (PW-2), who conducted the medico-legal-examination of the victim, has also given the complete description of the injuries sustained by the victim aged about three years. She also stated that fresh bleeding was present in the sexual organs of the victim. In cross examination, she has stated that if the victim had a fall over a pointed article, she could only suffer injury on her sexual organs and not on her vagina and anus simultaneously.

Constable Praveen Kumar (PW-5) deposed about the registration of the Chick F.I.R. as well as G.D. No.44.

Rajesh Kumar Singh (PW-6), the first Investigating Officer, has also given description of all the recoveries effected by the Forensic Team who visited the place of occurrence and recovered the articles which included hairs. This witness also stated that accused was arrested by the S.H.O. from near a canal on the next date and the medico-legal-examination of the victim was conducted and, thereafter, the articles handed over by the Forensic Science team as well as PW-2 were sent for DNA examination to Forensic Science Laboratory, Agra.

In cross examination, this witness remained consistent about the investigation conducted by him except certain minor discrepancies regarding deposition of PW-1 and PW-3.

Mohd. Shakir (PW-7), the second Investigating Officer, also deposed about the further investigation, collecting the birth certificate of the victim, recording of statement under Section 164 of Cr.P.C. of the victim and her mother (PW-3), recording of statements of other witnesses under Section 161 of Cr.P.C. and collecting the report from K.G.M.U., Lucknow. This witness stated that he recorded the statement of PW-2, Dr. Seema Gupta, by way of supplementary report and the same was submitted before the Court. The defence has argued that no independent witness was examined and there are discrepancies in the statements of the prosecution witnesses. After careful perusal of the statements of the witnesses, going through the statement of the victim and her statement under Section 164 Cr.P.C., the prosecution has duly proved the identity of the accused, place of occurrence and, therefore, the finding of the Trial Court is upheld.

(III) Regarding point (c), i.e. non examination of independent witness, though it is argued on behalf of the appellant that it has come in the statement of PW-3 that many villagers gathered at the

spot when they recovered the victim but no independent witness was examined. However, it is well settled principle of law that if the informant and other eye-witnesses are consistent regarding the manner in which the offence is committed, the identification of the accused as well as place of occurrence which is corroborated by the medical evidence, mere non examination of any independent witness is not fatal to prosecution case especially where the charge is under Section 376 AB of IPC and Section 5/6 of POCSO Act. Therefore, the finding recorded by the Trial Court that non examination of independent witness is not fatal to the prosecution case is upheld.

(IV) Regarding point (d), the prosecution has proved the description of identification of the place of occurrence which is a house just next to the house of the informant (PW-1). A recovery was effected from inside a fodder room meant for the cattles and it has come in the statement of PW-1 to PW-3 that they heard the cries of the victim and by breaking open the door, they entered the room and found that the victim was lying on a plastic sack in naked and semi unconscious condition and she was bleeding from her sexual organs. The accused was also found in the room hiding behind a heap of bricks and on seeing the prosecution witnesses, he succeeded in running away. Therefore, the place of occurrence is duly proved by the prosecution and finding of trial court in this regard is upheld.

(V) Regarding point (e) i.e. DNA result of the victim regarding commission of offence- The counsel for the appellant has argued that it has come in the DNA report that the same is not conclusive as partial DNA profile was generated and, therefore, it was not possible to give opinion regarding matching the same with source Ex.12 i.e. the blood sample of accused-Prem Naresh. However, a careful perusal of the entire report leads to a conclusion that the same supports the prosecution version. Firstly, because in source (Ex.1, 2, 3 & 6) which are the vaginal swab stick, vulval swab stick, anal swab stick and blood sample of victim-S, presence of male allele was found which proved that she was subjected to aggravated penetrative assault. Secondly, Ex.4, breast swab stick, and Ex.7, the top/shirt belonging to the victim, were found to be matching with her blood sample and were of a female. The most important part of DNA report is that the source Ex.8 to 10 which are pubic hair, pieces of nail and underwear belonging to accused Prem Naresh matched with the DNA profile source of Ex.12 which is the blood sample of Prem Naresh and a definite opinion is given that the same matched and is of a male person. Thus, it is proved from the statement of PW-6, the first Investigating Officer, that when the Field Unit of Forensic Science Lab collected the articles, human hairs were also recovered which as per the source Ex.8 are pubic hair of accused and it matched with his blood sample Ex.12. Therefore, DNA report also proves that the accused has committed the offence with the victim.

(VI) Regarding point (f), the injury sustained by the victim also proved the commission of offence. PW-2, Dr. Seema Gupta, has clearly deposed that when she medico legally examined the victim, she found that the victim complained of vaginal pain and bleeding with vaginal tear of size 3 x 3 cm at 6’ O Clock position and there was tear from vagina up to anus with bleeding and it was a case of sexual assault. This witness further stated that clotted blood and fresh

blood were present in perineal region. PW-2 reported as under :

*"Injury present at vagina valva anus vaginal tear present with anal sphinter tear bleeding present from anus and vagina. This may be due to sexual assault."*

*"A case of sexual assault vaginal and anus tear, bleeding present. This may be due to sexual assault."*

During cross examination, this witness was asked whether the victim suffered injury if she fell on peg meant for tying cattles, to which PW-2 has clearly stated that the victim could only suffer injury on her vagina and not simultaneously both on vagina and anus. Thus, the nature of injury sustained by the victim also proves that the accused has committed the offence of penetrative sexual assault on her. Accordingly, the finding recorded by the Trial Court is upheld.

(VII) Regarding point (g), the determination of age of the victim, it is proved by PW-6 that the date of birth of the victim was 3.10.2018 and on the date of incident i.e. 20.10.2021 she was aged about 3 years and 17 days and, therefore, the Trial Court has rightly recorded that the age of the victim was 3 years and 17 days. The Trial Court has also recorded a finding that both the Investigating Officers, PW-6 & PW-7, have conducted the investigation in a proper manner leading to a conclusion that the accused has committed the offence.

(VIII) Regarding point (h), in the statement recorded under Section 313 Cr.P.C., all the incriminating evidence was put to the accused.

Question No.1 relates to enticing away the victim aged about three years on allurement of giving biscuits and committing penetrative sexual assault, the accused simply stated that it is wrong and he has not committed the rape.

Similar is the reply with regard to question No.2 regarding search and recovery of the victim from the fodder room where the accused replied that he has not committed the offence.

Question No.3 relates to putting up the entire medical evidence as per the statement of PW-2 and the Medico Legal Report. The accused stated that the same is incorrect and the victim suffered the injury because of fall.

Under question No.4, the accused was put to the statement of the victim as well as her mother recorded under Section 164 Cr.P.C. In reply, the accused stated that he has not taken away the victim and has not given any biscuit to her.

Under question No.5, the statement of the victim was put to the accused, to which, he replied that the victim was tutored.

Question No.6 was put regarding registration of the F.I.R. on the basis of the written complaint by the informant. In reply, the accused stated that the prosecution has wrongly put up the facts.

Under question No.7, statement of the first Investigating Officer (PW-6) and the documents prepared by him were put to the accused. In reply, it is stated that the investigation was wrongly done and the place of occurrence was also wrongly shown.

Under question No.8, statement of PW-7, the second Investigating Officer, as well as the documents prepared by him were put to the accused and in reply, the accused stated that it is incorrect, the investigation is defective and no recovery was effected from the spot.

Question No.9 was put regarding F.S.L. report from Agra. In reply, the

accused stated that the same is incorrect and he did not want to comment anything.

Question No.10 was put whether accused want to lead any defence evidence to which, he replied 'yes'.

On question No.11, it was asked whether the accused want to say anything, to which, he replied that he is innocent and how the victim has suffered injuries on her body only she can tell.

33. In view of the reply given by accused to all the incriminating evidence led against him and non examination of any defence witness to prove his innocence or to prove that he was not present at the spot and has not committed the offence, the Trial Court has rightly recorded the finding holding the accused guilty of offence. Therefore, the finding recorded by the Trial Court holding the appellant guilty of offence punishable under Section 376 AB of IPC and Section 5/6 of Prevention of Child from Sexual Offences Act, 2012 as amended in 2019 are upheld.

34. However, the Court finds merit in the argument raised by the counsel for the appellant that it is not a 'rarest of the rare' case where death penalty could be awarded and the Trial Court has not recorded any mitigating circumstances which require that only death penalty should be awarded to the accused.

35. In recent judgment the Supreme Court in **Navas alias Mulanavas vs. State of Kerala, 2024 SCC OnLine SC 315** has considered many cases where the Court has commuted death sentence to life imprisonment. The operation part of the order read as under :

*"29. In **Haru Ghosh v. State of West Bengal, (2009) 15 SCC 551** which involved the murder of two individuals and the attempt to murder the third by the accused who was out on bail in another case, after conviction, this Court while commuting the death penalty after taking into account the aggravating and mitigating circumstances imposed a sentence of 35 (thirty five) years of actual jail sentence without remission. It was noted that commission of the offence was not premeditated since he did not come armed and that the accused was the only bread earner for his family which included two minor children.*

*30. In **Mulla & Another v. State of U.P., (2010) 3 SCC 508** the accused/appellant, along with other co-accused, was found guilty of murdering five persons, including one woman. This Court confirmed the conviction but modified the sentence. This Court stressed on the fact that socioeconomic factors also constitute a mitigating factor and must be taken into consideration as in the case the appellants belonged to extremely poor background which prompted them to commit the act. The sentence was reduced from death to life imprisonment for full life, subject to any remission by the Government for good reasons.*

*31. In **Ramraj v. State of Chhattisgarh, (2010) 1 SCC 573** which involved the murder of his wife, this Court imposed a sentence of 20 (twenty) years including remissions.*

*32. In **Ramnaresh and Others vs. State of Chhattisgarh., (2012) 4 SCC 257** the convicts were sentenced to death by the lower court, with the High Court confirming the sentence, on finding them guilty of raping and murdering an innocent woman while she was alone in her house. This Court confirmed the conviction but found the case did not fall under the 'rarest of rare' category for awarding death*

*sentence. Ultimately, after setting out the well-established principles and on consideration of the aggravating and mitigating circumstances, this Court, while commuting the sentence from death imposed a sentence of life imprisonment of 21 (twenty one) years.*

*33.* ***Neel Kumar v. State of Haryana, (2012) 5 SCC 766*** *was a case where the accused committed murder of his own four-year old daughter. This Court, after considering the nature of offence, age, relationship and gravity of injuries caused, awarded the accused 30 (thirty) years in jail without remissions.*

*34. In* ***Sandeep v. State of Uttar Pradesh, (2012) 6 SCC 107*** *which involved the murder of paramour and the unborn child (foetus), this Court, while considering the facts and circumstances awarded a period of 30 (thirty) years in jail without remission.*

*35. In* ***Shankar Kisanrao Khade vs State of Maharashtra, (2013) 5 SCC 546****, the accused was convicted for raping and murdering a minor girl aged eleven years and was sentenced to death for conviction under S. 302 of IPC, life imprisonment under S. 376, seven years RI under S. 366-A and five years RI under S. 363 r/w S. 34. This Court confirmed the conviction but modified the death sentence to life imprisonment for natural life and all the sentences to run consecutively.*

*36.* ***Sahib Hussain v. State of Rajasthan, (2013) 9 SCC 778****, concerned killing of five persons including three children. This Court, taking note of the fact that the guilt was established by way of circumstantial evidence and the fact that the High Court had already imposed a sentence of 20 (twenty) years without remission, did not interfere with the judgment of the High Court.*

*37. In* ***Gurvail Singh & Anr. v. State of Punjab, (2013) 2 SCC 713*** *which involved the murder of four persons, this Court weighed the mitigating factors i.e., age of the accused and the probability of reformation and rehabilitation, and aggravating factors i.e., the number of deceased, the nature of injuries and the totality of facts and circumstances directed that the imprisonment would be for a period of 30 (thirty) years without remission.*

*38. In* ***Alber Oraon v. State of Jharkhand, (2014) 12 SCC 306*** *which involved the murder by the accused of his livein partner and the two children of the partner, this Court, even though it found the murder to be brutal, grotesque, diabolical and revolting, applied the proportionality principle and imposed a sentence of 30 (thirty) years over and above the period already undergone. It was ordered that there would be no remission for a period of 30 (thirty) years.*

*39. In* ***Rajkumar v. State of Madhya Pradesh, (2014) 5 SCC 353****, which involved the rape and murder of helpless and defenceless minor girl, this Court commuting the death penalty imposed a sentence of 35 (thirty five) years in jail without remission.*

*40. In* ***Selvam v. State, (2014) 12 SCC 274****, the accused was found guilty of rape and murder of nine year old girl. This Court imposed a sentence of imprisonment for a period of 30 (thirty) years without any remission, considering the diabolic manner in which the offence has been committed against the child.*

*41. In* ***Birju v. State of Madhya Pradesh, (2014) 3 SCC 421****, the accused was involved in the murder of a one-yearold child. This Court noted that various criminal cases were pending against the accused but stated that it*

*cannot be used as an aggravating factor as the accused wasn't convicted in those cases. While commuting the death penalty, this Court imposed a sentence of rigorous imprisonment for a period of 20 (twenty) years over and above the period undergone without remission, since he would be a menace to the society if given any lenient sentence.*

*42. In **Tattu Lodhi v. State of Madhya Pradesh, (2016) 9 SCC 675** this Court was dealing with an appeal preferred by the accused who was sentenced to death after he was found guilty of committing murder of a minor girl and for kidnapping and attempt to rape after destruction of evidence. This Court reduced the sentence from death to life imprisonment for a minimum 25 (twenty five) years as it noted that there exists a possibility of the accused committing similar offence if freed after fourteen years. This Court also opined that the special category sentence developed in Swamy Shradhanand (supra) serves a laudable purpose which takes care of genuine concerns of the society and helps the accused get rid of death penalty.*

*43. **Vijay Kumar v. State of Jammu & Kashmir, (2019) 12 SCC 791** was a case where the accused was found guilty of murder of three minor children of the sister-in-law of the accused. This Court, taking note of the fact that the accused was not a previous convict or a professional killer and the motive for which the offence was committed, namely, the grievance that the sister-in-law's family was not doing enough to solve the matrimonial problem of the accused, imposed a sentence of life imprisonment till natural death of the accused without remission.*

*44. In **Parsuram v. State of Madhya Pradesh, (2019) 8 SCC 382**, the accused had raped and murdered his own student. The Trial Court sentenced the accused to death which was affirmed by the High Court. This Court took into consideration the mitigating factors i.e., that the accused was twenty two years old when he committed the act and the fact that there exists a possibility of reformation and the aggravating factors i.e., that the accused abused the trust of the family of the victim. After complete consideration and reference to some precedents, this Court imposed a sentence of thirty years without any remission.*

*45. In **Nand Kishore v. State of Madhya Pradesh, (2019) 16 SCC 278**, the accused was sentenced to death by the Trial Court and the High Court for committing rape and murder of minor girl aged about eight years old. This Court noted the mitigating factors i.e., age of the accused at the time of committing the act [50 years] and possibility of reformation and imposed a sentence of imprisonment for a period of 25 (twenty five) years without remission.*

*46. **Swapan Kumar Jha v. State of Jharkhand and Another, (2019) 13 SCC 579** was a case relating to abduction of deceased for ransom and thereafter murder by the accused. This Court took into consideration the mitigating factors i.e., young age of the accused, possibility of reformation and the convict not being a menace to society. On the other side of the weighing scale, was the fact that the accused had betrayed the trust of the deceased who was his first cousin and the fact that the act was premeditated. This Court modified the death sentence to one of imprisonment for a period of 25 (twenty five) years with remissions.*

*47. **Raju Jagdish Paswan v. State of Maharashtra, (2019) 16 SCC 380** was a case where the accused was convicted for the rape and murder of minor*

*girl aged about nine years and sentenced to death by the trial court which was affirmed by the High Court. This Court noted the mitigating factors i.e., murder was not preplanned, young age of the accused, no evidence to show that the accused is a continuing threat to society and the aggravating factors i.e., the nature of the crime and the interest of society, if petitioner is let out after fourteen years, imposed a sentence of life imprisonment for 30 (thirty years) without remission.*

*48. In* ***X v. State of Maharashtra, (2019) 7 SCC 1*** *the accused was sentenced to death by this Court on his conviction for committing rape and murder of two minor girls who lived near his house. However, in review, the question placed before the Court was whether postconviction mental illness be a mitigating factor. This Court answered it in the affirmative but cautioned that in only extreme cases of mental illness can this factor be taken into consideration. The Court reduced the sentence from death to life imprisonment for the remainder of his life as he still poses as a threat to society.*

*49. In* ***Irappa Siddappa Murgannavar v. State of Karnataka, (2022) 2 SCC 801****, this Court affirmed conviction of the accused, inter alia, under S. 302 and 376 but modified the sentence from death to life imprisonment for minimum 30 (thirty years). This Court stated that mitigating factors such as young age of the accused, no criminal antecedents, act not being pre-planned, socioeconomic background of the accused and the fact that conduct of the accused inside jail was 'satisfactory' concluded that sufficient mitigating circumstances exists to commute the death sentence.*

*50. In* ***Shiva Kumar v. State of Karnataka, (2023) 9 SCC 817****, this Court opined that the facts of the case shocked the conscience of the Court. The accused was found guilty of rape and murder of a twenty eight year old married woman who was returning from her workplace. Despite noting that the case did not fall under the 'rarest of rare' category, the Court stated that while considering the possibility of reformation of the accused, Courts held that showing undue leniency in such a brutal case will adversely affect the public confidence in the efficacy of the legal system. It concluded that a fixed term of 30 (thirty years) should be imposed.*

*51. In* ***Manoj and Others v. State of Madhya Pradesh, (2023) 2 SCC 353****, the three accused were sentenced to death by the lower court and confirmed by the High Court on their conviction under Section 302 for committing murder, during the course of robbery, of three women. This Court, while modifying the sentence from death to life imprisonment for a minimum 25 (twenty five) years, took into consideration the non-exhaustive list of mitigating and aggravating factors discussed in Bachan Singh (supra) to establish a method of principled sentencing. This Court also imposed an obligation on the State to provide material disclosing psychiatric and psychological evaluation of the accused which would help the courts understand the progress of the accused towards reformation.*

*52. In* ***Madan vs State of U.P., 2023 SCC OnLine SC 1473****, this Court was dealing with a case wherein the accused was sentenced to death, along with other coaccused, for murdering six persons of his village. This Court called for the jail conduct report and psychological report of the accused which were satisfactory and depicted nothing out of the ordinary. This Court also took into consideration the old age of the accused and period undergone [18 yrs.] as mitigating factors. This Court*

*concluded that the case did not fall under the rarest of rare category and commuted the death sentence to life imprisonment for minimum 20 (twenty years) including sentence undergone.*

*53. In **Sundar vs State by Inspector of Police- 2023 SCC OnLine SC 310**, this Court, while sitting in review, commuted death sentence awarded to accused therein to life imprisonment of minimum 20 (twenty years). The accused had committed rape and murder of a 7-year-old girl. Factors that influenced this Court to reach such a decision were the fact that no court had looked at the mitigating factors. It called for jail conduct and education report from the jail authorities and found that the conduct was satisfactory and that accused had earned a diploma in food catering while he was incarcerated. Apart from the above, the Court noted the young age of the accused, no prior antecedents to reach a conclusion warranting modification in the sentence awarded.*

*54. In **Ravinder Singh vs State Govt. of NCT of Delhi- (2024) 2 SCC 323,** the accused was convicted under Sections 376, 377 & 506 of the IPC for raping his own 9- year-old daughter by the Sessions court and conviction was confirmed by the High Court. The Sessions Court, while imposing life imprisonment, also stated that the accused would not be given any clemency by the State before 20 years. This Court clarified that, as discussed in V. Sriharan (supra), the power to impose a special category sentence i.e., a sentence more than 14 years but short of death sentence can only be imposed by the High Court or if in appeal, by this Court. Considering the nature of the offence committed by the accused and the fact that if the accused is set free early, he can be a threat to his own daughter, this Court imposed a minimum 20 (twenty years) life imprisonment without remissions.*

*55. A survey of the 27 cases discussed above indicates that while in five cases, the maximum of imprisonment till the rest of the life is given; in nine cases, the period of imprisonment without remission was 30 years; in six cases, the period was 20 years **(In Ramraj (supra),** this Court had imposed a sentence of 20 years including remission); in four cases, it was 25 years; in another set of two cases, it was 35 years and in one case, it was 21 years.*

*56. What is clear is that courts, while applying **Swamy Shraddananda (supra),** have predominantly in cases arising out of a wide array of facts, keeping the relevant circumstances applicable to the respective cases fixed the range between 20 years and 35 years and in few cases have imposed imprisonment for the rest of the life. So much for statistics. Let us examine how the judgments guide us in terms of discerning any principle.*

*57. A journey through the cases set out hereinabove shows that the fundamental underpinning is the principle of proportionality. The aggravating and mitigating circumstances which the Court considers while deciding commutation of penalty from death to life imprisonment, have a large bearing in deciding the number of years of compulsory imprisonment without remission, too. As a judicially trained mind pores and ponders over the aggravating and mitigating circumstances and in cases where they decide to commute the death penalty they would by then have a reasonable idea as to what would be the appropriate period of sentence to be imposed under the **Swamy Shraddananda (supra)** principle too. Matters are not cut and dried and nicely weighed here to formulate a uniform*

*principle. That is where the experience of the judicially trained mind comes in as pointed out in **V. Sriharan (supra).** Illustratively in the process of arriving at the number of years as the most appropriate for the case at hand, which the convict will have to undergo before which the remission powers could be invoked, some of the relevant factors that the courts bear in mind are:- (a) the number of deceased who are victims of that crime and their age and gender; (b) the nature of injuries including sexual assault if any; (c) the motive for which the offence was committed; (d) whether the offence was committed when the convict was on bail in another case; (e) the premeditated nature of the offence; (f) the relationship between the offender and the victim; (g) the abuse of trust if any; (h) the criminal antecedents; and whether the convict, if released, would be a menace to the society. Some of the positive factors have been, (1) age of the convict; (2) the probability of reformation of convict; (3)the convict not being a professional killer; (4) the socioeconomic condition of the accused; (5) the composition of the family of the accused and (6) conduct expressing remorse. These were some of the relevant factors that were kept in mind in the cases noticed above while weighing the pros and cons of the matter. The Court would be additionally justified in considering the conduct of the convict in jail; and the period already undergone to arrive at the number of years which the Court feels the convict should, serve as part of the sentence of life imprisonment and before which he cannot apply for remission. These are not meant to be exhaustive but illustrative and each case would depend on the facts and circumstances therein.*

*58. How do these factors apply to the case at hand? The act committed by the accused was preplanned/premeditated; the accused brutally murdered 4 (four) persons who were unarmed and were defenseless, one of whom was a child and the other an aged lady. It is also to be noted that by the act of the accused, three generations of single family have lost their lives for no fault of theirs; Nature of injuries inflicted on Latha, Ramachandran and Chitra highlights the brutality and coldbloodedness of the act.*

*59. On the mitigating side, the accused was quite young when he committed the act i.e., 28 years old; The act committed by the accused was not for any gain or profit; accused did not try to flee and in fact tried to commit suicide as he was overcome with emotions after the dastardly act he committed; accused has been in jail for a period of 18 years and 4 months and the case is based on circumstantial evidence. We called for a conduct report of the appellant from the Jail Authorities. The report dated 05.03.2024 of the Superintendent, Central Prison and Correctional Home, Viyyur, Thrissur has been made available to us. The report indicates that ever since his admission to jail, he had been entrusted with prison labour work such as duty of barber, day watchman and night watchman. Presently, he has been assigned the job as convict supervisor for the last one and a half years. The report clearly indicates that no disciplinary actions were initiated against him in the prison and that the conduct and behavior of the appellant in prison has been satisfactory so far.*

***Conclusion:***

*60. For the reasons stated above, we uphold the judgment of the High Cout insofar as the conviction of the appellant under Sections 302, 449 and 309 IPC is concerned. We also do not interfere with the sentence imposed on the accused for the*

*offence under Section 449 and Section 309 of IPC. We hold that the High Court was justified on the facts of the case in following Swamy 60. For the reasons stated above, we uphold the judgment of the High Cout insofar as the conviction of the appellant under Sections 302, 449 and 309 IPC is concerned. We also do not interfere with the sentence imposed on the accused for the offence under Section 449 and Section 309 of IPC. We hold that the High Court was justified on the facts of the case in following* ***Swamy Shraddananda (supra)*** *principle while imposing sentence for the offence under Section 302 IPC. However, in view of the discussion made above, we are inclined to modify the sentence under Section 302 imposed by the High Court from a period of 30 years imprisonment without remission to that of a period of 25 years imprisonment without remission, including the period already undergone. In our view, this would serve the ends of justice.*

*For the reasons stated above, the Appeal is partly allowed in the above terms."*

36. In the light of **Swamy Shraddananda's Case (Supra)** and the provisions of Section 376 AB of IPC as well as Section 5/6 of POCSO Act, we find that the sentence of capital punishment be commuted to life imprisonment as the trial Court while awarding death sentence has not recorded any mitigating circumstances in the instant case though it is noticed that in the judgment relied upon by the Trial Court in **Bachchan Singh vs. State of Punjab, AIR 1980 SC 898,** the aggravated as well as mitigating circumstances are noticed. The Trial Court has not recorded any finding that if the death sentence to the appellant is commuted to life imprisonment, it will create fear and chaos in the public at large. However, we find the following mitigating circumstances from the record.

(i) The accused who is aged about 29 years at the time of incident has no criminal history and has his family to support.

(ii) Both the families of victim and accused were having visiting terms with each other and, therefore, the possibility of reformation and rehabilitation of the appellant in the society cannot be ruled out as the Trial Court has not recorded any finding that awarding severest punishment is the only possibility in the present case.

(iii) The Trial Court has also not recorded any finding that accused can be a menace to the society before awarding capital punishment.

(iv) The Trial Court has not recorded any aggravating circumstances against the appellants which can over weigh the mitigating circumstances especially, when the appellant has no criminal history.

(v) In view of **Navas alias Mulanvas Case (Supra)**, there should be exceptional circumstances warranting imposition of excess death penalty which cannot be reversed.

(vi) Lastly, the trial court has also not recorded any finding as to how the present case is rarest of the rare case even though the accused has committed the gravest offence.

37. Therefore, we are of the opinion that the capital punishment awarded to the appellant should be commuted to life imprisonment for a fixed term of 25 years without any remission. The order of sentence qua the fine is upheld with the aforesaid modification.

38. With the aforesaid modification, the appeal qua conviction is dismissed. However, the appeal qua sentence is partly allowed and the sentence is modified.

39. The accused appellant is in jail. He will undergo the remaining sentence in accordance with law.

40. Record and proceedings be sent back to the Trial Court forthwith.

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**(2024) 7 ILRA 778**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 04.07.2024**

**BEFORE**

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

Capital Case No. 10 of 2023

**Tarun Goel** **...Appellant**
**Versus**
**State of U.P.** **...Respondent**

**Counsel for the Appellant:**
Sri Ashutosh Singh, Sri Rahul Srivastava (A.C.), Sri Shashank Pandey, Sri Rajiv Lochan Shukla

**Counsel for the Respondent:**
A.G.A.

**Criminal Law-(The Indian Penal Code-1860-Sections 302, 307, 394, 411 & 506)-** Reference has been made by the Court of Additional Sessions Judge/ Special Judge (Dacoity Affected Area), Court No.6, Firozabad for confirmation of death sentence awarded to appellant vide judgment of conviction holding the appellant guilty of offence under Sections 302, 307, 394, 411 & 506 of Indian Penal Code-Capital punishment awarded by the trial court is not a "rarest of rare" case for the following reasons: (A) Appellant is aged about 45 years and has two children and wife to support (B) Trial court has not recorded any finding how it is a rarest of the rare case. (C) Trial court has also not recorded the finding that there is no possibility of reformation and rehabilitation of appellant in the society (D) Trial court has also not recorded any finding that accused is a menace to the society or he is having any criminal antecedents. (E) If the Court is inclined to award death penalty, there must be exceptional circumstance warranting imposition of excessive death penalty which cannot be reversed. **(Para 68 & 69)**

**order of sentence modified and death penalty awarded to the appellant commuted to the life imprisonment**. (E-15)

**List of the Cases cited:**

1.Subramanya Vs St. of Karnataka, 2022 0 AIR (SC) 5110

2.Mohd. Hussain Alias Zulfikar Ali Vs St. (Government of NCT of Delhi), (2012) 2 SCC 584

3.St. of Mah. Vs Nisar Ramzan Sayyed, 2017(2) R.C.R.(Criminal) 564

4. St. of U.P. Vs Ram Kumar & ors., 2017(5) R.C.R.(Criminal)785,

5.Chhannu Lal Verma Vs St. of Chhatt., 2019(5) R.C.R.(Criminal) 192

6.Dnyaneshwar Suresh Borkar Vs St. of Mah., 2019(2) R.C.R.(Criminal) 302

7.Manoharan Vs St. by Inspector of Police, Variety Hall Police Station , Coimbatore, 2019AIR (Supreme Court ) 3746

8.Veerendra Vs St. of M.P., 2022(3)R.C.R. (Criminal) 254,

9.The St. of Har. Vs Anand Kindo & anr. etc., 2022(4)R.C.R. ( Criminal)735

10.Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered

While Imposing Death Sentences, 2023(1) R.C.R.( Criminal) 571

11.Sundar @ Sundarrajan Vs St. by Inspector of Police, 2023 Cri.L.R.(SC) 473

12.Ravindar Singh Vs The St. Govt. of NCT of Delhi, 2023 AIR (Supreme Court)2220

13.Digambar Vs The St. of Mah., 2023 Cri. L.R. (SC) 564

14.Bhaggi @ Bhagirah @ Naran Vs The St. of M.P., 2024(1) Crimes 121

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. Reference No. 9 of 2023 has been made by the Court of Additional Sessions Judge/ Special Judge (Dacoity Affected Area), Court No.6, Firozabad for confirmation of death sentence awarded to appellant Tarun Goel vide judgment of conviction dated 24.4.2023, holding the appellant guilty of offence (in Sessions Trial No.877 of 2022 arising out of Case Crime No.220 of 2022), under Sections 302, 307, 394, 411 & 506 of Indian Penal Code ( hereinafter referred to as 'IPC') and the order of sentence dated 25.4.2023 vide which, the appellant was awarded death sentence, to be hanged till death under Section 302 of IPC with a fine of Rs.20,000/-and in case of default of payment of fine, to undergo further additional imprisonment for one year; under Section 307 of IPC, the appellant was awarded life imprisonment along with a fine of Rs.20,000/-and in case of default of payment of fine, to undergo further additional imprisonment for one year; under Section 394 of IPC, the appellant was awarded life imprisonment along with a fine of Rs.20,000/-and in case of default of payment of fine, to undergo further additional imprisonment for one year; under Section 411 of IPC, the appellant was awarded three years imprisonment along with a fine of Rs.5,000/-and in case of default of payment of fine, to undergo further additional imprisonment for three months; under Section 506 of IPC, the appellant was awarded seven years imprisonment along with a fine of Rs.5,000/- and in case of default of payment of fine, to undergo further additional imprisonment for three months. All the sentences were to run concurently. The appellant has laso filed jail appeal.

2. The Reference and Appeal were admitted. The Trial Court's record is received and paper books are ready.

3. Heard Sri Rajiv Lochan Shukla, Sri Ashutosh Singh, Sri Shashank Pandey, learned counsel for appellant, Sri Rahul Srivastava, learned Amicus Curie for the appellant, Sri A.N. Mulla and Sri Kailash Prakash Pathka, learned AGA for the State and perused the material placed on record.

4. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

5. Facts of the case are that informant- Arpit Jindal (PW-1) s/o Lokesh Kumar Agarwal, resident of Mohalla Arya Nagar, Lane No.9, Police Station Firozabad North, District Firozabad gave a written complaint to S.H.O. Police Station Firozabad North, District – Firozabad stating that "Today on 1.4.2022 at about 2:15 p.m. I, Arpit Jindal son of Lokesh Kumar Agarwal, my mother- Sobha Jindal wife of Lokesh Kumar Agarwal, my cousin brother Chandan Agarwal son of Rakesh Kumar Agarwal, my cousin sister Astha Agarwal d/o Rakesh Kumar Agarwal, my cousin sister Akansha Mittal wife of

Manish Mittal, my maternal aunt Sarita Agarwal wife of Rakesh Kumar Agarwal, my nephew Arnav Goel son of Tarun Goel and my another nephew Anshuman Mittal son of Manish Mittal had gone to D. Bharat Cinema, Firozabad for watching a movie. At about 4:30 p.m. our neighbour Bhatiya called on my mother's mobile phone that some incident has taken place in your house and we should immediately rush back to our home. We all left the movie in between and while entering our house, saw that our maid servant Renu Sharma wife of Narendra Sharma, resident of Tapa Path ( Kaushalya Nagar) was lying in unconcious and injured condition. On entering inside the house, I saw that in the room, my grandmother is lying dead and blood was spread over the bed. The jewellery and money lying in the house were missing. When we thoroughly looked, we saw that about 70 to 75 thousand rupees, four gold bangles, one gold earring, two gold rings and one silver coin were missing. My grandmother used to keep the bundles of currency note carefully. Some unknown miscreants has committed the loot of money and jewellery and has committed murder of my grandmother by causing injuries to the maid servant. By calling an ambulance, the injured maid servant was sent to the hospital. My grandmother is lying dead on the bed, therefore, it is requested that my report be recorded and legal action be taken".

6. Thereafter, the police registered chik FIR-Exhibit-Ka-4 on the written compliant-Exhibit-K-1, dated 2.4.2022. The police started the investigation and on the same day i.e. on 2.4.2022, recorded a recovery memo / arrest memo and recovery of a screwdriver and blood stained cloths of accused along with cash of Rs.77620/- and jewellery consisting of four gold bangles, two gold rings, one earring of yellow metal, one 20 rupee dollar note and one white metal note from accused.

7. This recovery memo ( Exhibit Ka-7) which was prepared by Sanjay Kumar Dubey, Investigating Officer, bears signature of informant -Arpit Jindal as a witness. As per this recovery memo, the police party came to the house of appellant-Tarun Goel who was found present and he was informed that Case Crime No.220 of 2022 under Section 394/302 of IPC is registered and the Investigating Officer has suspicion against him. Therefore, Tarun Goel was asked to co-operate and Tarun Goel while keeping his head cool from under the bedding lying over a bed produced the cash and jewellery looted in the incident and confessed that it is the same money and jewellery which he had snatched by committing murder of his grandmother-in-law. While counting the money, 57 notes of 10 rupees total Rs.570/-, 200 note of 20 rupees total Rs.4000/-, 107 note of 50 rupees total amount Rs.5350/-, 321 note of 100 rupees total Rs.32100/-, 8 note of 200 rupees total amount Rs.1600/-, 64 note of 500 rupees total amount Rs.32,000/- and 1 note of 200 rupees total Rs.200/- were recovered at the spot. The witnesses namely, Arpit and Himanshu on seeing the jewellery stated that the same is of their maternal grandmother and they also identified a packet of new notes which has red colour mark. They stated that their maternal grandmother used to perform Pooja on festival of Diwali. All these currency notes which belonged to their maternal grandmother and jewellery were taken in possession by keeping in a separate plastic boxs. Tarun Goel stated that he confess his offence and had handed over money, jewellery, T-shirt and lower pant which were blood stained and were

washed and dried. He handed over the T-shirt, lower and one screwdriver by which he committed murder of his maternal grandmother. The screw driver was concealed in dickey of Activa scooter and recovered from Activa scooter no.UP-15 CV-5735. The screwdriver was having blood stains. Lower, T-shirt and screwdriver were also taken in possession by the police and kept in separate packets and were sealed, bearing a sample seal. Thereafter, on the basis of the evidence collected at the spot, the accused was arrested at 10:00 p.m. The recovery memo was prepared by Sanjay Kumar Dubey, Investigating Officer. Thereafter, the Investigating Officer prepared the inquest report and recovered the dead body which was sent to postmortem examination. After completing other formalities, the challan was presented against the appellant.

8. On completing the investigation, the charge-sheet against accused-Tarun Goel under Section 302, 307, 394, 411 and 506 of IPC. was submitted before the Court. Thereafter, copy of the charge-sheet was supplied to the accused and charges were framed under the aforesaid sections which were read over to the accused. However, he did not plead guilty and claimed trial.

9. The Trial Court, in prosecution evidence examined, informant- Arpit Jindal (PW-1) who stated on the line of information given in the FIR which was recorded on the basis of the written complaint given by him, Exhibit-Ka-1. He stated that on the same day i.e. on 2.4.2024, the jewellery and money was recovered from the house of accused Tarun Goel which was concealed under the bedding lying over a bed. At that time, Himanshu was also with him along with the police. He identified that Tarun Goel as the same person from whom the recovery was effected. He proved the recovery memo made by the police regarding screwdriver and blood stained earth and a white metal twenty rupees dollar note having serial no.6-A/1 and it bears the signature.

10. In cross examination, this witness stated he had not witnessed how incident took place. Regarding the incident, there was no CCTV footage and while recording the complaint (Ex.-Ka-1), he has not stated about the involvement of Tarun Goel. He further stated that after police has reached at the house of Tarun Goel, he also reached there along with his cousin brother, Himanshu. He further stated that when they reached at the house of Tarun Goel, police had already recovered the items. They stayed at the house of Tarun Goel for about 5-10 minutes and he and Himanshu came back from the house of Tarun Goel and the police also came back. The police did not stay at the house of the accused after recovering the articles. This witness stated that inquest report/Panchnama was prepared at about 6:00 p.m., which is at Serial No.9A/15 to 17. He, Rakesh, Pradeep Kumar Jindal, Himanshu Agarwal and Manish Mittal were the punches. He had signed the inquest report which he identified. He stated that Kamla Devi was his grandmother. He further stated that the articles which were recovered by the police were released in his favour by the Court. He had brought the same before the Court and some of the currency notes have been spent and the some are left which he had brought.

11. With the permission of the Court, the case property was opened from which four gold bangles, two lady gold rings and one gold earring were found. All these

articles were exhibited as Ex.1 to Ex-7. One silver earring and twenty rupees dollar notes was exhibited as Exhibit-8. One sealed plastic container received from the police station was also opened from which photocopies of the recovered notes was there, in which 111 notes of 500 having value of Rs.55,500/- and on 17 pages, 68 notes of 500 having value of Rs.34000 was there. There were total 46 pages which were exhibited as Ex.-9 to Ex.-55. There were two papers of 2000 notes and 200 notes of 5 rupees, 100 notes of 5 rupees, the total of Rs. 5500/- which were exhibited as Ex.-58 to Ex.-60. The plastic cane and tape were exhibited as Ex.-59 & Ex.-60 and the clothe was exhibited as Ex.-61. He further stated that the police has taken the recovered articles to the police station and he and Himanshu accompanied the police. He stayed in the police station for three hours. The compliant was scribed by his brother-in-law and the recovery proceedings were done in the police station in their presence. During this entire proceedings, the accused was sitting at in the police station and PW-1 and Himanshu signed on the recovery proceedings. He stated that he has no knowledge when the police sealed the recovered articles, however, the same were not sealed in his presence and only he had signed the documents. He further stated that the currency notes which were recovered, were released by the Court in his favour and the photocopies of currency notes was got done by the police at his expenses. Currency notes which were returned to him, their photocopies were produced in the Court.

12. This witness, on showing the recovery memo, stated that as per the recovery memo 64 notes of Rs.500 hundred are shown and he admitted that from the Police Station 111 and 68 i.e. 179 notes of Rs.500 were recovered. He pleaded ignorance as to how the police has produced excessive currency notes over and above the recovery memo.

13. He stated that in the recovery memo, 9 notes of Rs.200/- are mentioned whereas he received 5 notes of Rs.200/-. In recovery, there are 321 notes of Rs.100/- whereas, he received 5 notes of Rs.100/-. He received 2 notes of Rs.2000/- but the same was not shown in the recovery memo. On the sealed copy, Case No. 4061 was mentioned and no one has signed it. The C.J.M. has made endorsement on 6.4.2022.

14. This witness further stated that he had received the currency notes as per the order of the Court and he has submitted the coloured photocopy of the same in the Court along with affidavit marked as 20B/1 to 21B/100 which are Ex.Ka-9 to Ex.Ka-108.

15. Similarly, the coloured copies of twenty rupees notes were marked as 22B/1 to 22B/193 which are Ex.108 to 301. The photocopies of fifty rupees notes were marked as 23B/1 to 23B/100 which are Ex.302 to 402. Coloured copy of ten rupees notes were marked as 24B/1 to 24B/50 which are Ex.403 to 452.

16. He further stated that as per the order of the Court, he got the photostate copies and till date, the Investigating Officer did not get the copies of the notes. He prepared copies on 2.9.2022 and submitted in the Court on 5.9.2022. He further stated that accused- Tarun Goel was doing work of sale of sanitary articles and, in connection of his business, he used to go to Delhi. Accused-Tarun Goel used to keep a bag regarding his business separately, in which, he had a diary along with sample

articles and money. This witness stated that he had also gone to Delhi with Tarun Goel on some occasions but in the Police Station he had not seen any such bag. He stated that Tarun Goel is in the business of sanitary since childhood and running his business in the name of Pari Traders.

17. PW-1 further stated that for the last one year, he was also doing sanitary business and before that he was doing business of ready made clothes. He stated that he acquired experience of sanitary work from Tarun Goel and used to visit various places in Delhi with Tarun Goel. He stated that he and Tarun Goel trusted each other and they even dealt in the giving and taking of money. He further stated that writing regarding recovery of the articles was made in the Police Station. This witness admitted "this is correct that he was owning money towards accused-Tarun Goel". He denied a suggestion that due to business rivalry, he has falsely implicated Tarun Goel.

18. Renu Sharma (PW-2), the injured witness, stated that one year prior to the incident, she was working in the house of Kamla Devi and used to cook food. However, her services were terminated later on.

19. On 1.4.2022, Kamla Devi called her on mobile phone and she reached at 2.00 PM. Thereafter, family members of Kamla Devi had gone to watch a movie in Bharat Talkies by directing her to take care of Amma Ji (grandmother). After they left and at about 2.15 p.m. Tarun Goel came. She knew Tarun Goel previously as he is the son-in-law of Amma Ji. She opened the door. Tarun Goel directly went to the room of Amma Ji and asked her to prepare tea. When she prepared tea, he told her to keep it and he will take it himself. He further informed Amma Ji was sleeping and after making tea, she went to the other room to take rest. At 4.00 PM, Tarun Goel called her and she saw that Amma Ji was lying dead and Tarun Goel was carrying a screwdriver and when she asked him what he had done, he told her to keep her mouth shut otherwise she would also be killed. Thereafter, Tarun Goel stated that she should also be killed and with a piece of mirror, he caused injuries on her head, arms and neck. He had caused injuries to her and had killed Amma Ji and her bedding was blood stained. This witness further stated that when she pleaded, what is her fault and why Tarun Goel was giving her beating, he stated that since she was a witness, he would not leave her. Thereafter, she fell down and Tarun Goel went away. She gained consciousness after some time. Then she called Jitendra Bhatiya, a neighbour, who was standing on the roof and told him about the incident. Uncle Bhatiya Ji said, "open the door", then she told him that her both hands were injured and with the help of her mouth, she had opened the door. Some other person also came inside and they took her to the hospital. In the Court she identified Tarun Goel and stated that he is the same person who has killed Amma Ji and caused injuries to her.

20. In cross examination, this witness stated that after one year, she was removed from service and thereafter, for the first time, Kamla Devi, by making a phone call called her. The daughter-in-law of Kamla Devi namely Sobha had met with an accident and received injury on her hand. After she recovered, services of PW-2 were terminated.

21. She further stated that deceased-Kamla Devi made a phone call from her phone as she used to keep a

mobile phone with her. She further stated that on the date of incident, PW-2 was also keeping a mobile phone and when she reached the house of Kamla Devi, she was carrying a mobile phone. She used to talk to aunty while coming for work. She stated that she only had number of Aunty in her mobile phone, however, the same was not stored. She further stated that she had not suffered any injury on her own.

22. Tarun Goel stayed at the place of occurrence for about three hours. There is a kitchen on the side of the room of Amma Ji and from the room, there is a passage leading to the small roof from where house of Jitendra Bhatiya is visible. There was latch on the door which can be opened from one hand and she had opened the latch with one hand and called Bhatiya Ji. She again stated that she opened it with her mouth. She stated that she told Bhatiya Ji about incident when Tarun Goel had left and she was in a position to get up.

23. She further stated that at the time of incident, she was pregnant and in the incident, her child got aborted and she got treatment from Government Hospital, Firozabad and informed about the same to the police but she cannot tell why police has not recorded this in the statement. She denied that no such incident has taken place.

24. Dr. Siddharth Yadav (PW-3) who prepared the medico legal report of Renu (PW-2) recorded the following injuries :

"चोट नं०-1 घाव में टांके लगे हुए थे। *1 cm* के बायी हाथ पर थी और *5cm* कलाई के ऊपर।

चोट नं०-2 टाँके लगे हुए *4 cm* सिर पर उल्टे कान से *12* से०मी ऊपर।

चोट नं०-3 खुरसट की लाइन *1* से०मी० सीधी कोहनी पर थी।

चोट नं० 4 खुरसट 3 से०मी० सीधी तरफ गर्दन पर सीधे कान से *7* से०मी० नीचे थी।

चोट नं०-5 फटा हुआ घाव *1x1*से०मी० गर्दन पर सीधी तरफ *9* से०मी० सीधे कान से नीचे था।

चोट नं०-6 फटा हुआ घाव *1x1* से०मी० सीधी तरफ पीछे कन्धे पर

चोट नं० 7 सीधे कन्धे पर दर्द की शिकायत थी जिसके लिये *x-Ray* की एडवाइज दी गयी।

चोट नं०-8 उल्टी हाथ पहली उँगली में दर्द की शिकायत थी। "

25. This witness sated that he cannot give any opinion regarding injury Nos.1 & 2. Injury Nos. 3 to 8 are caused by hard and blunt weapon and are simple injuries. X-ray was advised qua injury No.7. The injuries were ¼ day old. This witness proved the Medico Legal Report as Ex.Ka-2.

26. In cross examination, he stated that he met the injured after stitches were given to her and none of the injuries was grievous in nature.

27. Dr. Anurag Gupta (PW-4) who conducted the postmortem of Kamla Devi recorded the following injuries :

"चोट नं०-1 विभिन्न इनसाइण्ड वून्ड गले एवं जबड़े के उल्टी तरफ *13 X 8 cm* गितनी में *6* औसत आकार *1 X 1.5 cm* मसल तक गहरी चोट पायी गयी।

चोट नं०-2 एकाधिक *Incised wound* गले के सीधी तरफ *7 X 4 cm* क्षेत्र में गिनती में चार चोटों का औसत आकार *1 X 1 ½ cm* माँस पेशियों तक गहरी चोटें पायी गयी।

चोट नं०-3 एकाधिक *Incised wound* छाती पर एवं पेट के ऊपरी भाग में आगे की तरफ *25 X 25* क्षेत्र में गिनती में आठ औसत आकार *1 X 1½ cm* माँस पेशियों तक गहरी पायी गयी।

चोट नं०-4 *Abraded Contusion* कंधे के उल्टी तरफ आगे की ओर *10 X 4 cm* क्षेत्र में पायी गयी।

चोट नं०-5 रेखिका का आकार *Abrasion* लम्बाई में *16 cm* पीठ के ऊपरी भाग में *Scapula bone* उल्टी तरफ थी। नीचे की ओर जाती हुयी पीठ के ऊपरी भाग में सीधी तरफ चोट पायी गयी।

चोट नं०-6 *8 X 6 cm* आकार का *Contusion* पीठ के सीधे भाग में पायी गयी।

आन्तरिक परीक्षणः-

1- सिरः-कोई चोट नहीं।

झिल्लियाँ एवं रक्त वाहिनियाँ पेल थी मस्तिष्क का वजन *1250/* ग्राम एवं *Pale* पायी गयी।

गले की स्थिति गले के आन्तरिक उरकों की स्थिति इस प्रकार उसमें *Incised wound* पाया गया।

अन्य उपस्थितियों की स्थिति मे जमा हुआ खून *Larynx* एवं श्वाँस की नली के चारों ओर पाया गया। *Hyoid bone* में कोई परिवर्तन नही पाया गया।

छाती की स्थितिः- *3-8* पसलियों में फ्रेक्चर पाया गया जो सीधी ओर की थी। *Plura* सीधे ओर की *Lacerated* पायी गयी। छाती की केविटी में जमा हुआ एवं फ्री रक्त लगभग आधा लीटर पाया था।

फैफड़ो सीधी ओर *350* ग्राम *Lacerated* थे। और उल्टी ओर *325*/ग्राम *Pale* थे। हृदय दोनों चैम्बर खाली पाये गये जिसका वजन *175* ग्राम पाया गया।

उदरः- उदर शिस्ती की दशा में *incised wound* पाया गया। आमाशय में पेस्टी फूड पाया गया। छोटी आँत में आधा पचा हुआ खाना बड़ी आँत में गैस एवं *Fecal Mattal*? पाया गया।

लीवर *1300* ग्राम *Pale* पाया गया स्पलीन *150* ग्राम पेल पायी गयी गुर्दा दाहिनी ओर *90* ग्राम *Pale* बायी ओर *80* ग्राम *Pale* मृत्यु का संभावित समय *¾* दिन, मृत्यु का कारण रक्त श्राव एवं *Shock* से आयी चोटों के कारण मृत्यु होना संभव है। "

28. He further stated that that on the neck, one incised wound was found and blood was deposited around the breathing chord and Larynx and there was no injury on hyoid bone. 3 to 8 ribs were fractured on the front side. The death occurred ¾ days before. The wearing clothes of the victim, Maxi, Blouse, Petikot, two foot-rings, one white mettled earring, one yellow coloured nose pin and one black string were handed over to the police official who had brought the dead body.

29. This witness proved the postmortem report as Ex.Ka-3.

30. In cross examination, he stated that injury No.1 can be caused by any sharp edged weapon. Similarly, injuries No.2 and 3 were also caused with sharp edged weapon. He stated that if many sharp edged weapons are lying on the earth and victim fall on such injuries can also be sustained and injury No.4 to 6 may be caused because of dragging or falling. There were fractures on right side of the ribs and no other fracture was found on other part of the body.

31. Kishan Singh (PW-5) stated that he prepared the chik F.I.R. at Serial No. 3A/1 to 3A/3 which bears signature of the S.H.O. and was exhibited as Ex.Ka-4. He has made entry in G.D. vide Rapat No. 4 on 2.4.2022. Copy of which is at Serial No. 9A/27 which Ex.Ka-5.

32. In cross examination, he stated that he dictated F.I.R. to the Computer Clerk Atul Bhargav and has mentioned so in the opening of the F.I.R. The complaint was brought by informant along with two ladies. The F.I.R. was registered against unknown persons and at that time, the accused was not in custody. He denied a suggestion that on the direction of the higher official, he registered ante time F.I.R. and G.D.

33. PW-6, Inspector, Sanjeev Kumar Dubey stated that he was the Investigating

Officer and prepared CD No. 1 on 2.4.2022. Thereafter, he inspected the spot and prepared *'naksha nazri'* on the asking of the informant, which is at Sl. No. 5-A/1. He had prepared and signed the same and same was exhibited as K-6. He further stated that he has recorded the statement of eye witness Renu Sharma, arrested the accused, recovery memo of the article which is at Sl No. 6-A and was exhibited as K-7. He stated that the witness from the public had signed this Exhibit K-7. He further stated that field unit which prepared report is also mentioned and after recording statement of Tarun Goel, the accused, section 307, 506 and 411 I.P.C. were added and Panchayatnama was prepared. This witness further stated that G.D. No. 2 dated 6.4.202, the Panchayatnama dated 1.4.2022 signed by five witnesses was recorded which is at Sl No. 9-A/15-17. The same was exhibited as Ex-K-8. He had prepared photograph of the dead body, reports of Inspection and letter to the CMO, Firozabad for post mortem which was exhibited as K-9 to 12. Vide GD No. 3 dated 4.9.2022. He investigated eye witness Renu Shamra and other witnesses. Vide G.D. No. 4 dated 13.4.2022, he made request to the Court for comparison of the finger print and DNA sample of the accused Tarun Goel for matching with the scientific finger print, blood stained sample collected from the spot vide G.D. No. 6 dated 17.4.2022. He presented MLR of Renu Sharm and postmortem report of Kamla Devi.

34. According to G.D. No. 7 dated 18.4.2022, the order of the Court for DNA test of Tarun Goel's finger print was obtained vide G.D. No. 8 dated 19.4.2022. A copy of order of the Court for DNA examination of the accused was submitted to the CMO, Firozabad. This witness further stated that vide G.D. No. 9 dated 5.5.2022, CMO Dr. Naveen alongwith staff went to the District Prison and taken blood sample of the accused Tarun Goel and the same was handed over to him/I.O. and Head Moharrir of the police station was directed that blood sample and the sample recovered by Forensic Team at the place of occurrence be sent to Forensic Lab vide G.D. No. 10 for the purpose of matching of examination, he recovered the articles which was signed by the public witness Himansu and sent to the Forensic Science Lab, Agra. Thereafter, the statement of doctor who conducted the postmortem was recorded in G.D. No.11 and charge-sheet was presented before the Court on 14.5.2022 vide Exhibit No.13. This witness further stated that:

*इस मुकदमें से सम्बन्धित माल एक प्लास्टिक की बोरी में न्यायालय के समक्ष पेश किया गया जिसे न्यायालय के अनुमति से खोला गया। एक अदद रक्त रंजित दुपट्टा नौकरानी रेनू शर्मा प्लास्टिक में पैक है। जिस पर घटना स्थल प्राप्त हुआ लिखा है। प्लास्टिक की थैली पर वस्तु प्रदर्श-451, दुपट्टा पर वस्तु प्रदर्श-452 डाला गया पौलीथीन में वेडशीट का टुकडा निकला, थैली पर वस्तु प्रदर्श 453 तथा बैडशीट के टुकडे पर वस्तु प्रदर्श 454 डाला गया। तथा सादा बैडशीट के टुकडे पर वस्तु प्रदर्श- 455 डाला गया। एक प्लास्टिक की थैली में रक्त रंजित चप्पल निकली थैली पर वस्तु प्रदर्श-456 तथा चप्पलों पर 457 व 458 डाले गये। एक सफेद प्लास्टिक की थैली में दो कडा दो चूडी टूटी हुयी निकली जो फारेंसिक टीम ने मेरे सामने कब्जे में लिये थे प्लास्टिक की थैली वस्तु प्रदर्श 459 व कडों पर 460,461 तथा चूडी टूटी पर 462,463 डाले गये। एक प्लास्टिक की पौलीथीन रक्त रंजित कांच का टुकडा निकला, थैली पर वस्तु प्रदर्श 464 व काँच के टुकडों पर वस्तु प्रदर्श 465 डाले गये एक पौलीथीन में सादा कांच का टुकडा निकला थैली पर 466 तथा सादा काँच के टुकडों पर वस्तु प्रदर्श 467 डाले गये। एक पालीथीन में मृतका के दो टाप्स पीली धातु के निकले पौलीथीन पर वस्तु प्रदर्श 468 तथा टाप्सो पर 469,470 डाले गये। एक पोलीथीन में रक्त रंजित पैर का एक मौजा निकला, पौलीथीन पर वस्तु प्रदर्श 471 तथा मोजा पर वस्तु प्रदर्श 472 डाला गया फिंगर प्रिन्ट जिस पर प्रदर्श क-473 डाला*

*गया एक पटला रक्त रंजित निकला जिस पर वस्तु प्रदर्श 474 डाला गया एक पौलीथीन में चाय दानी छन्नी निकली थैली पर वस्तु प्रदर्श 475 तथा छलनी पर 476 डाले गये एक पोलीथीन में 4 स्टील का चाय का ग्लास निकला पालीथीन पर वस्तु प्रदर्श 477 तथा ग्लास पर 478 डाले गये। तथा चाय दानी पर 479 तथा पौलीथीन पर 480 डाला गया। एक प्लास्टिक की थैली में मृतका के बाल निकले थैली पर वस्तु प्रदर्श 481 तथा बालों पर 482 डाला गया एक थैली में खून आलूदा मिट्टी निकली प्लास्टिक की थैली में मृतका के दाये व बाये स्वैप व सादा स्वैप निकले पोलीथीन 485 तथा स्वेप पर 486 दूसरी पौलीथीन पर 487 व 488 डाले गये एक थैली में नौकरानी क स्वेप निकले पौलीथीन पर 489,490,491 डाले गये दूसरी पौलीथीन नौकरानी के स्वेप सादा निकले थैली पर वस्तु प्रदर्श 492 स्वेप पर 493, 494 डाले गये। उपरोक्त प्रदर्श मेरे समक्ष व मेरी उपस्थिति में फोरेंसिक टीम द्वारा लिये गये थे जिसको मैंने सत्यापित किया है। एक प्लास्टिक के डिब्बा में आला कत्ल पेचकश निकला डिब्बे पर मेरे व गवाहान व अभियुक्त के हस्ताक्षर है। डिब्बे पर वस्तु प्रदर्श 495 व पेचकश पर वस्तु प्रदर्श 496 डाला पेचकश पर खून लगा है। जिससे घटना कारित हुयी थी। एक सील मारकीन के कपडे में जिस पर अ०सं० 220/22 से सम्बन्धित है। जिस पर मेरे व गवाहान तथा अभियुक्त के हस्ताक्षर है। मारकीन कपडे पर वस्तु प्रदर्श 497 व नीली कलर का लोअर वस्तु प्रदर्श 498 टी शर्ट 499 डाला जो रक्त रंजित है। जो घटना के समय अभियुक्त पहने था।*

35. In cross examination, this witness stated at that time many people of the vicinity had gathered and injured Renu Sharma was taken to hospital by government ambulance, however he did not remember who accompanied her. This witness stated that during investigation nothing came on record regarding giving or handing over of money between informant and the accused. The case property relating to the case was sent to Forensic Lab for examination and its report was not received when the charge sheet was filed and even till date report is not on record. He further stated that the maid servant Renu Sharma had left the job and only on the date of incident she was called back at work. He did not try to recover mobile phone of Renu Sharma and same is not mentioned in the inquiry report. He did not try to find out if prior to the incident or after the incident Renu Sharma talked to how many persons on mobile phone. He denied suggestion that he has created evidence and submitted the charge sheet.

36. PW-7, Constable Mohan Singh stated that he alongwith constable Anjali has taken the deceased Kamla Devi for postmortem. Doctor had given cloths worn by the deceased which were sealed. Seal and clothes were marked as Ex. 500-506. In cross examination he stated that the I.O. did not record his statement.

37. Thereafter the statement of the accused under section 313 Cr.P.C. was recorded in which all incriminating evidence was put to him. He denied that he was present at the spot and stated that at that time, he was doing marketing and visited 3-4 shops. He denied that he has caused any injury to Renu Shama and he has looted the articles and money. Regarding question no. 9 that as per FSL report Ex.35-A his DNA matched with the hair and blood found at the spot, this witness that by extending threat his hair were taken in the police station and even blood was taken. He had no knowledge if blood stained screw driver were recovered from him.

38. Regarding question no. 12, he stated that he has suffered loss of money in gambling and his father-in-law used to help him and he has not committed any offence.

39. No defence evidence was led. Thereafter trial court held the appellant guilty for offence punishable under Section 302, 307, 394, 411 and 506 IPC and

sentenced him to death penalty, to be hanged till death.

40. The trial court has thus made a reference for confirmation for the death sentence. The appellant has also filed a jail appeal.

41. Heard learned counsel for the appellant, learned counsel for the State and with their help the entire trial record is re-appreciated and re-scrutinised.

42(a). Learned counsel for the appellant has argued that the alleged recovery of the articles is not in consonance with Section 27 of the Evidence Act. The counsel submits that as per the prosecution, when the police team came to the house of the appellant, they already had an information that the articles are to be recovered from the appellant. The counsel drawn a reference to the recovery memo Ex.Ka.7 dated 02.04.2022 which is a joint recovery memo as well as the arrest memo. It is stated in Ex. Ka-7 that I.O. along with witnesses reached the house of accused Tarun Goyal and informed him that FIR for committing the murder is registered and police has information that he is in possession of articles looted from the deceased. Upon this, the accused told the I.O. that he has concealed the currency notes and jewellery under the bed and got it recovered. The counsel has referred to the Section 27 of the Evidence Act which read as under:

***"27. How much of information received from accused may be proved.---***

*Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

Learned counsel has referred to the judgment of the Supreme Court in ***Subramanya Vs. State of Karnataka, 2022 0 AIR (SC) 5110*** to submit that where the police has recovered the articles and clothes of the accused by drawing a recovery memo under Section 27 of the Evidence Act, the following conclusion was made:

"76. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:

"27. How much of information received from accused may be proved.— Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

77. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.

78. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then

the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panchwitnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."

It is submitted that in the light of the same, the prosecution has failed to prove that the recovery was effected in terms of Section 27 of the Evidence Act.

(b) It is next argued that the I.O. has stated that the accused confessed for committing the offence before him and stated that he has washed his blood stained clothes but the screwdriver was having blood staines. The counsel submits that as per the ***Subramanya Vs. State of Karnataka (supra),*** recovery of weapon of offence, in the first part of recovery memo cannot be read in evidence as no explanation is given how the police got the information that accused was in possession of the articles looted from the house of the deceased, on the basis of which the police entered the house of the accused. It is submitted that there was no independent witness to the recovery and the informant himself was cited as witness in the recovery memo. The police did not record any separate statement of the accused before effecting the recovery or preparing the Panchayatnama of recovery and rather in a casual manner, it is shown that the recovery memo and the arrest memo which is a joint memo, which is not permissible under the law. It is next argued that the investigation carried out in this case regarding the involvement of the appellant is highly doubtful.

(c) Learned counsel has referred to C.D. No.4 dated 02.04.2022 which read as under:

"श्रीमान जी मुकदमा उपरोक्त में घटना स्थल पर बुलाये गये फिल्ड यूनिट टीम फिरोजाबाद द्वारा घटना से एकत्रित किये गये साक्ष्य की रिपोर्ट उपलब्ध करायी लिस्ट का अवलोकन किया तो 1. एक अदद खून आलूदा 2. एक अदद बेड सीट का टूकड़ा रक्त रंजीत 3. एक अदद बेड सीड का टुकड़ा सादा 4. एक अदद नौकरानी रेनू शर्मा का रक्त रंजीत दुपट्टा 5. एक जोड़ी रक्त रंजीत चप्पल **6. बाल काले कलर के** 7. टूटी फूटी चूड़िया व

कड़े 8. एक अदद रक्त रंजीत कॉच का टूकड़ा 9. एक अदद सादा कॉच का टूकड़ा 10. एक अदद पीली धातु के कान के टोक्स 11. एक अदद रक्त रंजीत पैरो के मोजे 12. 07 चान्स फिंगर प्रिंट 13. एक अदद रक्त रंजीत पटला 14. एक अदद चाये दानी व छल्लो 15. एक अदद इस्टील का ग्लास जिसमे चाय भरी हुयी 16. नौकरी सोनू शर्मा के दाहिने व बाये हाथ का स्वैव एक 17. अदद मोबाइल 18. मृतिका कमला देवी उम्र 74 वर्ष का दाहिने व बाये हाथ का स्वैव उपलब्ध कराया। जिसे अकब से थाना हाजा के रो०आम० में दाखिल किया जायेगा।"

It is argued that in this C.D. it is recorded that the Field Unit Team of F.S.L. Firozabad has provided the report of evidence collected at the spot. The list was prepared according to which 18 articles were taken in possession. The counsel argues that the original list was never produced before the court and only the C.D. entry is relied upon by the prosecution. The counsel submits that in this C.D. entry there is mention of black colour hair at S.No.6 but there is no mention that the same were collected from the hand of the deceased, a finding recorded by the trial court forming basis of conviction of the appellant. The counsel next argues that another important link evidence which is not produced on record, is the copy of the letter which was sent by the S.H.O. to the F.S.L. Agra for comparison of the hair with the blood sample of the appellant.

(d) The counsel submits that it is mentioned in C.D. No.6 dated 14.5.2022 as under:

"अवलोकन दाखिला माल.......... मुकदमा उपरोक्त में प्रकाश में आये अभियुक्त तरूण गोयल पुत्र अशोक गोयल नि० म०न० 195 बंगला एरिया सदर बाजार मेरठ हाल पता लोहिया नगर गलीन० 02 वाटिका रिसोर्ट के पीछे थाना उत्तर फिरोजाबाद के बल्ड सैम्पल एवं मृतिका कमला देवी के हाथों से मिले सिर के कुछ बालों को वास्ते कराने डी.एन.ए. परीक्षण विधि विज्ञान प्रयोगशाला आगरा में केस फाइल न० RFSL(AGRA)/1856/DNA/154/22 दिनांक 09.05.2022 को CO NAGAR FIROZABAD के आदेशानुसार है०का० 824 राजकुमार द्वारा दाखिल किया गया है जिसे मनोज कुमार वर्मा लैब एस्सिटेण्ट द्वारा रिसिव किया गया है दाखिल सम्बन्धी रिसिविंग सम्बन्धि छायाप्रति संलग्न सी.डी. की जाती है।"

It is argued that the blood sample of the accused and the hair recovered from the hand of the deceased Kamla Devi were sent for Forensic Science Lab, Agra vide Letter No. 1856 dated 09.05.2022, as per order of the court. Counsel submits that copy of this forwarding letter no. 1856 was never produced before the trial court.

(e) The counsel submits that though it has come on record that the I.O. moved an application before the C.J.M. for taking blood sample of the appellant for the purpose of D.N.A. examination of his fingerprint, however, the operative part of the order of the C.J.M.- Firozabad is read as under:

"आदेश

विवेचक का प्रार्थना पत्र स्वीकार किया जाता है। तदनुसार मुख्य चिकित्साधिकारी, फिरोजाबाद को आदेशित किया जाता है कि वह प्रकाश में आये अभियुक्त तरूण गोयल उपरोक्त के डी०एन०ए० एवं फिंगर प्रिंट मिलान हेतु सैम्पल लेने हेतु किसी योग्य चिकित्साधिकारी को आदेशित करें तथा सैम्पल विवेचक को उपलब्ध करायें, जिससे कि सैम्पल को नियमानुसार डी०एन०ए० परीक्षण हेतु भेजा जा सके। तदनुसार विवेचक आवश्यक पैरवी करें।"

It is argued that the C.J.M. has directed for taking the blood sample of appellant and fingerprint of appellant for D.N.A. examination vide order dated 18.04.2022, however, no permission was granted to take the hair of the appellant as sample for matching with the hair allegedly recovered from the hand of Kamla Devi. The counsel submits that even in the application filed by the I.O. before the C.J.M., there was no request to take the sample of the hair of the appellant and only blood sample was taken. The counsel has

drawn a reference in the statement of the appellant under Section 313 of Cr.P.C. that while he was in police custody, forcibly his hair were taken and blood sample was also drawn. The counsel submits that in the absence of the two link evidence i.e. the original evidence report prepared by the Field Unit as well as the copy of the letter no. 1856 by which the hair recovered from the hand of Kamla Devi along with blood sample of the appellant was sent to F.S.L. is not on record.

(f) The counsel has then referred to the report of F.S.L. and the operating part of the report read as under:

"पत्रांकः 1856-DNA-154/22

अप०सं०ः 220/22 राज्य बनाम – तरूण गोयल

धाराः 394/302/307/506/411 IPC थाना- फिरोजाबाद नोर्थ

उपर्युक्त मामले से सम्बन्धित प्रदर्श प्रयोगशाल में दिनाँक 09/05/2022 को विशेष वाहक द्वारा प्राप्त हुये।

सील का विवरण

कुल दो, एक समुद्रित प्लास्टिक डिब्बा व एक समुद्रित थर्माकोल बॉक्स जिन पर मुद्रा (Signature SI UPP) की छाप नमूनानुसार अक्षत थी।

प्रदर्शों का विवरण

01-बॉल । प्लास्टिक पॉउच में, । एक समुद्रित प्लास्टिक डिब्बा में।

02- रक्त नमूना (EDTA + Plain Vail में) । एक समुद्रित थर्माकोल बॉक्स में- अभियुक्त तरूण गोयल से।

परीक्षण परीणाम

प्राप्त प्रदर्शों (1) व (2) का डी०एन०ए० परीक्षण किया गया।

स्रोत प्रदर्श (1) का डीएनए प्रोफाइल, स्त्रोत प्रदर्श (2) (अभियुक्त तरूण गोयल) के समान व पुरूष मूल का पाया गया।

(HID & Y-STR KITS)

डी०एन०ए० परीक्षण में जैनेटिक एनालाइजर व जीन मैपर साफ्टवेयर का प्रयोग किया गया।

उक्त परीक्षण में मानक विधियाँ प्रयोग में लायी गयी।

नोटः- समस्त प्रदर्शों को परीक्षण उपरान्त एक समुद्रित बण्डल में वापस लौटाया जा रहा है। "

Learned counsel has submitted that in this report there is no mention that the hair, in the plastic pouch at S.No.1 were recovered from the hand of the deceased. It is submitted that if it was so mentioned in the application by the I.O. with reference to the Field Unit Report, there would be a complete chain of evidence and since the report of the F.S.L. did not describe that the hair sent for examination were recovered from the hand of the deceased, the defence taken by the appellant that his hair were taken during the police custody raises a doubt on the prosecution version and the trial court has not relied upon a plausible defence explanation.

(g) Learned counsel further submits that even the report submitted by the C.J.M. in terms of the order of Magistrate dated 18.04.2022 has also not come on record. It is submitted that as per the lower court records, in C.D. No. 10, it is mentioned that the blood sample was provided by Dr. Naveen Kumar Jain by visiting the District Jail- Firozabad, however, the report in this regard is also not produced on record and the prosecution relies upon C.D.No. 10 only. This also raises a suspicion about the prosecution version. The counsel has argued that as per the complaint K1 forming basis of FIR Case No. 4, in the first part it is not mentioned that at the time PW-1 along with his family members had left to watch a movie, PW-2- Renu Sharma was present there and they had asked her to take care of his grand mother deceased Kamla Devi. However, in the later part of the complaint it is mentioned that when they returned back they found that Renu Sharma was lying unconscious. Counsel submits that the police has not investigated the case in a manner as if PW-2, in conspiracy with her

accomplishes may have committed the offence and the statement of PW-2 is highly suspicious for the following reasons:

i) It is argued that PW-2 has stated that when appellant- Tarun Goyal came, he asked her to prepare tea and keep it there and thereafter, she went to take rest.

ii) The counsel submits that this witness has stated in examination-in-chief that she was working in the house of deceased Kamla Devi one year prior to the incident and later on her services were terminated. Only on the day of incident, Kamla Devi by making a phone call, from her phone to the phone of PW-2- Renu Sharma called her at home. The counsel has argued that this raises a suspicion on the manner in which, PW-2 was cited as a witness. The counsel submits that in cross-examination of the I.O.- PW-4- Sanjeev Kumar Dubey, it has come that he did not investigate the case to find out that prior to the incident and subsequently to the incident PW-2- Renu Sharma talked to how many persons, to find out her own involvement in commission of offence. The counsel submits that PW-2 has admitted that she used to keep mobile phone with her, all the time and Kamla Devi has called her on phone on the day of incident only. The counsel submits that this co-incidence of calling her by Kamla Devi on 01.04.2022 at about 2:00 PM when immediately thereafter, she was murdered that too when services of PW-2 were terminated one year ago, raises a suspicion about this co-incidence and her presence at spot.

iii) The counsel submits that as per PW-2 she sustained injuries on her both hands and then she called Jitendra Bhatia, a neighbour who was standing on the roof and when he asked her to open the door she stated that both of her hands was injured and she opened the latch with her mouth and many people including Jitendra Bhatia came inside the house. The counsel submits that neither Jitendra Bhatia was cited as a witness nor any other person who came inside the house, were cited as witness by the police.

iv) The counsel has referred to the M.L.R. of PW-2 to submit that no such substantive grievous injury was found on her hand except that she was complaining of pain in one finger of one hand and there was stitched wound on the other hand, do not prove that she was not in a position to open the latch with her hands and she had made such statement just to escape the notice of the I.O. that he may not raise a suspicion on her presence. Counsel further submits that it has come in the statement of PW-1 that when they reached home, PW-2 Renu Sharma was lying unconscious and after the police reached there, by arranging the ambulance she was sent to hospital. PW-2 belied this entire version of PW-1 when she stated that immediately after when accused gave her injury she called Jitendra Bhatia, a neighbour and then she open the latch of the door and Jitendra Bhatia and another came at the spot and the police came and she was sent to hospital. This contradiction in the statement of PW-1 and PW-2 regarding the fact that PW-2 was found unconscious by PW-1 raises a suspicion about the prosecution case.

v) It is submitted that PW-2 has nowhere stated that when accused Tarun Goyal left her home, he was carrying any bag in which any articles like currency notes or jewellery was there. The counsel submits that such a heavy amount of bundle of notes cannot be carried without there being the small bag in the hands of the accused and this fact is not stated by PW-2. The counsel submits that PW-2 has suffered only simple injuries and as per her version she was present in home when the

accused Tarun Goyal caused multiple injuries to the deceased with a screwdriver and therefore, it is not believable that the deceased may not have raised hue and cry which was not heard by PW-2 as it is clear from the site plan that house was very small and PW-2 stated that after preparing the tea, she had gone to the side room where murder of deceased took place.

vi) The counsel further submits that the statement of PW-2 stands belied from another fact as she stated that after causing her injuries, accused ran away from the spot and in such event how the door was closed from inside as PW-2 stated that when she called Jitendra Bhatia, a neighbour he asked her to open the door which was closed from inside and with her mouth, she opened the latch. Counsel submits that all this show that the incident did took place not in the manner as stated by the prosecution and rather the role of PW-2 is very doubtful and she herself was a party in commission of offence with the help of her companions.

vii) Counsel submits that PW-2 has stated that she was pregnant at the time of incident but she had a miscarriage due to incident, however, this fact is not mentioned in her M.L.R. as reproduced above. Therefore, the statement of PW-2 is not reliable as she has even tried to gain sympathy of the court. The counsel submits that the accused was arrested on the same day and was medico legal examined, however, no defence injury was found on his body which shows that when murder assault was made on the deceased or on the injured witness PW-2, they did not try to defend themselves by causing any defence injury and this fact is also make the case doubtful.

viii) It is further submitted that as per the FIR version, PW-1 stated that while they were watching the movie, they received a phone call from the neighbour Jitendra Bhatia intimating that some untowards incident has taken place. Firstly, Jitendra Bhatia is not cited as a prosecution witness and secondly he being the neighbour knew that appellant is the grand son-in-law of the deceased and used to visit her house frequently and therefore, he was known to the next door neighbour Jitendra Bhatia but at the first instance he did not name him as an assailant and rather as per the information of PW-1 some unknown persons have committed the offence, as he intimated PW-1 that some untowards incident has taken place, thus all this show that PW-2 is not a natural witness.

(h) Counsel has next argued that neither bloodstained screwdriver which was used in commission of murder of the deceased-Kamla Devi nor the piece of mirror which was used to cause injury to PW-2, Renu Sharma, were sent for forensic science examination which also raises doubt. Counsel submits that in the entire investigation, the police did not join any independent witness including Jitendra Bhatia, the person who came at the place of occurrence at the first instance and in all the documents, it is the informant who alone is cited as a witness including recovery memo/arrest memo, as well as the inquest report.

(i) Counsel submits that in cross examination, PW-1 (informant) has stated that he owed money towards accused Tarun Goel and for that reasons, he had falsely implicated the appellant with a mala fide motive.

(j) Counsel submitted that PW-1 has not stated in the first part that when they left the home along with family members, they told Renu Sharma (PW-2) to take care of Kamla Devi but it is so stated by PW-2 that when she reached home, the family members had gone to

watch a movie by directing her to take care of Kamla Devi and this discrepancy is vital.

(k) Counsel submits that these two contradictory statements also raises suspicion regarding involvement of the appellant in the present case. It is next argued that vide C.D. No.3 dated 9.4.2022, the statement of Renu Sharma (PW-2) was recorded, in which, name of the appellant figured. However, much prior thereto, on the date of incident i.e. 1.4.2022 itself the appellant was arrested and recovery was effected at his residence. Counsel submits that the Police had failed to inform the source of information the basis of which, the appellant was involved in the case.

(l) Counsel submits that even the recovery effected from the appellant is highly discrepant. Counsel has referred to recovery-cum-arrest memo (Ex.Ka-7) wherein the description of the notes and the photocopy of the recovery effected, as per the description given by PW-1 in comparative manner show that more currency notes are produced before Trial Court than recovered as per recovery memo.

Counsel submits that it is very strange that the recovery which was effected from the spot is excess as per the recovery produced before the Court and there is no explanation given by the Investigating Officer or PW-1.

(m) It is also submitted that as per the case of PW-1, he has received back the currency notes and other articles on supurdari from the Court. However, the said order was never produced on record to show that the Trial Court has directed to file photocopies of the currency notes. Counsel submits that PW-1 has stated that he has got the coloured photocopies of currency notes on his own after the amount was released in his favour. Whereas, in ordinary course, it was for the Investigating Officer to first get the currency notes photocopied and then release the same in favour of informant.

(n) Counsel referred to the statement of PW-1 where he stated that some of the currency notes, he has already spent and some he has in his possession. However, the jewellery was never produced before the Court at the time of cross examination of either PW-1 or PW-4 which also raises suspicion about recovery effected from the appellant.

(o) Counsel has next argued that as per the joint recovery/arrest memo, the police had prior information that the appellant is in possession of the articles. However, the source was not disclosed and secondly, no separate inquest report was prepared for the recovery of the articles. These currency notes and the jewellery in terms of Section 27A of the Evidence Act, 1872 and in view of the decision in ***Subramanya Vs. State of Karnataka (supra).***

(p) Learned counsel for the appellant next argued that PW-1 has failed to prove any motive to commit the murder and the recovery being highly discrepant was planted on the appellant because of the reason that he admitted that informant owed money to the appellant. Counsel has next argued that the Trial Court has failed to appreciate the theme of Section 313 of Cr.P.C. which reads as under :

***"313. Power to examine the accused. -*** *(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—*

*(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;*

*(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:*

*Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).*

*(2) No oath shall be administered to the accused when he is examined under sub-section (1).* ***Hussain***

*(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.*

*(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.*

*(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.:"*

Counsel has referred to all the questions asked to the appellant to submit that the same have been asked in a manner the Trial Court is asking the appellant to make a confessional statement. Counsel has argued that the purpose of Section 313 Cr.P.C. is to put all the incriminating evidence to the accused so that he may reply and lead his defence evidence to prove his innocence. It would be relevant to refer to statement of accused under Section 313 Cr.P.C. recorded by the Trial Court which reads as under :

*"ब्यान अन्तर्गत धारा- 313 दं०प्र०सं०*

*नाम- तरूण गोयल पिता का नाम- श्री अशोक गोयल उम्र- 39 वर्ष, पेशा- बिजनेसमैन निवासी- मकान नम्बर 195 बंगला एरिया सदर बाजार मेरठ। हाल पता लोहिया नगर गली नम्बर 02 वाटिका सिरोर्ट के पीछे, थाना उत्तर, फिरोजाबाद थाना- उत्तर जिला- फिरोजाबाद।*

***प्रश्नः-1 क्या आप द्वारा दिनाँक 01/04/2022 को समय अपराह्न 2.15 बजे दिन से अपराह्न 4.30 बजे के मध्य प्रथम सूचना रिपोर्टकर्ता की दादी श्रीमती कमला देवी आयु लगभग 70 वर्ष की हत्या जेवरात व धनराशि की लूट के आशय से कारित की गयी, इस सम्बन्ध में आपक क्या कहना है?***

*उत्तरः- मै घटना स्थल पर था ही नहीं। मैं उस मार्केटिंग के लिए निकला था, मैं इस समय पर भोला स्नेटरी झील की पुलिया जलेसर रोड़ तथा तीन चार अन्य दुकानों पर भी गया था। घटना से मेरा कोई सम्बन्ध नहीं है।*

***प्रश्नः-2 क्या आपके द्वारा इसी घटना के दौरान श्रीमती रेनू शर्मा को भी जान से मारने के आशय से घायल किया गया, इस सम्बन्ध में आपको क्या कहना है?***

*उत्तरः- यह वह कैसे कह रही है, इसकी मुझे कोई जानकारी नहीं है। मेरी रेनू शर्मा से कोई दुश्मनी नहीं है, रेनू शर्मा मेरी पत्नी श्रीमती प्रेरणा गोयल के मामा के घर में काम करती है, इसलिए मैं इसे जानता हूँ।*

***प्रश्नः-3 आपके द्वारा कमला देवी की हत्या करने और श्रीमती रेनू शर्मा को मरा हुआ समझकर घर में रखे 70-75 हजार रुपये कमला देवी के हाथ की सोने की चार चूड़ी, कान के टाप्स, दो सोने की अंगूठी व एक चाँदी का सिक्का लूट लिया, इस सम्बन्ध में आपको क्या कहना है?***

*उत्तरः- मेरे ऊपर गलत आरोप लगाया है।*

***प्रश्नः-4 प्रथम सूचना रिपोर्टकर्ता अर्पित जिन्दल द्वारा लूटी गयी सामग्री की पहचान की गयी है, इस सम्बन्ध में आपको क्या कहना है?***

*उत्तरः- मेरे पास से कोई सामान बरामद नहीं हुआ। अर्पित से मेरी कोई दुश्मनी नहीं है, मैने ही इन्हें सैनटरी का व्यापार सिखाया है, वो इस घटना के बाद हमारा तलाक भी करवाना चाहते थे।*

*प्रश्नः-5 इस घटना में घायल श्रीमती रेनू शर्मा द्वारा अभियोजन साक्षी के रूप में इस तथ्य की पुष्टि की गयी है कि दिनाँक 01/04/2022 को आप समय लगभग 2.15 बजे प्रथम सूचना रिपोर्टकर्ता के घर पहुँचे और आपके पहुँचने पर दरवाजा*

*अभियोजन साक्षी संख्या-2 द्वारा दरवाजा खोला तथा घटना देखने पर अभियोजन साक्षी संख्या-2 को भी आपके द्वारा जान से मारने के आशय से शीशे के टुकड़ों से वार किये, इस सम्बन्ध में आपको क्या कहना है?*

*उत्तर यह कहना गलत है, यदि मै मारता तो उसे जिन्दा क्यों छोड़ता। यह कहना गलत है।*

*प्रश्नः-6 अभियोजन साक्षी संख्या-2 द्वारा घटना में प्रयुक्त पेंचकस आपके हाथ में होने के तथ्य की पुष्टि की है और इसी पेंचकस श्रीमती कमला देवी की आपके द्वारा हत्या कारित की गयी, इस सम्बन्ध में आपको क्या कहना है?*

*उत्तरः- मैं इस सम्बन्ध में कुछ नहीं जानता।*

***प्रश्नः-7 दिनाँक 02/04/2022 को अभियोजन साक्षी संख्या-1 की उपस्थिति में शाम करीब 6.00 बजे लूट का माल आपकी अभिरक्षा से बरामद किया गया, इस सम्बन्ध में आपको क्या कहना है?***

*उत्तरः- यह कहना गलत है।*

*प्रश्नः-8 आपके द्वारा सुनियोजित ढंग से प्रथम सूचना रिपोर्टकर्ता के समस्त परिवार के सदस्यों को भारत सिनेमा में फिल्म देखने के लिए भेजा और आपका आशय लूट कारित करने का था और इसी घटना को सफल बनाने के लिए आपके द्वारा श्रीमती कमला देवी की तथा श्रीमती रेनू शर्मा की हत्या करने की योजना बनायी, जिसमें श्रीमती कमला देवी की हत्या हो गयी और श्रीमती रेनू शर्मा घायल व बेहोश होने के बाद जिन्दा बज गयी, इस सम्बन्ध में आपको क्या कहना है?*

*उत्तरः- मैं टिकट नहीं लाया, मेरा बेटा अर्नव भी फिल्म देखने गया था। मैनें कोई योजना नहीं बनाई।*

*प्रश्नः-9 विधि विज्ञान प्रयोगशाला दस्तावेज 35अ के अनुसार घटनास्थल पर पाये गये बाल तथा खून का डी०एन०ए० परीक्षण किया गया, जो कि आपके डी०एन०ए० के समान पाया गया, इस सम्बन्ध में आपको क्या कहना है?*

*उत्तरः- मुझे डरा कर थाने पर सैम्पल के रूप में बाल तोड़ लिए थे, तथा खून भी निकाला था। इसके अतिरिक्त मुझे कोई जानकारी नहीं है कि पेंचकस व सीले पर मेरा खून व बाल पाये गये हों।*

*प्रश्नः-10 आप तथा मृतका श्रीमती कमला देवी के परिवार का क्या सम्बन्ध है और उसके द्वारा किस प्रकार घटना कारित की गयी, इस सम्बन्ध में आपको क्या कहना है?*

*उत्तरः- कमला देवी मेरे ससुर की सास है, तथा मेरी पत्नी की नानी है।*

***Hussain*** *प्रश्नः-11 अभियोजन साक्षी संख्या-1 ता० 7 द्वारा अभियोजन कथानक/घटना घटित होने तथा घटना में प्रयुक्त सामान की बरामदगी के तथ्य की पुष्टि की गयी है, इस सम्बन्ध में आपको क्या कहना है?*

*उत्तरः- झूठा बयान दिए हैं।*

*प्रश्नः-12 आप अपराध के सम्बन्ध में कुछ और बताने की इच्छुक हो। यदि हाँ तो विवरण दीजिए?*

*उत्तरः- मुझे अजीब सा लगता है, मैं अपनी पत्नी व बच्चों को इसलिए नहीं बुलाता। मैं पहले मेरठ रहता था, वहाँ मेरे सट्टे में पैसे बर्बाद हो गए थे, इसलिए मैं यहाँ आ गया। मेरे ससुर मेरी मदद करते हैं। मैनें ऐसी कोई घटना कारित नहीं की। मेरे पिता से मेरा कोई सम्बन्ध नहीं है।*

*दिनांकः- 06/04/2023"*

Counsel submits that question Nos. 1, 2, 3, 4 to 7 are in the shape of questionnaire asking the appellant either to admit or deny commission of offence which is not the mandate of Section 313 Cr.P.C.

In reply to question No.9, the appellant stated that by extending threat in the Police Station his hair were removed and blood sample was taken. Thus the counsel submits that in absence of proper recording of statements under Section 313 Cr.P.C. the appellant was not afforded proper opportunity of hearing.

(q) Learned counsel submits that the manner in which trial was conducted by the legal aid counsel reflects that he was not adequately experienced to deal with a trial under Section 302 of IPC and, therefore, he could not put all the relevant questions to the Investigating Officer as well as the PW-2 to give a suggestion that the incident was caused by her with her aides and the appellant has been falsely implicated. Similarly, the legal aid counsel did not object to the statement recorded under Section 313 of Cr.P.C.

Learned counsel for the appellant has referred to the judgment in **Mohd.**

**Hussain Alias Zulfikar Ali vs. State (Government of NCT of Delhi), (2012) 2 SCC 584,** wherein it has been held as under :

*"Fundamental principles based on reason and reflection in no uncertain term recognize that the appellant haled into court in our adversary system of criminal justice and ultimately convicted and sentenced without a fair trial. There are high authorities of this Court which take this view and I do not deem it expedient to multiply and burden this judgment with those authorities as the same have been referred in the judgment of my learned Brother Dattu, J. except to refer to a judgment of this Court in the case of Hussainara Khatoon & Others v. Home Secy., State of Bihar, (1980) 1 SCC 98, in which it has been held as follows:*

*"6. .............................Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just". It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him............."*

*16. Having found that the appellant has been held guilty and sentenced to death in a trial which was not reasonable, fair and just, the next question is as to whether it is a fit case in which direction be given for the de novo trial of the appellant after giving him the assistance of a counsel."*

(r) Counsel has lastly argued that the perusal of the zimni order of the Trial Court shows that report of the Forensic Science Laboratory was received after the last witness i.e. PW-7 was examined on 13.2.2023. It is argued that the F.S.L report was received by the Trial Court on 29.3.2023 and, therefore, the appellant has no occasion to cross examine the Investigation Officer on the basis of F.S.L. Report as he was never recalled back.

43. In reply, the learned State Counsel has submitted that the judgment in ***Subramanya Vs. State of Karnataka (supra)*** cited by the learned counsel for the appellant is distinguishable as in the said judgment, the recovery was effected at the instance of the accused. The learned counsel has stated that on the date of incident i.e. 02.04.2022, vide C.D. No. 1 immediately after the occurrence, the complaint of PW-1 was recorded and thereafter, C.D. Nos. 2 and 3 were recorded in quick succession with regard to registration of chic FIR, Ex. K-1 vide C.D. No. 4, the complete details of the articles handed over by the Field Unit Team, F.S.L.- Firozabad was recorded in C.D. No.6 in which black coloured hair were recovered. The counsel submits that on the same day vide C.D. No. 7, site plan was prepared and C.D. No. 11, the statement of PW-2- Renu Sharma under Section 161 of Cr.P.C. was recorded in which she has narrated the complete incident and involvement of accused Tarun Goel. She has stated that she had seen a blood stained screwdriver in the hand of Tarun Goel as well as stated causing injury to her and the manner in which she had called the neighbour- Jitendra Bhatia.

44. Learned State Counsel submits that prior to effecting the recovery from the appellant vide C.D. No. 13, on the same day, the police has got the information through the statement of PW-2- Renu Sharma regarding committing the offence

by accused Tarun Goel and therefore, there is no violation of procedure under Section 27 of the Evidence Act as the police on the basis of the statement of an eye witness had gone to the house of the appellant, after registration of the FIR and effected the recovery of looted articles as well as blood stained T-shirt, lower and the screwdriver.

45. The State Counsel has further argued that it is a case where the police as well as F.S.L. Team has promptly conducted the investigation and effected the recovery of looted articles and weapon of offence and blood stained clothes of the accused within 48 hours of the incident and therefore, the prosecution case is fully proved from the statement of PW-1- informant as well as PW-2- a witness.

46. The State Counsel submits that C.J.M.- Firozabad by passing an order dated 18.04.2022, on an application of the Investigating Officer, had granted permission to take blood sample of the appellant and thereafter, vide letter no. RFSL (Agra)/1856/DNA/154/22 dated 09.05.2022, blood sample and hair were sent to F.S.L.- Firozabad. Learned counsel submits that the same case file no. is mentioned in the report of F.S.L. The counsel has also referred to C.D. No.6 dated 14.05.2022 in which also the same case file number is also mentioned.

47. The counsel has also referred to a certificate issued under Section 65 B of the Evidence Act with regard to proof all the documents mentioned in the certificate. This certificate includes all the C.D. and G.D. which are already exhibited as well as the reports of the doctor and order of the C.J.M.

48. It is next argued that the blood sample was drawn by the C.M.O. of Firozabad in terms of the order of C.J.M. and therefore, the defence raised by the accused that his blood sample and hair were forcibly taken in the police station, is an in fact an incorrect statement.

49. The counsel submits that it is clearly opined in the F.S.L. report, which is based on the scientific examination of Ex.1 (hair) and Ex.2 (blood sample) of appellant- Tarun Goel that the D.N.A. profile of the appellant has matched with the hair.

50. The State Counsel next argued that as per the post-mortem report of Kamla Devi, there are multiple incised wound caused with the screwdriver in order to commit the murder of the deceased.

51. The counsel has also referred to post mortem report which suggest that 3-8 ribs on the right side of the deceased were fractured. It is argued that by exerting heavy pressure on the chest of deceased like by putting knee in order to commit the offence, the injuries were caused to the deceased and in that process, it was natural for the deceased to save herself by catching hold of the hair of the appellant which were found in the hand of the deceased. The counsel submits that the manner in which the fractures of eight ribs on the right side of the deceased is found in the post-mortem report, suggest that while causing multiple incised wound with the screwdriver on the upper part of the body of the deceased including chest, stomach, neck, jaw prove that the appellant by using force did not allow the deceased to move while she was lying in bed and in such circumstances, the deceased in her self-defence had caught hold of the hair of the accused and therefore, the prosecution case is duly supported by medical version. The counsel has next argued that PW-2 is a natural

witness as her presence is not disputed by the appellant. It has come in the statement of PW-2 she was called by the deceased and was present in the house when Tarun Goel came to the house, after the informant and other family members have gone to watch a movie. Since PW-2 previously worked as a maid servant she was known to him and did not raise a suspicion on him at the first instance and only when she saw the accused carrying a blood stained screwdriver and clothes then she asked him why he has committed murder of Kamla Devi, upon which the accused attacked her while saying that she should also not be spared. PW-2 has stated that when she felt unconscious, the accused ran away. The injuries sustained by the accused by a piece of glass also suggest that she suffered injury nos. 1, 3, 6, 7 and 8 on her hand and shoulder as she may have tried to save herself by raising her hand and the accused attacked her with a piece of mirror has caused injuries on her hand and shoulder. This also support her version that she has called a neighbour- Jitendra Bhatia for help and it is Jitendra Bhatia who called the mother of the informant, while they were watching movie that some untowards incident has taken place in their house. The counsel submits that the presence of PW-2 is well-proved at the spot.

52. The State Counsel has further argued that the statement of PW-1 that he had some money transaction with the appellant and owed some money, nowhere suggest that he is inimical towards him and rather submits that it has come in the statement of accused under Section 313 of Cr.P.C. that he lost entire money in gambling and his father-in-law was supporting him financially and therefore, there is no such enmity to involve the appellant falsely by the informant. The State Counsel has next argued that by following the procedure the DNA test was conducted and the report has been proved on record, in terms of Section 292 of Cr.P.C.

53. The counsel submits mere fact that Jitendra Bhatia- a neighbour gave information to family members of the informant was not cited as a witness cannot be taken as an adverse circumstances as being a neighbour he was not interested in becoming a witness. The counsel submits that during the examination-in-chief of the PW-1 the case property i.e. gold articles was produced and was exhibited as PW-1 to PW-7. Similarly, the coloured photocopies of the currency notes done with the permission of the trial court were also proved and exhibited by the informant- PW-1 as well as PW-4. The State Counsel submits that minor discrepancy in the total numbers of the currency notes did not affect the prosecution case as the recovery has been duly proved by PW-1 and PW-4. It is argued that recovery was effected promptly from the house of the appellant and was never denied that the same is planted on him. As no such suggestion was given to PW-1 or PW-4. Regarding the statement under Section 313 of Cr.P.C., the State Counsel submits that the though some of the questions are not framed in a proper manner, however, in the remaining questions the entire evidence has been put to the accused including the report of the F.S.L.

54. It is also argued that the appellant was defended by the competent legal aid counsel has cross-examined all witnesses at length and has conducted the trial in a proper manner. It is argued that the appeal may be dismissed.

55. After hearing the counsel for the parties and on careful perusal and scrutinizing the entire evidence, this Court

finds no merits so far in judgment of conviction of the appellant is concerned. However, the Court finds merit with regard to the order of sentence passed by the trial court for the following reasons:-

A. The prosecution has proved from the statement of PW-1- informant, Arpit Jindal that on 01.04.2022 at about 02:15 PM he along with some other family members including son of the appellant/accused- Tarun Goel had gone to watch a movie leaving PW-2 (a maid servant) to take care of his grandmother. After they left the home, the appellant came to the house of the deceased Kamla Devi and told PW-2- Renu Sharma (maid servant) to prepare tea for him. The counsel for the appellant could not dispute that previously Renu Sharma was working as a maid servant for a long time, therefore, she was known to all the family members of the deceased including the informant as well as the appellant- Tarun Goel who was the grandson-in-law of the deceased. Therefore, neither the identity of the appellant nor his presence at the spot could be dispelled by the counsel for the appellant at the relevant time and place of occurrence.

B. The incident took place around 2:15 PM when the informant and other family members left home and at about 4:15 PM one of the neighbour- Jitendra Bhatia has called the mother of informant that some incident has taken place at his house and they should immediately rush back to home. The informant and other family members left the movie in between and rushed back to their house and found that PW-2- Renu Sharma (maid servant) was lying unconscious in injured condition and his grandmother- Kamla Devi is lying dead and blood was spread over the bed. The jewellery and money lying in the house was missing. The details of the jewellery and money of about Rs. 72,000-75,000/- was reported in the complaint given to the police promptly and chic FIR, Ex.Ka-4, on a written complaint Ex.K.1 was recorded on 02.04.2022, the police started investigation on the same day.

C. The Field Unit Team of F.S.L., Firozabad visited the spot and effected the recoveries which were recorded in C.D. No.4 as noticed above, at S.No. 6 black coloured hair were recovered. Thereafter, the police recorded the statement of injured PW-2 vide C.D. No. 11 in which she has given the complete description and she narrated the complete incident and involvement of accused/appellant- Tarun Goel. PW-2 has categorically stated that she had seen a blood stained screwdriver in the hand of Tarun Goel and finding that he has committed murder of Kamla Devi, she confronted him why he has done so, upon which Tarun Goel caused injury to PW-2 with a piece of mirror by saying that she should also be not spared as she has witnessed the incident. PW-2 became unconscious and thereafter, Tarun Goel left the place of the incident.

D. The occular version of PW-2- eye witness is duly corroborated by the medical evidence as well as the F.S.L. report. The Field Unit Team of F.S.L. found black coloured hair which were recovered and handed over to the police as per C.D.No.4 wherein at S.No.6 it is specifically mentioned.

E. Later on, the Investigating Officer filed application for seeking permission of the C.J.M. to get the DNA test of blood sample of the appellant with the black coloured hair, upon which an order was passed by the C.J.M. obtain the blood sample, through C.M.O., Firozabad and vide letter no. 1856, the same was sent to F.S.L team. As per the F.S.L. report, the

DNA of the appellant matched with the hair recovered at the spot.

F. Even the post-mortem report of the deceased suggests that multiple injuries were caused with the screwdriver recovered from the appellant on her stomach, chest and neck. Eight ribs on the right side of the body of the deceased was found fractured which suggests that Kamla Devi was lying on the bed and was overpowered by putting pressure on her ribs like by folding a leg or putting some other articles and in that process when the appellant was causing injuries to her, in self-defence the deceased had caught hold of the hair of the appellant which were found in her hand and matched with the blood sample of the appellant as per the F.S.L. report.

G. There is another clear evidence on record that after the statement of PW-2- Renu Sharma, the injured witness was examined by police under Section 161 of Cr.P.C. vide C.D. No.11 in which she disclosed that it is the appellant who committed the murder of Kamla Devi and taken away the money and jewellery. The police immediately visited the house of the appellant and recovered the looted money as well as gold articles like bangles etc. The recovery was effected in presence of two witnesses, PW-1- Arpit Jindal and one Himanshu. While appearing as PW-1, the recovered case property i.e. four gold bangles, two lady gold rings, one gold earring were produced from the sealed envelop and was identified by PW-1 as Ex.1 to Ex.7 along with silver earring and silver note of Rs. 20$. Even the currency which was recovered from the appellant (which was taken on supurdaginama by PW-1, after getting photocopies of the same and submitted it before the court) was identified by him and were exhibited. Even the blood stained clothes of the appellant i.e. T-shirt and lower which he had washed and the blood stained screwdriver were also recovered simultaneously, while effecting the recovery of the looted articles. Therefore, the prosecution has proved that the appellant committed the murder of Kamla Devi, his grandmother-in-law and grandmother of PW-1 and then caused injury to witness PW-2- Renu Sharma (maid servant) and took away money and gold articles, which were promptly recovered from his residence by the police after recording statement of PW-2- Renu Sharma, along with the weapon of offence and blood stained clothes.

H. The argument raised by the counsel for the appellant that the recovery is not effected in terms of Section 27 of the Evidence Act, as per ***Subramanya Vs. State of Karnataka (supra)***, is not sustainable as facts of the said case are on different footing. The recovery in the said case was effected on the disclosure of the accused himself whereas, in the instant case, police first recorded statement of injured witness- PW-2- Renu Sharma (maid servant) who has given the complete narration of the incident caused by the appellant and thereafter effected the recovery from the house of the appellant immediately after the incident and therefore, the argument raised by the counsel for the appellant has no substance. The submission of the counsel for the appellant regarding the presence of PW-2 at the spot and credibility of her statement is also not sustainable as she is an injured witness and her presence was never denied at the spot, in the cross-examination. She being the maid servant of the deceased on the previous occasion proved that she was known to all the family members including appellant- Tarun Goel. Her medico-legal-report also suggests that she suffered five injuries on her hand, elbow and shoulder as the appellant attacked her with a piece of

mirror, she tried to save herself by raising her hands and suffered the injuries as reflected in the MLR.

I. The minor contradiction in the statement of PW-1 and PW-2 regarding taking of PW-2 to the hospital or opening the latch of the door are of no consequence.

J. The argument raised by the counsel for the appellant that PW-2 herself may have committed the offence with the help of her companion, do not find force as she herself is the injured witness and was called by the deceased herself to take care of her as her family members were going to watch a movie. The arguments of the counsel for the appellant in this regard is otherwise of no force as the articles taken away by accused were promptly recovered by the police from his residence along with blood stained clothes and weapon of offence.

K. Another argument raised by the counsel for the appellant that PW-1 has admitted that he owed money to the appellant and therefore, the appellant is falsely implicated, and is also without any merit as nothing has come on the record from the side of the appellant as to how much money PW-1 has to pay the appellant. However, the appellant has admitted in his statement under Section 313 of Cr.P.C. that he has lost his money and business in gambling and his father-in-law was providing him financial help. Therefore, the Court finds no weight in the argument of counsel for the appellant that PW-1 has falsely implicated the appellant being a family member due to money transaction. The preparation of joint recovery memo and arrest memo is an irregularity on the part of the Investigating Officer but it does not vitiate the prosecution case. Similarly, the few questions put to the appellant in affirmative while recording the statement under Section 313 of Cr.P.C. instead of putting the prosecution evidence to him is also an irregularity as in the remaining questions, the prosecution has put the appellant, the entire evidence i.e F.S.L/ DNA report as well as the recovery of the articles and causing injury to Renu Sharma- injured witness. Therefore, even if some of the questions are not considered proper in the statement under Section 313 of Cr.P.C. still the entire evidence has been put to the accused in the remaining questions and the same is not defective.

L. The prosecution has followed the proper procedure and after taking permission of the C.J.M., Firozabad for getting the DNA of the blood sample of the appellant with the hair recovered from the hand of the deceased, the blood sample was taken through C.M.O., Firozabad and was sent to R.F.S.L. vide letter no. 1856 dated 09.05.2022. This letter number is mentioned in the report of the F.S.L. itself. Not only this, the other documents were duly proved by issuing a certificate under Section 65B of the Evidence Act and all the C.D. and G.D. entries was duly exhibited along with the report of the doctor and order of the C.J.M. and therefore, the investigation was carried out in a scientific and legal manner.

M. The argument raised by counsel for the appellant that the neighbour- Jitendra Bhatia was not cited as a prosecution witness is also of no consequence as the injured witness PW-2 has duly supported the prosecution version. The last argument raised by the counsel for the appellant that a competent legal aid counsel was not provided to the appellant is also of no avail as, while scrutinizing the evidence of all the PWs, the Court finds that the detailed cross-examination has been offered to all the prosecution witness putting the defence version. Therefore,

finding no merit in the arguments of the counsel for the appellant, the judgment of conviction dated 24.04.2023 holding the appellant guilty of offence (in Sessions Trial No.877 of 2022 arising out of Case Crime No.220 of 2022), under Sections 302, 307, 394, 411 & 506 of IPC is upheld.

**Order on Sentence:**

56. The trial court while awarding the death penalty has taken notice of the Dacoity Affected Areas Act only because the special trial court is a designated special court under the Dacoity Affected Areas Act, however, no charge under the provisions of this Act was framed against the appellant and the appellant is awarded the death penalty under Section 302 of I.P.C. Therefore, it is relevant to refer to certain recent judgments of the Supreme Court on award of capital punishment.

57. The Supreme Court in the case ***State of Maharashtra Vs. Nisar Ramzan Sayyed, 2017(2) R.C.R.( Criminal) 564,*** has held that in case where a pregnant woman who along with a minor child was murdered, there are various circumstances pointing out certain lacuna, the death penalty should not be awarded and the judgment of Trial Court was modified to life imprisonment till natural life of the accused.

58. The Supreme Court in ***State of U.P. Vs. Ram Kumar and others, 2017(5) R.C.R.( Criminal)785,*** has held that taking consideration of facts and circumstances of the case, the capital punishment is to be converted into life imprisonment.

59. The Supreme Court in ***Chhannu Lal Verma Vs. State of Chhattisgarh, 2019(5) R.C.R.( Criminal) 192***, has discussed the aggravating circumstances as well as mitigating circumstances which read as under : -

*"**Aggravating circumstances**: A court may, however, in the following cases impose the penalty of death in its discretion:*

*(a) if the murder has been committed after previous planning and involves extreme brutality; or*

*(b) if the murder involves exceptional depravity; or*

*(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—*

*(i) while such member or public servant was on duty; or*

*(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or*

*(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."*

***Mitigating circumstances:** In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:*

*(1) That the offence was committed under the influence of extreme mental or emotional disturbance.*

*(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.*

*(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.*

*(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.*

*(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.*

*(6) That the accused acted under the duress or domination of another person.*

*(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."*

In this case, after upholding the conviction of the accused who were held guilty of committing murder of four persons with a knife, the Supreme Court commuted the death penalty to life imprisonment.

60. In ***Dnyaneshwar Suresh Borkar Vs. State of Maharashtra, 2019(2) R.C.R.( Criminal) 302,*** it is held by Supreme Court that if the Court is inclined to award death penalty, then there must of exceptional circumstances warranting imposition of excess penalty. The Court should consider probability of reformation and rehabilitation of convict in the society as this is one of the mandates of special reason as per requirement of Section 354(3) Cr.P.C. It is also held in the judgment that when the DNA report is not done, an adverse inference should not be drawn. It is also held that the antecedents of the convict or that the pendnecy of one or more criminal cases against the convict, cannot be a factor of consideration for awarding death sentence and, therefore, has held that looking to the conduct of the convict, the capital sentence can be commuted .

61. The Supreme Court in ***Manoharan Vs. State by Inspector of Police, Variety Hall Police Station , Coimbatore, 2019AIR (Supreme Court ) 3746,*** has held that a balance sheet of aggravating and mitigating circumstances should be drawn while awarding death penalty and in doing so mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances while exercising judicial discretion. The Supreme Court while commuting death sentence to life imprisonment till his natural death without remission by upholding the conviction.

62. In ***Veerendra Vs. State of Madhya Pradesh, 2022(3)R.C.R. (Criminal) 254,*** the Supreme Court while upholding conviction under Section 364A, 376(2)(i), 302, 201 IPC regarding murder and rape of a minor girl, commuted the death sentence to life imprisonment with stipulation that the convict is not entitled to premature release or remission before undergoing imprisonment of thirty years.

63. In ***The State of Haryana Vs. Anand Kindo & Another etc., 2022(4)R.C.R. ( Criminal)735,*** the Supreme Court has again held that if there is any circumstance favouring the accused such as lack of intention to commit the crime, possibility of reformation, young age of the accused, accused not being a menance to the society and his clearly criminal antecedents, the death sentence can be commuted to life for a actual period of thirty years.

64. In Re: ***Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences, 2023(1) R.C.R.( Criminal) 571 ,*** the Supreme Court while deciding the issue regarding the same day sentence of capital sentence, held that the conviction will not be vitiated, however held that the hearing under Section 325(2) Cr.P.C., requires the accused and the prosecution, at their option, be given the meaningful opportunity which in usual course is not conditional upon time or dates granted for the same and should be qualitatively and quantitatively.

65. In ***Sundar @ Sundarrajan Vs. State by Inspector of Police, 2023 Cri.L.R.(SC) 473,*** the Supreme Court held that it is the duty of the Court to enquire into mitigating circumstances as well as to foreclose the possibility of reformation and rehabilitation before imposing the death penalty. It is also held that even though the crime committed by the accused is unquestionably grave and unpardonable, it will not be appropriate to affirm the death sentence as 'rarest of rare' doctrine requires that the death sentence not be imposed only by taking into account the grave nature of crime but only if there is no possibility of reformation.

66. In ***Ravindar Singh Vs. The State Govt. of NCT of Delhi, 2023 AIR (Supreme Court)2220, Digambar Vs. The State of Maharashtra, 2023 Cri. L.R. (SC) 564, Bhaggi @ Bhagirah @ Naran Vs. The State of Madhya Pradesh, 2024(1) Crimes 121,*** the Supreme Court has commuted the death sentence despite holding that the offence committed was brutal or barbaric, however, considering the mitigating circumstances, the capital sentence was commuted to life for a fixed term of sentence.

67. In the instant case, the appellant has no criminal history and has stated that he has two young children and wife to support and has pleaded that he may be given pardon.

68. The appellant is aged about 45 years. Therefore, we unable to uphold the capital punishment awarded by the trial court as it is not a "rarest of rare" case for the following reasons:

a. The appellant is aged about 45 years and has two children and wife to support.

b. The trial court has not recorded any aggravating circumstances and has not scrutinized the case of the appellant in the light of mitigating circumstances. As appellant has no criminal history, the trial court has not recorded any finding how it is a rarest of the rare case.

c. The trial court has also not recorded the finding that there is no possibility of reformation and rehabilitation of appellant in the society.

d. The trial court has also not recorded any finding that accused is a menace to the society or he is having any criminal antecedents.

e. As noticed above, it has been held by the Supreme Court in ***Nisar Ramzan Sayyed Case (Supra), Ram Kumar and others, Chhannu Lal Verma, Dnyaneshwar Suresh Borkar, Manoharan Case (Supra), Veerendra Case (Supra), Anand Kindo & Another Case (Supra), Ravindar Singh Case (Supra), Digambar's Case (Supra) and Bhaggi @ Bhagirah @ Naran's Case (Supra)*** that if the Court is inclined to award death penalty, there must

be exceptional circumstance warranting imposition of excessive death penalty which cannot be reversed.

69. Therefore, the finding of the trial court on order of sentence is modified as it is not a "rarest of rare" case, even though the accused has committed a grave offence of murder, therefore, we are of the opinion that the death penalty awarded to the appellant should be commuted to the life imprisonment. However, the sentence of fine imposed by the Trial Court is upheld.

70. With the aforesaid modification, the appeal against the judgment of conviction is dismissed, however, the appeal qua order of sentence is modified and the reference and jail appeal are disposed of accordingly.

71. The accused-appellant is in custody. He will undergo the remaining sentence in accordance with law.

72. Record and proceedings be sent back to the Trial Court forthwith.

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**(2024) 7 ILRA 806**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.07.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

Second Appeal No. 242 of 2024

**Ashok** ...**Appellant**
**Versus**
**Smt. Kusum Devi** ...**Respondent**

**Counsel for the Appellant:**
Smt. Kusum Devi

**Counsel for the Respondent:**
Km. Preete, Sri Amit Saxena

**A. Property Law – Title/ Possession/Registration - Registration Act, 1908 - Sections 17(f) & 49 - Indian Contract Act, 1872 - Section 2(e) - Transfer of Property Act ,1882 - Section 53-A, amended Section 54 - U.P. Civil Laws (Reforms and Amendment) Act, 1976 - Section 30 - The title once vests in plaintiff-respondent has not been divested by any cogent and legal document and, therefore, the defendant-appellant cannot be treated as owner of the property and even if for some point of time he might have asserted possession over the same, the same being patently illegal, no relief can be granted to the appellant.** (Para 21)

It is admitted on record that title in the property vested in plaintiff-respondent by virtue of registered sale deed dated 22.10.1999 executed by Malkhan Singh. **There is no other sale deed conferring title upon the defendant-appellant. The entire case of the defendant is based upon the matter written on the back-side of the registered sale deed.** There is no dispute about the fact that such writing was not made in the presence of Sub-Registrar or at the time when the registered sale deed was executed. **This writing was made two years after the execution of the registered sale deed. The same cannot be treated to be a registered sale deed or even a registered agreement.** The two witnesses of the said writing were also not produced before the courts for leading evidence. (Para 12)

The appellant cannot get any benefit of judgment in case of *R. Hemlatha* (*infra*) inasmuch as the case before the Apex Court had arisen out of State of Tami Nadu where a different amendment was dealt with by the Apex Court. In **The provisions applicable in the State of U.P. as regards mandatory registration of an agreement were not dealt by the Apex Court nor was there any occasion for the same.** Further, the matter before the Supreme Court had arisen out of a suit for specific performance of an agreement for sale and facts of the present case are totally

different. The Court has already held that **the writing relied upon by the appellant though termed as "sale" does not satisfy the parameters even of an agreement and, therefore, the entire case of the defendant-appellant has no basis at all.** (Para 22)

**No substantial question of law arises for consideration in this appeal. Second appeal dismissed.** (E-4)

**Precedent distinguished:**

R. Hemlatha Vs Kasthuri, Civil Appeal No. 2535 of 2023 @ SLP (C) No. 14884 of 2022, decided on 10.04.2023) (Para 10)

**Present appeal challenges two concurrent decrees passed by judgment dated 01.02.2024.**

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Supplementary affidavit filed today, is taken on record.

2. Heard Ms. Preete, learned counsel for the defendant-appellant and Sri Amit Saxena, learned counsel for the sole plaintiff-respondent and perused the record.

3. The instant second appeal is listed for admission under Order 41 Rule 11 CPC.

4. One Malkhan Singh executed a registered sale deed dated 22.10.1999 in favour of the plaintiff-respondent Smt. Kusum Devi. According to the case of the plaintiff-respondent, she was enjoying possession over the said property, however, the defendant-appellant was interfering in her possession and, consequently, Original Suit No.375 of 2015 was instituted by her claiming a decree for permanent prohibitory injunction. She got an order of temporary injunction and, when on a particular date, the injunction order was not extended, taking advantage of the same, the defendant-appellant took forcible possession over the property and, consequently, plaint was amended claiming a decree for possession too. A counter claim was preferred by the defendant-appellant claiming a decree for injunction on the basis of his possession. The trial court decreed the original suit and dismissed the counter claim. Two civil appeals were filed against the said decree, both were consolidated by the appellate court and have been dismissed by a common judgment dated 01.02.2024. Two concurrent decrees, therefore, are under challenge in this appeal. Defendant has not challenged decree of dismissal of his counter claim.

5. The contention of the learned counsel for the defendant-appellant is that though title of plaintiff-respondent is admitted to the defendant-appellant at the strength of the sale deed executed by Malkhan Singh, the plaintiff, by entering into a "transaction of sale" with the appellant on 25.06.2001, delivered possession of the property to him in lieu of a sum of Rs.36,500/-. When asked, the learned counsel referred to a matter handwritten on the backside of the registered sale deed, appended at page 20 of the supplementary affidavit filed today. The entire defence in the suit as well as the basis of the counter claim is the said writing itself, whereas the entire claim and defence of the plaintiff is the registered sale deed executed by Malkhan Singh. The matter written on the backside of the sale deed, needs reproduction as under:-

"आज दिनांक 25.6.2001 को श्रीमति कुसुम w/o जगदीश निवासी देवीपुर प्रथम बालमीकि नगर जिला बुलन्दशहर का प्लाट जो

बैनामे पर अंकित है वो मु० 36500/- में श्री अशोक कुमार s/o श्री छज्जा नि० अकबरपुर पर० बु० शहर को **बेचा गया** जिसके आधे 18250/- होते है जो कि मैने नगद प्राप्त करके **बैनामा सुपुर्द कर दिया** और लिखकर तहरीर लगा दिया जो वक्त जरूरत काम आये।

नि०अ० कुसुम w/o जगदीश

1. गवाह- सुरेश कुलिचरन

2. गवाह- ह० अप० ह० राधेश्याम पुत्र राम चन्द्र सिंह "

6. Both the courts below have discarded the factum of entering into any agreement or transaction of sale between the parties. In so far as the language handwritten on the backside of the sale deed is concerned, it has been found to be not tenable in the eyes of law for following multiple reasons:-

(i) Factum of payment of Rs.36,500/- was not proved;

(ii) Writing does not amount to a sale though it mentions that the property has been sold by the plaintiff Kusum to the defendant Ashok Kumar;

(iii) Two witnesses of the said writing, namely, Suresh Kalicharan and Murari had not been produced as witness; and

(iv) Such writing, in absence of a valid registration, cannot confer any right upon the defendant-appellant.

7. Learned counsel for the appellant has vehemently argued that the said writing should have been read as evidence of the very agreement in terms of proviso to Section 49 of the Registration Act, 1908. The entire Section 49, as applicable in the State of U.P., reads as under:-

**"49. Effect of non-registration of documents required to be registered**.- No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (Act No.4 of 1882), or of any other law for the time being in force, to be registered shall-

(a) affect any immovable property comprised therein, or

(b) confer any power or create any right or relationship, or

(c) be received as evidence of any transaction affecting such property or conferring such power, or creating such right or relationship, unless it has been registered:

**Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (Act No.4 of 1882), to be registered may be received or as evidence of any collateral transaction not required to be effected by registered instrument."**

8. The submission is that delivery of possession in lieu of Rs.36,500/- by the plaintiff to the defendant was a "collateral transaction" not required to be effected by any registered instrument and, therefore, the courts below have fallen into an error of law by emphasising upon the requirement of registration. She has also referred to definition of "contract" as provided under

Section 2(e) of the Indian Contract Act, 1872, which reads as under:-

"2(e). Every promise and every set of promises, forming the consideration for each other, is an agreement"

9. Further submission is that the suit initially filed was for a decree for permanent prohibitory injunction, however, by amendment, its nature was completely changed and no issue was framed by the trial court and the appellate court on such change of nature. Learned counsel further submits that dismissal of counter claim on the ground of non-valuation is also an illegal exercise of power as the defendant was not granted any opportunity in this regard.

10. It is also contended that requirement of registration came into existence on 24.09.2001, whereas the agreement was executed on 25.06.2001 and, therefore, even unregistered document could be read in evidence. In support of her submission, learned counsel has placed reliance upon a judgment of the Supreme Court in the case of R. **Hemlatha Vs. Kasthuri (Civil Appeal No.2535 of 2023 @ SLP (C) NO.14884 of 2022, decided on 10.04.2023)** and has referred to paragraph no.12 of the judgment, which reads as under:-

"12. At this stage, it is required to be noted that the proviso to Section 49 came to inserted vide Act No.21 of 1929 and thereafter, Section 17(1A) came to be inserted by Act No.48 of 2001 with effect from 24.09.2001 by which the documents containing contracts to transfer or consideration any immovable property for the purpose of Section 53 of the Transfer of Properties Act is made compulsorily to be registered if they have been executed on or after 2001 and if such documents are not registered on or after such commencement, then there shall have no effect for the purposes of said Section 53A. So, the exception to the proviso to Section 49 is provided under Section 17(1A) of the Registration Act. Otherwise, the proviso to Section 49 with respect to the documents other than referred to in Section 17(1A) shall be applicable."

11. Per contra, Sri Amit Saxena, learned counsel for the plaintiff-respondent submits that the matter written on the backside of the registered document has no sanctity and, even otherwise, when the plaintiff appeared in the witness box and original sale deed was shown to her, she denied her thumb impression on the writing terming the same as forged and also refused to identify the witnesses of the said writing. As regards the amendment, it is argued by him that once the amendment application was allowed and no challenge was made upto the appellate stage, such an argument cannot be accepted at the second appellate stage.

12. Having heard learned counsel for the parties, the Court finds that it is admitted on record that title in the property vested in plaintiff-respondent by virtue of registered sale deed dated 22.10.1999 executed by Malkhan Singh. There is no other sale deed conferring title upon the defendant-appellant. The entire case of the defendant is based upon the matter written on the back-side of the registered sale deed. There is no dispute about the fact that such writing was not made in the presence of Sub-Registrar or at the time when the registered sale deed was executed. This writing was made two years after the execution of the registered sale deed. The

same cannot be treated to be a registered sale deed or even a registered agreement. The two witnesses of the said writing were also not produced before the courts for leading evidence.

13. In so far as provisions regarding sale are concerned, it is observed that in U.P., U.P. Civil Laws (Reforms and Amendment) Act, 1976, (U.P. Act No. 57 of 1976) has been enforced, w.e.f. 1.1.1977. By virtue of Section 30 of this Act, Section 54 of Transfer of Property Act has been amended as follows:

"30. Amendment of Section 54 of Act 4 of 1882 - In Section 54 of the Transfer of Property Act, 1882, hereinafter in this Chapter referred to as the principal Act, -

(a) In the second paragraph, the words "of the value of one hundred rupees and upwards" shall be omitted;

(b) the third and fourth paragraphs shall be omitted;

(c) after the last paragraph, the following paragraph shall be inserted, namely: -

"Such contract can be made only by a registered instrument."

14. Similarly, by Section 32 of this Act, Section 17 of the Registration Act has been amended and Clause (f) has been inserted in it.

32. Amendment of Section 17 of Act 16 of 1908 - In Section 17 of the Registration Act, 1908, hereinafter in this Chapter referred to as the principal Act –

(a) In Sub Section (1) –

(i) In clause (b) the words "of the value of one hundred rupees and upwards", shall be omitted;

(ii) In clause (e) the words "of the value of one hundred rupees and upwards", shall be omitted;

(iii)after clause (e), the following clause shall be inserted, namely:

(f) any other instrument required by any law for the time being in force, to be registered."

15. By virtue of the aforesaid amendments w.e.f. 1.1.1977, an agreement to sell of the immovable property is a compulsorily registrable document in U.P. and no un-registered agreement to sell can be executed nor it can be taken in evidence in view of Section 49 of the Registration Act.

16. The definition of "sale" as per Section 54 of Transfer of Property Act, 1882 reads as under:-

**"54. "Sale" defined**.— "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

**Sale how made**.—Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can **be made only by a registered instrument**.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

**Contract for sale**.—A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

17. It is, therefore, clear that transfer of any tangible immoveable property of the value of Rs.100/- and upwards can be made only by a registered instrument.

18. A perusal of the handwritten matter shows that it is termed as a "sale of immovable property" by plaintiff-respondent Kusum Devi in favour of defendant-appellant Ashok Kumar. Admittedly, it is not a registered instrument and, therefore, it cannot be treated as a sale deed.

19. In so far as the submission that the document does not require registration, this Court is not in a position to accept the same and proviso to Section 49, as applicable in the State of U.P., does not come for the rescue of the defendant-appellant as transfer of property and also delivery of possession cannot be treated as a collateral transaction not required to be effected by registered document.

20. The argument of the learned counsel for the appellant based upon the amendment made by Act No.48 of 2001 in Registration Act with effect from 24.09.2001 does not impress the Court, inasmuch as, in the State of U.P., requirement of registration, even of a contract of sale is in force with effect from 01.01.1977. Irrespective of the same, the matter written on the backside can neither be treated to be a sale deed nor even an agreement as it does not satisfy the requirement of any of the two.

21. I have carefully examined the findings recorded by the courts below on the case of the parties as well as interpretation of the writing in dispute. Both the courts below have critically examined the oral and documentary evidence and each and every feature of the said writing has been discussed at length. Provisions of Section 53-A as argued by the defendant-appellant before both the courts below have also been rightly interpreted. This Court is of the considered opinion that title once vests in plaintiff-respondent has not been divested by any cogent and legal document and, therefore, the defendant-appellant cannot be treated as owner of the property and even if for some point of time he might have asserted possession over the same, the same being patently illegal, no relief can be granted to the appellant.

22. The appellant cannot get any benefit of judgment in case of **R. Hemlatha (supra)** inasmuch as the case before the Apex Court had arisen out of State of Tamilnadu where a different amendment was dealt with by the Apex Court. The provisions applicable in the State of U.P. as regards mandatory registration of an agreement were not dealt by the Apex Court nor was there any occasion for the same. Further, the matter before the Supreme Court had arisen out of a suit for specific performance of an agreement for sale and facts of the present

case are totally different. The Court has already held that the writing relied upon by the appellant though termed as "sale" does not satisfy the parameters even of an agreement and, therefore, the entire case of the defendant-appellant has no basis at all.

23. No substantial question of law arises for consideration in this appeal and summoning of lower court record for further consideration is not required as sufficient material is already appended along with memo of appeal and the supplementary affidavit filed today.

24. The instant second appeal has no force and is, accordingly, **dismissed.**

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**(2024) 7 ILRA 812**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.07.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

Second Appeal No. 450 of 2024

**Rambhool** ...**Appellant**
**Versus**
**Sheeshpal & Ors.** ...**Respondents**

**Counsel for the Appellant:**
Sri Avadh Pratap Singh Shishodia, Sri Rahul Kumar Tyagi

**Counsel for the Respondents:**

**A. Civil Law –** Second Appeal- Sale deed executed by plaintiff-appellant sought to be cancelled on the ground of fraud-sale deed invalid for want of permission from the Competent Authority.

B. No pleading in the plaint that the plaintiff-appellant belongs to Scheduled Caste Community- no pleading that permission under Section 157-AA was required- No application for additional evidence under Order 41 Rule 27 read with Order 42 CPC filed- caste certificate cannot be read in the present proceedings- argument regarding non-compliance of Section 157-AA has no force. **(Paras 5 and 6)**

**HELD:**
As far as the first argument based upon Section 157-AA of the Act, 1950 is concerned, the Court finds that there was no pleading in the plaint that the plaintiff-appellant belongs to Scheduled Caste Community. The plea of permission from the Competent Authority was taken in paragraph no.10 of the plaint but it was not stated that permission, as contemplated under Section 157-AA, was required and even though it was not necessary to plead any section of the Statute, the pleading was to the effect that the property was given on lease by the State Government and, therefore, in absence of permission from the Competent Authority/ District Magistrate, sale could not be effected and the sale deed is void. (Para 5)

Sri Tyagi has drawn attention of this Court towards Annexure no.1 to the affidavit supporting stay application, which is a photostat copy of caste certificate dated 26.03.2021 demonstrating the alleged status of the plaintiff-appellant as a person belonging to Scheduled Caste Community. Admittedly, this document did not form part of the record of the courts below nor has any application for additional evidence under Order 41 Rule 27 read with Order 42 CPC by which the provisions of Order 41 have been made applicable to second appeals, been moved before this Court. Therefore, the photostat copy of the document filed as Annexure no.1 cannot be read in the present proceedings. Therefore, argument on non-compliance of Section 157-AA has no force. (Para 6)

**C. Plea of fraud-** presumption of validity of instrument-consonant with provisions of Sections 58, 59 and 60 of the Registration Act, 1908- rebuttable presumption-no cogent evidence was led by plaintiff-appellant to rebut the said presumption- Effect of acquisition proceedings by U.P. Avas Vikas Parishad- Sections 189 (c) and 190 (1)(d) of the UPZALR Act, 1950-rights of tenure holder would extinct-

U.P. Avas Vikas Parishad not arrayed as defendant- Suit would fail as per Proviso to Order I Rule 9 to CPC- No substantial question of law arises for consideration-Appeal dismissed. **(Paras 7, 11, 13 and 14)**

**HELD:**
n so far as the plea of fraud is concerned, both the courts below have dealt with oral and documentary evidence in this regard and this Court does not find any error or perversity in the view taken to the effect that there was a presumption of validity of the registered document. This Court finds that such a view is in consonance with the provisions of Sections 58, 59 and 60 of the Registration Act, 1908 and though the presumption is rebuttable, no cogent evidence was led by the plaintiff-appellant to rebut the said presumption. (Para 7)

A bare perusal of Sections 189 (c) and 190(1)(d) of the Act, 1950 shows that when the land comprised in the holding of a bhumidhar with transferable rights or a bhumidhar with non-transferable rights has been acquired under any law for the time being in force relating to the acquisition of land, the rights of the tenure holder would extinct. (Para 11)

This Court is not in a position to accept the said submission for the simple reason that irrespective of execution of sale deed, whether the plaintiff-appellant is the owner or the defendant respondents, the rights in the agricultural land in dispute vested absolutely in Avas Vikas Parishad after acquisition. Extinction of the interest, either of the plaintiff-appellant or of the defendant respondents would nullify the entire suit proceedings on this ground alone and, as aforesaid, U.P. Avas Vikas Parishad not being party to the litigation though it was a necessary party to the proceedings, the suit would fail for all purposes. The Court may note that prayer No.B in the plaint was in the nature of decree of permanent prohibitory injunction restraining the defendants from receiving compensation from the office of Additional District Magistrate (Finance and Revenue), Ghaziabad at the strength of sale deed of 2001. Neither the said competent authority nor the acquiring body being party to the proceedings, the suit was bound to fail as per proviso attached to Order 1 Rule 9 CPC. The provision reads as under: -

"9. Misjoinder and non-joinder. - No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it: Provided that nothing in this rule shall be apply to non-joinder of a necessary party." (emphasis supplied) (Para 13)

In view of the findings recorded by both the courts below dealing with the case of the plaintiff-appellant coupled with the effect of Sections 189 and 190 of the Act, 1950, this Court finds no good ground to entertain this appeal even on admitted facts. (Para 14)

**Appeal dismissed.** (E-14)

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Sri Rahul Kumar Tyagi, learned counsel for the plaintiff-appellant and perused the record.

2. A registered sale deed dated 31.05.2001 was executed by the plaintiff-appellant in favour of the defendant-respondents and the Original Suit No.383 of 2010 was filed after nine years seeking cancellation of the sale deed on the ground that the signatures of the plaintiff (vendor) were obtained by fraud and, in fact, the plaintiff-appellant had taken a loan of Rs.20,000/- from the vendee and sale deed was neither intended to be executed nor actually executed. The other plea was that the sale deed was invalid for want of permission from the Competent Authority.

3. Learned counsel for the appellant has vehemently argued that the plaintiff-appellant belongs to Scheduled Caste Community and, therefore, as per Section 157-AA of U.P. Zamindari Abolition and Land Reforms Act, 1950 (for short the Act,

1950), unless there was a permission accorded by the Competent Authority, sale deed could not be executed. He further submits that both the courts below have also erred in not correctly examining the plea of fraud and by merely observing that the sale deed being a registered document, there would be a presumption as regards its validity, the suit has been dismissed. He further submits that the plaintiff-appellant was not aware of the execution of sale deed and when proceedings for disbursement of compensation by Avas Vikas Parishad were held and the purchasers/ defendants put their claim for getting the compensation, the plaintiff-appellant came to know about the fraud committed with him and, therefore, the suit was filed. He also submits that as per Section 166 of the Act, 1950, any transfer made in contravention of the provisions of the Act shall be void and, therefore, the sale deed would be void for want of compliance of Section 157-AA.

4. The Court has perused the entire record of proceedings attached to the appeal.

5. As far as the first argument based upon Section 157-AA of the Act, 1950 is concerned, the Court finds that there was no pleading in the plaint that the plaintiff-appellant belongs to Scheduled Caste Community. The plea of permission from the Competent Authority was taken in paragraph no.10 of the plaint but it was not stated that permission, as contemplated under Section 157-AA, was required and even though it was not necessary to plead any section of the Statute, the pleading was to the effect that the property was given on lease by the State Government and, therefore, in absence of permission from the Competent Authority/ District Magistrate, sale could not be effected and the sale deed is void.

6. Sri Tyagi has drawn attention of this Court towards Annexure no.1 to the affidavit supporting stay application, which is a photostat copy of caste certificate dated 26.03.2021 demonstrating the alleged status of the plaintiff-appellant as a person belonging to Scheduled Caste Community. Admittedly, this document did not form part of the record of the courts below nor has any application for additional evidence under Order 41 Rule 27 read with Order 42 CPC by which the provisions of Order 41 have been made applicable to second appeals, been moved before this Court. Therefore, the photostat copy of the document filed as Annexure no.1 cannot be read in the present proceedings. Therefore, argument on non-compliance of Section 157-AA has no force.

7. In so far as the plea of fraud is concerned, both the courts below have dealt with oral and documentary evidence in this regard and this Court does not find any error or perversity in the view taken to the effect that there was a presumption of validity of the registered document. This Court finds that such a view is in consonance with the provisions of Sections 58, 59 and 60 of the Registration Act, 1908 and though the presumption is rebutable, no cogent evidence was led by the plaintiff-appellant to rebut the said presumption.

8. There is another aspect of this matter. The courts below have discussed the acquisition proceedings initiated by U.P. Avas Vikas Parishad in respect of land in dispute. The initial notifications were issued in the year 1998 and it appears that

the acquisition was either cancelled or held up or stayed in the year 2006 by the State Government, but, later on, in the year 2007, fresh notifications were issued. It is also the admitted case of the plaintiff-appellant that he came to know about the execution of sale deed in the year 2009-10 when the defendants were trying to get the compensation released in their favour.

9. The land in dispute being agricultural in nature, it is necessary to discuss the effect of acquisition in respect of agricultural land as regards the rights of tenure holders are concerned.

10. Section 189 of the Act of 1950 deals with extinction of the interest of a bhumidhar with transferable rights and Section 190 is an identical provision in respect of bhumidhar with non-transferable rights. The said provisions are quoted below:-

"**189. Extinction of the interest of a bhumidhar with transferable rights.**- The interest of a [bhumidhar with transferable rights] in his holding or any part thereof shall be extinguished-

(a) when he dies intestate leaving no heir entitled to inherit in accordance with the provisions of this Act;

(aa) when the holding or part thereof has been transferred or let out in contravention of the provisions of this Act;

**(b) when the land comprised in the holding has been acquired under any law for the time being in force relating to the acquisition of land**; or

(c) when he has been deprived of possession and his right to recover possession is barred by limitation.

**190 Extinction of the interest of a bhumidhar with non-transferable rights.**- (1). Subject to the provisions of Section 172, the interest of a [bhumidhar with non-transferable rights] in a holding or any part thereof shall be extinguished-

(a) when he dies having no heir entitled to inherit in accordance with the provisions of this Act;

(b) when the holding has been declared as abandoned in accordance with the provisions of Section 186;

(c) when he surrenders his holding or part thereof;

(cc) when the holding or part thereof has been transferred, let out or used in contravention of the provisions of this Act;

**(d) when the land comprised in the holding has been acquired under any law for the time being in force relating to the acquisition of land**;

(e) when he has been ejected in accordance with the provisions of this Act; or

(f) when he has been deprived of possession and his right to recover possession is barred by limitation." (emphasis supplied)

11. A bare perusal of Sections 189 (c) and 190(1)(d) of the Act, 1950 shows that when the land comprised in the holding of a bhumidhar with transferable rights or a bhumidhar with non transferable rights has been acquired under any law for the time being in force relating to the acquisition of land, the rights of the tenure holder would extinct.

12. In the present case, though the acquisition proceedings were discussed by the courts below and even the plaintiff's case is based upon plea of acquisition, neither U.P. Avas Vikas Parishad, which is the Acquiring Body, was arrayed as defendant in the proceedings nor has the appellant been able to establish as to how

the land would remain under his title after acquisition. The submission of Sri Tyagi in this regard is that since the authorities for disbursement of compensation are not competent to examine the validity of the registered sale deed, the suit was rightly filed as the civil court only was competent to deal with the plea of fraud etc.

13. This Court is not in a position to accept the said submission for the simple reason that irrespective of execution of sale deed, whether the plaintiff-appellant is the owner or the defendant-respondents, the rights in the agricultural land in dispute vested absolutely in Avas Vikas Parishad after acquisition. Extinction of the interest, either of the plaintiff-appellant or of the defendant-respondents would nullify the entire suit proceedings on this ground alone and, as aforesaid, U.P. Avas Vikas Parishad not being party to the litigation though it was a necessary party to the proceedings, the suit would fail for all purposes. The Court may note that prayer No.B in the plaint was in the nature of decree of permanent prohibitory injunction restraining the defendants from receiving compensation from the office of Additional District Magistrate (Finance and Revenue), Ghaziabad at the strength of sale deed of 2001. Neither the said competent authority nor the acquiring body being party to the proceedings, the suit was bound to fail as per proviso attached to Order 1 Rule 9 CPC. The provision reads as under:-

"**9. Misjoinder and non-joinder.**- No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

**Provided that nothing in this rule shall be apply to non-joinder of a necessary party**." (emphasis supplied)

14. In view of the findings recorded by both the courts below dealing with the case of the plaintiff-appellant coupled with the effect of Sections 189 and 190 of the Act, 1950, this Court finds no good ground to entertain this appeal even on admitted facts.

15. No substantial question arises for consideration.

16. The second appeal is **dismissed**.

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**(2024) 7 ILRA 816**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 18.07.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

Second Appeal No. 472 of 2024

**Padam Singh** ...**Appellant**
**Versus**
**Devi Singh & Anr.** ...**Respondents**

**Counsel for the Appellant:**
Sri Ashok Kumar Gupta, Sri B.D. Pandey

**Counsel for the Respondents:**
Ms. Rama Goel Bansal, Ms. Shalini Goel

**Civil Law - Specific Relief Act, 1963 - Section 20 - Evidence Act, 1872 - Sections 91 & 92 - Transfer of Property Act, 1882 - Section 52 - A registered agreement for sale was executed in respect of agricultural land in between the plaintiff - respondent and defendant – appellant - Another registered agreement was executed in respect of same property, defendant agreed to sell in favour of plaintiff, but when latter didn't adhere to terms of agreement and, despite notice issued by plaintiff, sale deed was not executed by defendant - Suit was instituted by plaintiff no. 1, for specific**

**performance - Trial Court ruled in favour of defendant, Appellate Court reversed the order by granting specific performance to plaintiff - Held, transaction was for taking of loan, defendant failed to prove fraud had been committed with him, no documentary evidence was filed as regards return of money to the plaintiff - If execution of agreement was fraudulent, nothing precluded defendant from either instituting a separate suit seeking declaration from Civil Court nor did he prefer counter claim in suit - Mere filing of civil appeal/cross appeal by defendant, Section 92 would not aid to defendant - Transaction was not a transaction of loan, rather agreements for sale of agricultural land - Sale deed is hit by doctrine of lis pendens covered by Section 52. (Para 2, 14, 15, 16)**

**Second Appeal Dismissed.** (E-13)

**<u>List of Cases cited</u>:**

1. Smt. Gangabail w/o Rambilas Gilda Vs Smt. Chhabubai w/o Pukharajji Gandhi (1982) 1 SCC 4

2. Roop Kumar Vs Mohan Thedani (2003) 6 SCC 595

3. Placido Fransisco Pinto (D) by LRs & anr. Vs Jose Francisco Pinto & anr., 2021 (2) ARC 40 (SC)

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri B.D. Pandey, holding brief of Shri Ashok Kumar Gupta, learned counsel for defendant-appellant and Ms. Rama Goel Bansal, learned counsel for plaintiff-respondent No. 1.

2. A registered agreement for sale dated 03.12.1993 was executed in respect of agricultural land covered by Gata Nos. 547 and 574, measured differently, in between the plaintiff and the defendant. The period for executing the sale deed was agreed upon as one year from the date of agreement. After the said period expired, another registered agreement dated 06.12.1994 was executed in respect of the same property and, thereby too, the defendant agreed to sell the same in favour of the plaintiff, but when the latter did not adhere to the terms of the agreement and, despite notice issued by the plaintiff, sale deed was not executed by the defendant, Original Suit No. 324 of 1996 was instituted by respondent No. 1 claiming a decree for specific performance of registered agreement(s) with an alternative relief of refund of earnest money with interest.

3. The defence of defendant No. 1 (appellant) was that the agreement was not executed for selling the property, but it was a transaction of loan and a sum of Rs. 41,000/- was given as loan amount to him, but the plaintiff fraudulently got the said agreement executed as an agreement for sale.

4. The trial court found force in the defence of the defendant as regards the nature of transaction and held that it was an understanding about loan. While reaching to the said conclusion, the trial court referred to different portions of cross-examination of PW-1 much emphasising on that portion of the said cross-examination, in which the plaintiff had stated that interest at the rate of Rs. 20/- per Rs.1000/- was agreed upon between the parties. With the said finding, coupled with observation that the plaintiff was not ready and willing to get the sale deed executed as he was a labourer and stated in his oral testimony that he used to earn meagre wages and all his earnings were deposited by him in the bank, the trial court arrived at a conclusion that the plaintiff was not entitled to get a

decree for specific performance. It, however, vide judgment and decree dated 02.05.2009, decreed the suit for alternative relief directing the defendant to refund a sum of Rs.75,000/- along with 10% interest to the plaintiff.

5. Two appeals were preferred against the judgment and decree of the trial Court. While Civil Appeal No. 31 of 2009 was filed by the plaintiff being aggrieved by non-grant of decree for specific performance of the agreement(s), Civil Appeal, being Cross Appeal No. 65 of 2015, was filed by the defendant No. 1(appellant) being aggrieved by the decree of refund of money.

6. The first Appellate Court has allowed the appeal filed by the plaintiff and dismissed the cross appeal filed by the defendant. It has recorded in the judgment that the defence of defendant No. 1 stating the agreement as a transaction for loan and that he had returned the sum taken from the plaintiff in December, 1995, could not stand substantiated by any oral or documentary evidence. The Appellate Court elaborately dealt with the said defence and also observed that had the defendant returned the amount taken from the plaintiff, he would have taken steps to get the agreement cancelled, but no such step was taken by him. It also recorded that though, according to the defendant, there was a written document executed as regards refund of money, but the same was not filed by him. Accordingly, adverse inference was drawn by the lower Appellate Court against the defendant-appellant.

7. The Appellate Court also noted the defence of the defendant that in the event of execution of sale deed, he would suffer hardship. While discussing the said aspect, the Appellate Court observed that when the plaintiff, apprehending execution of a sale deed by the defendant in teeth of the agreement(s), moved an application and affidavit during the pendency of appeal and sought stay against alienation, the defendant-appellant filed objections paper No. 12-C supported by affidavit paper No. 13-C giving an undertaking that he would never sell the property as the same was the only means for his livelihood. For this reason, no injunction was granted by the Appellate Court against the sale. The Appellate Court has observed that during the pendency of the appeal, present appellant executed a registered sale deed dated 25.07.2012 in favour of one Guddu (respondent No.2) in respect of 1/8th share in Arazi No. 574 and, therefore, the conduct of the defendant was sufficient to exercise discretion against him as per Section 20 of the Specific Relief Act, 1963.

8. Learned counsel for the appellant has vehemently argued that the Appellate Court has not reversed the findings recorded by the trial court as regards the transaction itself, particularly, when PW-1 himself stated that interest was agreed upon between the parties in relation to the transaction. He, however, admits that sale deed was executed by the appellant during the pendency of appeal but contends that though the agreement was executed in relation to the properties covered by Gata Nos. 547 and 574, only part of Gata No. 574 had been sold out. He also submits that the finding on readiness and willingness has also not been reversed by the Appellate Court and decree for specific performance has been illegally drawn.

9. On the other hand, learned counsel for the contesting-respondent

argues that the conduct of the defendant is apparent on the face of the record. First, he did not cross-examine the remaining witnesses produced by the plaintiff's side, secondly, he did not file any documentary evidence to establish that amount was ever returned to the plaintiff, thirdly, he executed the sale deed violating the undertaking given by him before the Court and, lastly, that the Appellate Court has dealt with the documentary evidence, whereby the plaintiff had ensured his attendance in the Sub-Registrar's office awaiting presence of the defendant as regards execution of sale deed. She further submits that only a very tiny part of the lengthy cross examination of PW-1 has been referred to by the trial court and the entire statement has not been considered, in which, throughout, the transaction in between the parties was stated to be that of an agreement for sale.

10. Having heard the learned counsel for the parties, the Court finds that in a suit for specific performance of a registered agreement for sale, mainly three things are important. First, that the document has to be a registered one, secondly, the plaintiff has to establish that he was ready and willing to get the sale deed executed and, thirdly, the discretion under section 20 of Specific Relief Act, 1963 considering conduct of parties and hardship, if any, to be suffered by the defendant.

11 . As regards the agreement, there is no dispute that there were two agreements and both were registered. As regards readiness and willingness, the oral and documentary evidence discussed by the lower Appellate Court is quite satisfactory and this Court finds that the trial court simply, by quoting few lines from the cross-examination of PW-1, arrived at a conclusion that the plaintiff was not ready and willing to get the sale deed executed. As regards discretion, it has already been observed that two pleas were raised by the defendant, one as regards nature of transaction as a loan agreement, which he could not prove either by oral or by documentary evidence and secondly, that the amount taken from the plaintiff was ever returned by the defendant which too he failed to prove. The most important aspect is the defence of hardship, which the Appellate Court has dealt with in relation to execution of sale deed dated 25.07.2012 in favour of defendant No. 2 despite giving an undertaking before the Court that the defendant would never sell the property.

12. Even accepting the submission of appellant that at one place in the cross-examination, PW-1 had stated that interest at the rate of Rs.20/- per Rs. 1000/- was agreed upon between the parties, the said situation would not go adverse to the plaintiff for two reasons. First, that the entire statement has to be read as a whole and the court is never justified to tear out one line from the lengthy statement of a witness to arrive at a conclusion. Secondly, so far as admissibility of oral evidence as regards terms of a contract, reference to Sections 91 and 92 of the Evidence Act, 1872 is required to be made. The provisions are reproduced as under:

**"91. Evidence of terms of contracts, grants and other disposition of property reduced to form of document-** When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall

be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein-before contained."

..…………..

**92. Exclusion of evidence of oral agreement**.

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, *no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms :*

Proviso (1). - Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2). - The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3). - The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4). - The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5). - Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6). - Any fact may be proved which shows in what manner the language of a document is related to existing facts.

13. The question of exclusion of oral evidence by documentary evidence came up for consideration before Hon'ble the Supreme Court **in Smt. Gangabail w/o Rambilas Gilda vs Smt. Chhabubai w/o Pukharajji Gandhi** (1982 ) 1 SCC 4, and **Roop Kumar vs. Mohan Thedani** (2003) 6 SCC 595**. In Roop Kumar (supra),** the Supreme Court was seized of an appeal filed by the defendant arising out of a suit for possession and for rendition of accounts. The plaintiff claimed that he entered into an agency- cum-deed of license with the appellant-defendant on 15.5.1975 and the terms of such agency-cum-licensing agreement were incorporated

in an agreement dated 15.5.1975. The stand of the defendant was that he was in lawful possession as a tenant under the plaintiff. The trial court decreed the suit holding that the transaction between the respondent and the appellant evidenced by the agreement dated 15.5.1975 amounts to license and not sub- letting. The question was whether relationship between the parties was that of a licensor and licensee or that of a lessor and lessee. The first appeal was dismissed by the High Court. The Supreme Court held that it is general and most inflexible rule that in respect of written instruments, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. It was held that section 91 is concerned with the mode of proof of a document with limitation imposed by Section 92 and if after the document has been produced to prove its terms under section 91, provisions of section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. It was further observed that wherever written instruments are executed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than oral evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. The aforesaid judgments have been reconsidered by the Supreme Court in the case **of Placido Fransisco Pinto (D) by LRs and another vs Jose Francisco Pinto and another, 2021 (2) ARC 40 (SC).**

14. In the present case, though in the written statement, the defendant-appellant took a plea that transaction in between the parties was with regard to taking of loan and a case was sought to be developed as if fraud had been committed with the defendant about which he came to know after institution of the suit, there is nothing on record that such a plea was sufficiently proved by the defendant by leading cogent evidence, particularly, when no documentary evidence was filed as regards return of money to the plaintiff, if, at all, his bald assertion as regards financial assistance is to be accepted. Further, if execution of the agreement(s) was fraudulent or a deceiving act rendering the documents as void/voidable/invalid, nothing precluded the defendant-appellant from either instituting a separate suit seeking such declaration from the Civil Court nor did he prefer any counter claim in the present suit. Mere filing of civil appeal/cross appeal by the defendant being aggrieved by the decree of refund of money would not suffice taking aid of proviso attached to Section 92 of the Evidence Act which, when read with Sections 92 and 91 in toto with the material on record of the case in hand, would not come for rescue of the defendant appellant.

15. During the course of hearing, copies of both the agreements were placed before the Court, from perusal whereof, the Court does not find even a single word, by which it can be inferred that transaction between the parties was a transaction of loan; rather both the documents, in so many

words, clearly infer that these were executed as pure agreements for sale of the agricultural land.

16. Last submission of learned counsel for the appellant that entire property covered by agreements or suit itself has not been sold, but only part thereof has been sold, also does not appeal to the Court for the reason that the agreement was in relation to 1/8th share in Gata No. 574 and the entire 1/8th has been sold to defendant No. 2. Irrespective of the fact that Gata No. 547 has or has not been sold, the same would not be read a circumstance in favour of the defendant or against the plaintiff. The defence of hardship stands washed off with execution of sale deed dated 25.07.2012 by the appellant in favour of defendant No. 2 and discretion to pass a decree against him emerges from the sale that was made in violation of the undertaking given by him on oath before the Appellate Court. As far as sale deed dated 25.07.2012, the same is clearly hit by the doctrine of lis pendens covered by Section 52 of the Transfer of Property Act, 1882.

17. In view of the aforesaid discussion, this Court does not find any good ground to interfere with the order of Appellate Court or to upset the findings of fact recorded by it. No substantial question of law arises for consideration by this Court.

18. Second appeal has no force and is, accordingly, **dismissed.**

19. The decree shall be executed forthwith positively by the end of this year, i.e. 2024.

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**(2024) 7 ILRA 822**

**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 05.07.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

First Appeal From Order No. 411 of 2024

**M/S MMI Tobacco Pvt. Ltd. & Anr. ...Appellants**

**Versus**

**Iftikhar Alam ...Respondent**

**Counsel for the Appellants:**
Sri Arvind Srivastava, Sri Mohammad Waseem, Sri T.P. Singh (Sr. Advocate)

**Counsel for the Respondent:**
Sri Santosh Kumar Tripathi, Sri Udyan Nandan, Sri Shashi Nandan (Sr. Advocate)

**Civil Law _ Code of Civil Procedure, 1908 - Order XLIII Rule 1(r) - Trade Marks Act, 1999 - Sections 29, 31, 34, 127, 134 & 135 - Copyright Act, 1956 - Section 62 - Trade Marks Rules, 2017 – Rule 25, 119 - Indian Contract Act, 1872 - Section 62 – Impugned order challenged, by which Injunction application rejected – Appellant was engaged in production and sale of tooth power, namely, "Musa-Ka-Gul" by wholesale and retail activity - Appellant company and its predecessors had been selling product since 04.03.1974 and registered their trade mark, valid upto 15.01.2024 - On 16.08.2022 appellant came to know that defendant selling the same product by same name - Suit was instituted - Claiming decree alongwith seeking temporary injunction - Defendant may be restrained from producing, selling tooth powder "Asli Musa-KaGul" – Held, the appellants have succeeded to establish all the three ingredients existing in their favour and in case injunction, is not granted, they would suffer day-to-day damages and losses on account of continuous infringement of their trade mark - Sales of the appellants have**

**drastically dropped on account of use of their goodwill by defendant, who is misleading the customers about the product and, consequently, appellants are loosing their customers – Impugned order is set aside- directions accordingly (Para 2, 3, 4, 29, 32)**

**Appeal is allowed.** (E-13)

**List of Cases cited:**

1. S. Syed Mohideen Vs P. Sulochana Bai, (2016) 2 SCC 683

2. Rajendra Prasad Gupta Vs Prakash Chandra Mishra & ors., (2011) 2 SCC 705

3. Aman Lohia Vs Kiran Lohia, 2021 (5) SCC 489

4. K.K. Modi Vs K.N. Modi & ors., (1998) 3 SCC 573

5. Zenit Mataplast P. Ltd. Vs St. of Mah. & ors., (2009) 10 SCC 388

6. H.R. Basavaraj (Dead) by his LRs. and another Vs Canara Bank & ors., (2010) 12 SCC 458

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri T.P. Singh, learned Senior Counsel assisted by Shri Arvind Srivastava and Shri Mohammad Waseem, learned counsel appearing on behalf of plaintiff-appellants and Shri Shashi Nandan, learned Senior Counsel assisted by Shri Santosh Kumar Tripathi and Shri Udyan Nandan, learned counsel appearing for defendant-respondent.

THE APPEAL

2. The instant appeal under Order XLIII Rule 1(r) of Code of Civil Procedure, 1908, has been preferred by the plaintiffs-appellants of Original Suit No. 20 of 2022 (M/s M.M.I. Tobacco Pvt. Ltd. and another vs Iftikhar Alam) challenging the order dated 30.01.2024, whereby the District Judge, Varanasi has rejected their injunction application (Paper No. 6-C). Further prayer made is to allow the injunction application dated 25.08.2022.

PLAINTIFFS' CASE

3. The said Original Suit was filed by M/s M.M.I. Tobacco Pvt. Ltd. through its Director Mohd. Nazish, as plaintiff No.1 and Mohd. Nazish in his personal capacity, as plaintiff No.2, against the defendant--respondent Iftikhar Alam under Sections 29, 134, 135 of the Trade Marks Act, 1999 and Section 62 of the Copyright Act, 1956 with the averments that plaintiff No.1 was a private limited company, well established in India and was engaged in the production and sale of tooth power, namely, "Musa-Ka-Gul" by wholesale and retail activity. It was further alleged that plaintiff No.1 company and its predecessors had been lawfully selling the said product since 04.03.1974 and that copyright office at New Delhi had issued Registered No. A0131294/2010 on 04.10.2019, Label and Registered No.140586/2021 dated 21.11.2021, Musa Gul and Registered No. 140586/2021 dated 21.11.2021 and GST No. 19AAHCM7286L1ZN. It was further alleged that plaintiff No.1 company had been registered on 16.12.2011 and its trade mark had been registered on 15.01.1994 at Registration No. 616611, Certificate No.733679, which would be valid upto 15.01.2024. In paragraph No. 14 of the plaint, it was pleaded as follows:-

"यह कि मो० खालिक ने मूसा एण्ड सन्स का अपना सारा अधिकार जरिए एसाइनमेन्ट डीड 19.07.2012 मेसर्स एम०एम० इन्डस्ट्रीज को अन्तरित कर दिया जिसके पार्टनर मो० दानिश व मो० नाजिश मो० खालिक थे तथा मेसर्स एम०एम० इन्डस्ट्रीज जरिए पार्टनर मो० खालिक व मो० दानिश व मो० नाजिश

ने ट्रेडमार्क नंबर-616611 का अपना सारा अधिकार जरिए एसाइनमेन्ट डीड दिनांक 28.03.2019 मेसर्स एम०एम०आई० टुबैको प्रा०लि० वादी संख्या-1 कम्पनी को अन्तरित कर दिया इस तरह ट्रेडमार्क नंबर-616611 मूसा का गुल (नाम) का प्रयोग करने का वादी कम्पनी को पूर्ण अधिकार प्राप्त है। प्रतिवादी को (असली मूसा का गुल) नाम व कम्पनी का नाम (मो० मूसा एण्ड सन) डिबिया पर लिखने का कोई अधिकार नहीं है। प्रतिवादी का न तो कम्पनी एक्ट में रजिस्ट्रेशन है तथा न तो ट्रेडमार्क का रजिस्ट्रेशन है तथा न तो कापी राईट एक्ट में रजिस्ट्रेशन है तथा न तो एम०एम०आई० एण्ड कं० द्वारा लाइसेन्स प्रतिवादी को दिया गया है।"

4. The cause of action for filing suit was alleged to have accrued on 16.08.2022 when the plaintiffs came to know about defendant selling the same product by the same name and, therefore, suit was instituted claiming a decree alongwith an application 6-C seeking temporary injunction pending suit, to the effect that the defendant may be restrained, either himself or through any camouflaged company, assignee, nominee, employee or agent from producing, selling or trading tooth powder "Asli Musa-Ka-Gul" and not to write "Asli Musa-Ka-Gul" on the container and wrappers or name of the company, i.e. Mohd. Musa and sons or M.M.I and Company.

5. The case of the plaintiffs-appellants, in a nutshell, is that they have exclusive right to use "Musa-Ka-Gul" with man device and photographs of Mohd. Musa and Mohd. Subedar for selling the product manufactured by them. The plaintiff No. 1 claims to be a reputed Company manufacturing tooth powder in the name of "Musa-Ka-Gul" with the aforesaid design and colour from the time of its predecessor-in-interest since 04.03.1974. They claim to have registered their trade mark No. 616611 with such description. They also have copyrights having registration No. A131294 of 2019 (Paper No. 12-Ga), A140586 of 2021 (Paper No. 13-Ga) and A140587 of 2021 (Paper No. 14-Ga) of the exclusive design and colour to be exclusively used by them on the wrapper and container of the product sold by them.

## DEFENDANT'S CASE

6. The defendant contested the claim for injunction by filing objection (Paper No. 40-C) supported by affidavit (Paper No. 41-C) stating therein that the registered trade mark No. 616611 was pending for rectification before the Registrar of Trade Marks; that the product "Musa-Ka-Gul" had been adopted by Mohd. Musa and sons, whose partners were Mohd. Subedar and Mohd. Islam; that Mohd. Musa and sons applied for registration of trade mark vide application No. 354633, in which the user was described since 04.03.1974. Mohd. Khalique, son of Mohd. Subedar was inducted in the partnership of the firm since 1983; the firm functioned upto 1997 with partners Mohd. Subedar and Mohd Islam, sons of Mohd. Musa and Mohd. Khalique, son of Mohd. Subedar; that it was dissolved in the year 1997, as a result whereof, a decision was taken to surrender the trade mark along with its goodwill before the Tribunal. Mohd. Islam, while being a partner, had assigned permission to use "Musa-Ka-Gul" with horse mark and "Musa-Ka-Gul" with photograph of Mohd. Musa in favour of wife of Mohd. Islam, namely Ishrat Jahan, on 01.04.1983 and, consequently, authorised her to get the trade mark registered and conduct business. Ishrat Jahan, by executing an assignment deed dated 28.05.2007, transferred the right of user to the defendant- objector Iftikhar Alam. It was further stated that plaintiff

No. 1 and the defendant were contesting in different proceedings relating to the trade mark and matter was pending before the Registrar, Trade Marks, i.e. the Competent Authority, in the form of an application to cancel/rectify the trade mark No. 616611. Further objection was that trade mark of plaintiffs was different from the one of the defendant and, hence, the plaintiffs neither had a *prima facie* case, nor did the balance of convenience lie in their favour nor would they suffer irreparable injury, in the event injunction was refused.

TRIAL COURT'S PREVIOUS ORDER

7. The trial court, by an order dated 10.10.2022, allowed the application (Paper No. 6-C) granting temporary injunction pending suit, restraining the defendant-respondent from producing, selling or trading in tooth powder ("Asli Musa-Ka-Gul"), either himself or in the name of camouflaged company or through any assignee, nominee, employee or agent and not to write "Asli Musa-Ka-Gul" on the container (*dibbi*) and wrappers or name of the company, i.e. Mohd. Musa and sons or M.M.I. and Company.

INTERFERENCE BY THIS COURT IN EARLIER ROUND

8. As against the aforesaid order dated 10.10.2022, the defendant-Iftikhar Alam filed First Appeal From Order No. 77 of 2023 (Iftikhar Alam vs. M/s M.M.I. Tobacco Pvt. Ltd. and Another) before this Court. The appeal was allowed by a detailed order dated 07.08.2023; the order dated 10.10.2022 was set aside only on the ground that the order granting injunction did not deal with the case of the parties nor the documents on record and that injunction was cryptically granted ignoring three basic ingredients. The matter was remanded to the trial court for fresh consideration of the injunction application in the light of factors enumerated in paragraph No. 24 of the order. This Court also permitted the parties to file additional documents before the trial court. The trial court has, this time, rejected the injunction application by the order impugned dated 30.01.2024.

SUBMISSIONS OF LEARNED COUNSEL FOR PLAINTIFFS-APPELANTS

9. Shri T.P. Singh, learned Senior Advocate assisted by Shri Arvind Srivastava and Shri Arvind Srivastava separately also, made following submissions:

(i) The defendant did not approach the Court with clean hands and deliberately concealed the proceedings culminated upto Calcutta High Court. Pursuant to the permission granted by this Court under order dated 07.08.2023, the appellant filed an application No. 157-C annexing therewith ten documents numbered from Paper No. 159-C to 168-C. While referring to the said documents, it is urged that Mohd. Islam, son of late Mohd. Musa, through document dated 01.04.1983, had made a declaration in favour of his wife Ishrat Jahan permitting her to manufacture goods "Gul" by using trade mark Mohd. Musa, i.e. name of Mohd. Islam's father in any manner and his photograph, design of head of horse, words "Musa-Ka-Gul" etc. on the label or in any manner by using the said trade mark with her own design, get-up etc. and that she would be at liberty to get the said trade mark, word and label registered under the

Trade and Merchandise Marks Act, 1958 in her own name as owner.

(ii) Ishrat Jahan, at the strength of the said authorisation made by Mohd. Islam, executed a deed of assignment on 26.05.2007 in favour of defendant-respondent-Iftikhar Alam stating therein that the assigner (Ishrat Jahan), being the proprietor of the trade mark "Musa-Ka-Gul" label in class-3 under Application No. 585128 dated November 19, 1992 and any other mark containing the word "Musa" and/ or photograph of late Mohd. Musa and/ or any artistic work containing the same, had agreed to assign the said trade mark to the assignee Iftikhar Alam together with the goodwill of the business concerned with the goods for which the said trade mark is used. The Application No. 585128 dated 19.11.1992 contained a specific condition, viz, "registration of this trade mark shall give no right to the exclusive use of word 'Gul' and all other descriptive matters appearing in the label". The said Application No. 585128 was, later on, got dismissed as withdrawn by Ishrat Jahan herself on 15.06.2010.

(iii) Ishrat Jahan made a request on 26.03.2009 before the Senior Examiner of Trade Marks, Kolkata under the Trade Marks Act, 1999 requesting that statement of use may be amended to read as "3rd April, 1984". The application was rejected by order dated 27.10.2009 for various reasons including on the ground that the amendment was sought after a long delay of 16 years.

(iv) The application for rectification, moved by Ishrat Jahan in relation to the registered trade mark No. 558741, was rejected by the Assistant Registrar of the Trade Marks, Kolkata on 25.03.2010, meaning thereby that the claim set up by Ishrat Jahan was successively turned down at the level of the Competent Authority.

(v) The defendant-Iftikhar Alam (assignee from Ishrat Jahan) filed a Review Petition before the Intellectual Property Appellate Board, Chennai Circuit Bench at Kolkata, seeking review of an Order No. 148 2011 dated 24.08.2011. The application was, however, rejected on 06.12.2012. The defendant-Iftikhar Alam carried the matter to the Calcutta High Court where also his prayer was rejected by order dated 21.03.2013.

(vi) Once the predecessor-in-interest of the defendant and the defendant himself lost the battle upto Calcutta High Court, he has no claim at the strength of assignment made by Ishrat Jahan in his favour and, hence, the entire defence is baseless, however, the trial court has not considered the documents to that effect while passing the order impugned.

(vii) As regards prior user, reference has been made to the registered trade mark Application No. 616611, which shows the date of registration as 15.01.1994, renewing date as 15.01.2014, registration being valid upto 15.01.2024. It is further contended that certificate contains history data describing step-by-step proceedings in relation to the registered trade mark with clear words that pursuant to the request made on Form TM–P dated 30.04.2019 and order dated 10.05.2019 passed thereon, the address of registered business was changed to 25-B, Zakaria Street, Kolkata, West Bengal and pursuant to a request on Form TM-P dated 29.05.2019 and order dated 13.08.2019 passed thereon, M.M.I. Tobacco Private Limited (i.e. plaintiff-appellant No. 1) has been brought on record as subsequent proprietor in respect of the said registered trade-mark by virtue of assignment deed dated 28.03.2019, affidavit dated

28.03.2019 and general power of attorney dated 24.03.2019.

(viii) The trial court, though referred the documents, paper Nos. 162-C to 168-C and observed about the user date as 04.03.1974, the defendant made no denial, hence, it has fallen into a grave error in rejecting the claim for injunction, inasmuch as prior user by plaintiffs since 1974 became an admitted fact before the trial court.

(ix) The plaintiffs-appellants, being owner of the registered trade mark No. 616611 and also its prior user in comparison to Ishrat Jahan or her assignee, i.e. the defendant-respondent, they were entitled for injunction and even if, for any interpretation, the documents of Ishrat Jahan are read otherwise, since the condition imposed was specified as "registration of this trade mark shall give no right to the exclusive use of word 'Gul' and all other descriptive matters appearing in the label", the defendant would have no case.

(x) The trial court has wrongly observed that the plaintiffs had admitted about Ishrat Jahan's prior user of trade mark No. 616611, as the plaintiffs' trade mark was applied on 15.01.1994, prior to which Ishrat Jahan had applied for trade mark No. 585128 on 19.01.1992.

## SUBMISSIONS OF LEARNED COUNSEL FOR DEFENDANT-RESPONDENT

10. On the other hand, Shri Shashi Nandan, learned Senior Advocate, has raised following arguments:

(i) The application for injunction cannot be considered on pleas other than those, on which plaint case is based. By referring to paragraph Nos. 13 and 14 of the plaint, he submits that though plaintiff No. 1 claims to have come into existence pursuant to the assignment deed dated 28.03.2019 from its predecessor, that had derived its existence vide assignment deed dated 19.07.2012, the statement made in paragraph No. 4 of the plaint that plaintiff No. 1 company and its predecessor were manufacturing and selling tooth powder "Musa-Ka-Gul" since 04.03.1974 cannot, at all, be accepted.

(ii) The assignment referred to in paragraph No. 14 of the plaint lost its significance after the assignor had withdrawn from assignment vide application, paper Nos. 47-C/6, 47-C/8 and 47-C/10, dated 16.03.2016, whereby the partners had requested the Deputy Registrar of Trade Marks to withdraw and cancel the trade mark and TM-24 application filed by the plaintiffs along with deed of assignment dated 19.07.2012 on the ground that the plaintiffs were not interested to take the proprietory rights of the said trade mark "Musa-Ka-Gul" with bust photograph of late Mohd. Musa under registered trade mark No. 616611 in Class-3.

(iii) Since the applications dated 16.03.2016 paper Nos. 47-C/6, 47-C/8 and 47-C/10, were in the nature of withdrawal applications, the cause of action to file and maintain the suit and also injunction application stood vanished and, hence, this Court should dislodge the entire claim for injunction.

(iv) Though it is true that there was a registered trade mark of the plaintiffs, injunction could not be granted merely on this ground, as the defendant was the prior user of the product. In this regard, he has referred to Section 34 of the Act, 1999, which reads as under:-

**"34. Saving for vested rights.**— Nothing in this Act shall entitle the proprietor or a registered user of registered

trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods or services in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date prior—

(a) to the use of the first-mentioned trade mark in relation to those goods or services be the proprietor or a predecessor in title of his; or

(b) to the date of registration of the first-mentioned trade mark in respect of those goods or services in the name of the proprietor of a predecessor in title of his; whichever is the earlier, and the Registrar shall not refuse (on such use being proved), to register the second mentioned trade mark by reason only of the registration of the first mentioned trade mark."

(v) Prior user becomes a right vested in the said user and, as per the language used under Section 34, even the proprietor of a registered trade mark has no right to interfere with or restrain the use by the prior user.

(vi) The plaintiffs have to stand on their own legs and they cannot strengthen their case by pointing out some lacuna or weakness in the defence of the other side and, as per the plaintiffs themselves, they would be deemed to have born on 28.03.2019, i.e., the date on which assignment was made by M.M. Industries in favour of plaintiff No.1 and they cannot contend anything anterior in point of time by referring to the proceedings undertaken by Ishrat Jahan or her assignee.

(vii) By referring to documents filed as paper No. 47-C/6 contained in different sub-parts and appended from page Nos. 84 to 99 of the counter affidavit, it is contended that Mohd. Khalique, as partner of M/s Musa and sons, on 16.03.2016, submitted before the Deputy Registrar of the Trade Marks that he had wrongly assigned mark "Musa-Ka-Gul" with bust photograph of late Mohd. Musa under registered trade mark No. 616611 in Class-3 in favour of M/s M.M. Industries by deed of assignment dated 19.07.2012 and that he denied all the terms and conditions specified and mentioned under the said deed, which had been filed under TM-24 application dated 07.08.2013. Mohd. Khalique expressed his non-inclination to assign the said trade mark in favour of M/s M.M. Industries and requested the Registrar to cancel the deed of assignment dated 19.07.2012.

(viii) In continuation, Mohd. Nazish, as partner of M/s M.M. Industries, by his application dated 16.03.2016, termed the deed of assignment dated 19.07.2012 as improper and untenable in the eyes of law and expressed his dis-interest to take proprietary rights of the trade mark No. 616611 and he also requested the Registrar to cancel TM-24 application along with the deed.

(ix) In continuation, Mohd. Khalique filed an affidavit before the Trade Mark Authorities in the form of an assignment deed dated 28.03.2019 qua registered trade mark No. 616611, executed in between Mohd. Khalique, Mohd. Danish, Mohd. Nazish and Zoya Shahid as partners of M.M. Industries on the one hand (termed as assigners) and M.M.I. Tobacco (P) Ltd. on the other hand (termed as assignees), however, such an assignment is wholly baseless in view of the applications dated 16.03.2016, by which, the previous assignment made in favour of M/s M.M. Industries (assigner of plaintiff No. 1), vide deed dated 19.07.2012, had been withdrawn/ cancelled.

(x) As regards proceedings held in Calcutta, it is contended that the defendant has filed a review application

against the order of Trade Marks Tribunal dated 25.07.2019 in relation to Application No. 585128 in class-3 under Section 127 of the Act of 1999 read with Rule 119 of the Rules of 2017 and the said application is still pending. The contention is that the application, being statutory in nature, its pendency itself is sufficient to infer that no finality has been attached in favour of plaintiffs as regards the registered trade mark. The review-provisions pressed by Shri Shashi Nandan, learned Senior Counsel, read as under:-

" **Section 127. Powers of Registrar**.— In all proceedings under this Act before the Registrar,—

(a) ..............................;

(b) ............................:

(c) the Registrar may, on an application made in the prescribed manner, review his own decision.

**Rule 119. Application for review of Registrar's decision.** - An application to the Registrar for the review of his decision under sub-section (c) of section 127 shall be made in Form TM-M within one month from the date of such decision or within such further period not exceeding one month thereafter as the Registrar may on request allow, and shall be accompanied by a statement setting forth the grounds on which the review is sought. Where the decision in question concerns any other person in addition to the applicant, such application and statement shall be left in triplicate and the Registrar shall forthwith transmit a copy each of the application and statement to the other person concerned. The Registrar may, after giving the parties an opportunity of being heard, reject or grant the application, either unconditionally or subject to any conditions or limitations, as he thinks fit."

(xi) The concealment of proceedings dated 16.03.2016, made by the plaintiffs-appellants from the officials of Trade Marks and also from the trial court, would dis-entitle them of discretionary relief of injunction and any subsequent documents or orders passed in favour of plaintiffs-appellants would be of no consequence.

(xii) Learned Senior Counsel also referred to two more trade mark, bearing No. 354633 appended at page No. 1069 of short counter affidavit (Volume-8) and bearing No. 402105 appended at page No. 1610, (Volume-8) and submitted that, apart from the disputed trade mark Nos. 616611 and 585128, misuse of the same product with different depiction was done by the predecessor-in-interest of the appellants.

(xiii) Reliance has been placed on paragraph No. 30 of the judgment of Supreme Court in ***S. Syed Mohideen vs P. Sulochana Bai***, (2016) 2 SCC 683 and it is urged that as per the Apex Court and also under the scheme of the Act itself, superior rights of a prior user of a trade mark have been recognised, even if, the same is registered in favour of other party. Simultaneous reference of internal page No. 14 of the impugned order has been made to demonstrate that voluminous evidence was produced on behalf of defendant-respondent establishing the sale of product since 1984, such as the statements of sale, Income Tax receipts, Registration Certificate issued by the Central Excise Department, documents issued from the State Bank of India as well as receipts of octroi-duty to establish prior user of the product by the defendant-respondent.

SUBMISSIONS IN REJOINDER

11. Following submissions have been made on behalf of the appellants in rejoinder:

(i) At no point of time, applications dated 16.03.2016 were pressed before the Authorities and, therefore, merely because the same form part of the record of the trial court or the Trade Marks Authorities, it would have no adverse impact on the claim for injunction, inasmuch as the history data shows orders and proceedings held in 2019 regarding change of address as well as subsequent proprietorship in favour of the plaintiff No.1-M.M.I. Tobacco products. Therefore, withdrawal never came in actual existence and assignment made in favour of the plaintiffs would relate back to the era of the predecessor-in-interest of the assigner and would continue until dislodged by Competent Court /Authority.

(ii) An affidavit of Mohd. Nazish filed before the trial court, appended at page No. 724 of fifth volume of appellants' paper-book, has been referred to disclose the circumstances under which the application dated 16.03.2016 had been moved, particularly, on account of conflicts amongst family members of Mohd. Khalique and, by the same affidavit, subsequent proceedings in favour of plaintiff No.1 at the strength of assignment deed dated 28.03.2019 were forcefully pressed in relation to form TM-P and other associated documents / certificates, etc.

(iii) Placing reliance on the judgment of Supreme Court in ***Rajendra Prasad Gupta vs. Prakash Chandra Mishra and others***, (2011) 2 SCC 705, it is argued that law recognizes "withdrawal of a withdrawal application" and, therefore, unless a positive order is passed on the withdrawal application, mere filing of the same would not *ipso-facto* infer withdrawal. He, therefore, terms applications dated 16.03.2016 as meaningless and ineffective in view of subsequent developments.

(iv) Placing reliance on a judgment of Supreme Court in the case of ***Aman Lohia vs Kiran Lohia***, 2021 (5) SCC 489, especially paragraph 47 thereof, it is argued that there can be no legal presumption about the factum of abandonment of proceedings as the abandonment has to be expressed or even if it is to be implied, the circumstances must be so strong and convincing that drawing such inference is inevitable.

(v) Matter went much ahead in terms of assignment deed dated 28.03.2019, which was given effect to by the Department of Trade Marks and that TM-24 application also lost its significance after form TM-P (appended at page No. 392 of third volume of appellants' paper-book) was submitted by assigner M.M. Industries at the strength of deed dated 19.07.2012.

(vi) Conduct of parties was further reflected vide documents appended at pages 393, 396 and 397, by which Mohd. Khalique, Mohd. Danish and Mohd. Nazish acted in favour of the plaintiffs by executing general power of attorney authorizing Mr. Ajit Pal and Mr. B.N. Chatterjee Advocates to act on their behalf in legal proceedings and, consequently, the assignment dated 28.03.2019 was duly recorded in form TM-P.

(vii) Reference of a judgment of this Court dated 13.10.2023 passed in First Appeal From Order No. 2170 of 2022 (Salik Mukhtar and 4 Others vs. M/s M.M.I. Tobacco Pvt. Ltd. and 2 Others) has also been made. The said appeal had arisen out of lis in between the plaintiffs of this case and other person, however, in relation to the same registered trade mark No. 616611 and the appeal ended in favour of M/s M.M.I. Tobacco Pvt. Ltd., who was defendant in the said proceedings. The said judgment was affirmed by the Hon'ble

Supreme Court in terms of dismissal of Special Leave to Appeal (C) No. 27265/2023 (Salik Mukhtar and others vs. M/s M.M.I. Tobacco Pvt. Ltd.) by order dated 15.12.2023. It is, therefore, contended that once the rights of M.M.I. Tobacco Pvt. Ltd., the present plaintiffs-appellants, at the strength of the same trade mark No. 616611, have been recognized upto the Supreme Court, no contrary view can be taken in these proceedings.

(viii) Placing reliance on judgment of Supreme Court in ***K.K. Modi vs. K.N. Modi and others***, (1998) 3 SCC 573, it is argued that the issue that has attained finality cannot be reopened, otherwise it would be an abuse of process of law.

(ix) Section 31 of the Act, 1999 has also been referred to contend that registration of a trade mark is to be treated as *prima facie* evidence of its validity. The provision reads as under:

**"31. Registration to be prima facie evidence of validity-**

(1) In all legal proceedings relating to a trade mark registered under this Act (including applications under section 57), the original registration of the trade mark and of all subsequent assignments and transmissions of the trade mark shall be *prima facie* evidence of the validity thereof;

(2) In all legal proceedings as aforesaid a registered trade mark shall not be held to be invalid on the ground that it was not a registrable trade mark under section 9 except upon evidence of distinctiveness and that such evidence was not submitted to the Registrar before registration, if it is proved that the trade mark had been so used by the registered proprietor or his predecessor in title as to have become distinctive at the date of registration."

(x) Rule 25 of Rules, reproduced as under, has also been referred to:

**"25. Statement of user in applications.**— (1) An application to register a trademark shall, unless the trademark is proposed to be used, contain a statement of the period during which, and the person by whom it has been used in respect of all the goods or services mentioned in the application.

(2) In case, the use of the trademark is claimed prior to the date of application, the applicant shall file an affidavit testifying to such use along with supporting documents."

WRITTEN SUBMISSIONS ETC.

12. On behalf of plaintiffs-appellants, detailed dates and events in different sets as well as various points for consideration in the form of written arguments have been filed containing detailed discussion of material on record and various authorities of the Hon'ble Supreme Court and various High Courts have been cited, however after careful scrutiny of the same, I find that in case, at this stage of proceedings where this Court is dealing with an appeal arising out of an order passed on an injunction application pending suit, any observation is made or finding recorded, which has the effect of forming a final opinion by this Court as regards the rival claims of the parties qua the registered Trade Mark or product or its user, it would certainly affect the trial as well as the ultimate conclusion to be drawn by the trial court in the suit itself. As noted above, this Court is examining the rival claims on the touchstone of three basic ingredients associated with grant/refusal of temporary injunction in the light of the material available on record and, therefore, the Court does not feel it appropriate to go

beyond the scope of interference in a miscellaneous appeal under Order XLIII Rule 1(r) of Code of Civil Procedure, 1908, otherwise it would seriously prejudice the case of the contesting parties either-way.

ANALYSIS OF RIVAL CONTENTIONS

13. Having heard the learned counsel for the parties, this Court may, first, note the bare fundamental principle governing decision in matter of grant or refusal of injunction. It is well settled that injunction application is decided on the test of satisfaction of three basic parameters and ingredients, i.e. *prima facie* case, balance of convenience and irreparable injury. By that time, primary and secondary evidence is not before the Court and, even if it is there, it is not to be considered because any piece of evidence would be subject to proof and dis-proof during the course of trial when the witnesses appear for examination and cross-examination.

14. In the case of ***Zenit Mataplast P. Ltd. Vs State of Maharashtra and others,*** (2009) 10 SCC 388, the Supreme Court considered the principles for grant of interim relief by referring to its previous judgments and held as under:

"23. Interim order is passed on the basis of 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. State of Assam vs. Tarkeshwar Prasad & Ors.** AIR 2001 SC 2367; and **Barak Upatyaka D.U. Karmachari Sanstha** (2009) 5 SCC 694)

24. Grant of an interim relief in regard to the nature and extent thereof depends upon the facts and circumstances of each case as no strait-jacket formula can be laid down. There may be a situation wherein the defendant/respondent 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 & Ors. Vs. Rasaranjan & Ors.** AIR 2006 SC 3275; and **Shridevi & Anr. vs. Muralidhar & Anr.** (2007) 14 SCC 721.

25. Grant of 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. Vs. M/s. Cadbury (India) Ltd.**, AIR 2000 SC 2114; and **Anand Prasad Agarwalla** (supra).

26. In **Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd.**, AIR 1999 SC 3105, this court observed that the other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below :

(i) Extent of damages being an adequate remedy;

(ii) Protect the plaintiff's interest for violation of his rights though however having regard to the injury that may be suffered by the defendants by reason therefor ;

(iii) The court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others;

(iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case- the relief being kept flexible;

(v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;

(vi) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or *prima facie* case in support of the grant;

(vii) Whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise."

15. The suit giving rise to the instant appeal was instituted in relation to the trade mark No. 616611, registered on 15.01.1994 and no other trade mark is in dispute. There are two plaintiffs, one being M/s M.M.I. Tobacco Pvt. Ltd. through its Director Mohd. Nazish, son of Mohd. Khalique and the other being Mohd. Nazish in his personal capacity. The basis of the claim is the deed of assignment dated 28.03.2019 executed by M/s M.M. Industries through its partners Mohd. Khalique, Mohd. Danish and Mohd. Nazish. The said partners drew their existence at the strength of assignment made by Mohd. Musa and sons through Mohd. Khalique in favour of M/s M.M. Industries vide assignment deed dated 19.07.2012. In paragraph No. 4 of the plaint, it is pleaded that plaintiff No. 1 and its predecessor, from 04.03.1974, had been conducting wholesale business of tooth powder ("Musa-Ka-Gul"). Registered trade mark contains a history data mentioning that pursuant to a request on form TM-P dated 30.04.2019 and order dated 10.05.2019 passed thereon, registered proprietor's name & style is altered to M/s M.M.I. Industries and pursuant to a request on form TM-P dated 30.04.2019 and the order dated 10.05.2019 passed thereon, its address is also altered to 25-B, Zakaria Street, Kolkata, West Bengal and, further, pursuant to a request on form TM-P dated 29.05.2019 and order dated 13.08.2019 passed thereon, M/s M.M.I. Tobacco (P) Ltd. (i.e. plaintiff-appellant No.1) has been brought on record as a subsequent proprietor in respect of said registered trade mark by virtue of assignment deed dated 28.03.2019, affidavit dated 28.03.2019 and general power of attorney dated 24.03.2019. As regards other trade mark Nos. 354633 and 402105, the Court is not inclined to deal with any contention as the same do not form subject matter of lis, which is in relation to registered trade mark No. 616611 only and, therefore, any observation made regarding other trade marks would, either-way, create complications.

16. In the instant case, much emphasis has been laid by the respondent on the withdrawal/cancellation of the assignment deed dated 19.07.2012. What the Court has noticed from the record is that members of the same family indulged into different activities in relation to the business transactions. There are applications and deeds of assignment, steps taken to withdraw and not pressing them and, then, going ahead with further ratification of the acts done in past. Conflict and clash of interest in between assigners and assignees, not only from the plaintiffs side but also from the defendant side, is also apparent on

the very face of the record. Therefore, the Court, at this stage, is not sure as to in what direction the substantive rights of the parties to the lis would be decided by the trial court while deciding the suit itself and as to which party or witness would support or oppose the claim/defence of one or the other party, cannot be pre-judged at this stage. There are serious possibilities of taking somersault by the parties during the course of trial and, hence, whatever is placed before this Court upto this stage of proceedings, would be decisive of the claim for injunction. Accordingly, whatever discussion is contained in this order, either by referring to the submissions advanced by the respective parties or the contents of documents or even the findings recorded in the order impugned or decision in the instant appeal, would be only tentative in nature and cannot be treated as an expression on merits of the rival claims to be finally adjudicated upon in terms of the decree of the trial court either way. Things have to be understood in that restricted sense only.

17. In none of the records of the Trade Marks Department, there is any whisper about recognition granted to withdrawal applications dated 16.03.2016 and, though learned counsel for the appellants did not dispute that such applications were actually filed by Advocate Ajit Pal, Mohd. Khalique and Mohd. Nazish, the record reveals that the same remained a dead letter having not been recognized by the Department. Here, the conduct of the parties would also be of quite significance and from the affidavit of Mohd. Nazish (plaintiff-appellant No. 2), it is apparent that the family dispute was the root cause behind applying for withdrawal in the year 2016 and even an attempt was made to de-recognize the deed of assignment dated 19.07.2012, however, same persons, namely, Mohd. Khalique, Mohd. Nazish, Mr. Ajit Pal recognized the same deed dated 19.07.2012 in the years 2017 and 2019 also and the proceedings ultimately culminated in favour of the plaintiff-appellant No.1, M/s M.M.I. Tobacco (P) Ltd. Such subsequent developments having been recorded in various orders passed by the Department and also in form TM-P, it cannot be said that the plaintiffs would lose their claim for injunction merely because on 16.03.2016 an attempt was made to cancel the previous deed of assignment dated 19.07.2012 or any rights flowing therefrom. Even this aspect has to attain finality during the course of trial when the persons instrumental in filing all such documents from year 2016 to 2019 may produce their witnesses and what stand they would take at that time, cannot be anticipated at this stage of proceedings, particularly looking at the conduct of parties of both sides.

18. Interestingly, same persons, namely, Mohd. Khalique, Mohd. Nazish and Mohd. Danish were instrumental in executing the assignment deed dated 19.07.2012, applications/affidavit dated 16.03.2016 and also the subsequent assignment deed dated 28.03.2019 and the withdrawal was neither recorded nor recognized by the Trade Marks Authorities, but subsequent assignment made vide deed dated 28.03.2019 was duly accorded recognition not only by the same persons, but also in the record of Trade Marks Authorities. The history data containing such reference has already been described above. Therefore, the said situation invokes principles governed by Section 62 of the Indian Contract Act, 1872 and conduct of parties, as reflected on record, would *prima facie* infer and imply a contract or at least

an arrangement between the parties flowing from the assignment deed dated 28.03.2019 leaving behind repercussions that the withdrawal proceedings dated 16.03.2016 could have fetched.

19. In view of decision of Supreme Court in the case of ***Aman Lohia*** (supra), the Court cannot draw inference or presumption, at this stage, about abandonment of rights flowing from deed of assignment dated 19.07.2012, though such an abandonment was contained in the applications dated 16.03.2016, but the proceedings held thereafter by the same persons culminating in favour of the appellants, the applications dated 16.03.2016 stood *prima facie* diluted, subject to evidence to be led in the suit, and cannot be treated as actual abandonment of rights at this stage, when the record otherwise reads in favour of plaintiffs-appellants.

20. As regards the applications dated 16.03.2016, the Court may also refer to Section 62 of Indian Contract Act, 1872, which describes the effect of novation, rescission and alteration of contract. The provision reads as under:

**"62. Effect of novation, rescission and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."**

21. The aforesaid provision was examined by the Supreme Court in the case of ***H.R. Basavaraj (Dead) by his LRs. and another vs. Canara Bank and others,*** (2010) 12 SCC 458, and in paragraph 18 thereof, the Apex Court observed that the provision gives statutory form to the common law principle of novation. The basic principle behind the concept of novation is the substitution of a contract by a new one only through the consent of both the parties to the same. Such consent may be expressed as in written agreements or implied through their actions or conduct. (emphasis supplied)

22. Now coming to the rights asserted by defendant-Iftikhar Alam, the genesis lies in assignment made by Ishrat Jahan in his favour. The deed of such assignment is dated 26.05.2007 in relation to the trade mark "Musa-Ka-Gul" (label) in class-3 under application No. 585128 dated 19.11.1992. The said application has admittedly been withdrawn by Ishrat Jahan and defendant-Iftikhar Alam is said to be pressing his review on the ground that Ishrat Jahan, having lost her rights in 2007 after assignment, was not, later, competent to withdraw the application No. 585128. The Court may notice that even in the application moved by Ishrat Jahan, a condition was imposed to the effect that "registration of this trade mark shall give no right to the exclusive use of word 'Gul' and all other descriptive matters appearing in the label". Therefore, even Ishrat Jahan relinquished her rights as regards exclusive use of word 'Gul' and all other descriptive features. On record, there is an application dated 17.05.2010 filed by Ishrat Jahan before Registrar, Trade Marks, containing the subject "Opposition No. Cal-255670 to application No. 585128 in class-3". By means of this application, she contended that application No. 585128 in class-3 had been wrongly filed in her name as she was not the proprietor of the said trade mark and that the same may be treated as withdrawn. Such a withdrawal is not on the same lines, on which steps to withdraw deed of assignment in favour of the

appellants' predecessor had been taken on 16.03.2016, inasmuch as, withdrawal made by Ishrat Jahan is duly recognized on record of the Trade Marks department, the review application filed by the defendant being admittedly pending, as also argued on his behalf, whereas there is no such record recognizing attempt of withdrawal or actual withdrawal allegedly made on 16.03.2016. It leads to a *prima facie* conclusion at this stage that whereas the assignment in relation to trade mark No. 616611 under the deed of 19.07.2012 continued and still continues to exist, the assignment made by Ishrat Jahan in favour of defendant lost its recognition in the records of the department and unless the defendant succeeds in his review application or witnesses prove things in his favour during trial, situation is not going to improve favouring him. Moreover, the two trade marks bearing Nos. 616611 and 585128, being two different trade marks, the Court does not find any *prima facie* right existing in favour of the defendant as regards trade mark No. 616611 about which the suit has been filed.

23. As regards the pendency of review application at the behest of defendant under Section 127 of the Act read with Rule 119, as argued by Shri Shashi Nandan, the Court finds that it is in relation to trade mark No. 585128 in class-3 and has no co-relation with the registered trade mark of the plaintiffs-appellants i.e. No. 616611. Hence, pendency of the review application has no *prima facie* relevance qua the rights claimed by the plaintiffs at the strength of registered trade mark No. 616611. Even the review application, filed as paper No. 49-C/7, does not refer steps for withdrawal by the assigner of the predecessor of the plaintiffs-appellants, contained in the document dated 16.03.2016, rather, it is at the strength of assignment made by Ishrat Jahan on 26.05.2007 in favour of defendant-Iftikhar Alam and on the ground that Ishrat Jahan, after making assignment in his favour, had been left with no rights in the said trade mark and, hence, could not withdraw the application in 2019. Filing of review application itself shows that there was a clash in interest in between the assigner-Ishrat Jahan and assignee-Iftikhar Alam and both were acting contrary to interest of the other. For this reason also, inter-se dispute in between Ishrat Jahan and Iftikhar Alam cannot be read adverse to the interest of plaintiffs-appellants at the strength of assignment deeds dated 19.07.2012 and 28.03.2019 as there is no clash of interest in between Mohd. Khalique, Mohd. Danish, Mohd Nazish and plaintiff No 1. Moreover, Mohd. Nazish himself is the Director of plaintiff No. 1 and impleaded himself as plaintiff No. 2 in his personal capacity in the plaint.

24. The Court also finds that trade mark No. 616611 was accorded recognition by this Court in favour of M.M.I. Tobacco (P) Ltd. in the proceedings of First Appeal From Order No. 2170 of 2022 (Salik Mukhtar and 4 Others vs. M/s M.M.I. Tobacco Pvt. Ltd. and 2 Others) decided on 13.10.2023, and the judgment of this Court has been upheld by the Supreme Court by order dated 15.12.2023 passed in Special Leave to Appeal (c) No. 27265/2023 (Salik Mukhtar and others vs M/s M.M.I. Tobacco Pvt. Ltd). Such recognition made upto the Supreme Court has a significant value, at least at this stage of proceedings and adds to the positivity existing in favour of the plaintiffs in so far as their *prima facie* case and balance of convenience is concerned.

25. The Court may also take note of the fact that in business transactions,

particularly in relation to use of trade mark, assignment from one person to other is a normal phenomenon and even in the instant case, both the parties are not the original manufacturers/sellers of the product, but they derive their existence by way of assignment(s) made over a number of years. The Court has to see that as on the date of institution of suit and when injunction was claimed, what was the record position and, in the light of above discussion, most of the documents including the judgment of this Court, as upheld by the Supreme Court, read in favour of the plaintiffs-appellants and there are only two things against them, first, that there was an attempt to cancel and withdraw the assignment dated 19.07.2012 and, secondly, pendency of review application by defendant challenging the act of withdrawal by his own assigner-Ishrat Jahan. Apart from this, there is no substantial weakness in the plaintiffs' case so as to dis-entitle them from claiming injunction pending suit. Conduct of business by Ishrat Jahan since 1984, as sought to be established by the defendant-side and the findings recorded in that regard by the trial court would not defeat the claim for injunction, inasmuch as, the plaintiffs derive their existence from their assigner, who succeeded the right of user from the original manufacturer, namely, Mohd. Musa. Paragraph 4 of the plaint also speaks of running of business since 04.03.1974 "by the plaintiffs-company and its predecessor" and, even if, the plaintiffs' company came into existence in 2019 by way of assignment, words "and its predecessor" used in paragraph No. 4 of the plaint would have to be harmoniously interpreted and chain from 04.03.1974 till the date of institution of the suit would, therefore, *prima facie*, be complete and, in that sense, the proceedings dated 16.03.2016, at this stage, would be ignorable.

26. It is also apparent that the proceedings undertaken for amendment etc. carried to the Senior Examiner of Trade Marks, Kolkata and, then, before the Assistant Registrar of Trade Marks, Kolkata followed by proceedings before Intellectual Property Appellate Board, Chennai Circuit Bench at Kolkata and, then, upto Calcutta High Court, ended against the defendant or his predecessor and the same further weakens his claim qua trade mark No. 616611 or user of descriptive features on the product.

27. Now, coming to the trial court's order impugned in the instant appeal, the Court finds that when the withdrawal/cancellation proceedings dated 16.03.2016 were pressed by the defendant side, the trial court, in a single line accepted the same by observing that " मैं प्रतिवादी के उपरोक्त तर्क में काफी बल पाता हूँ". The trial court, therefore, failed to analyze the voluminous documents on record reflecting that upto the year 2019, the same persons, who had undertaken the proceedings dated 16.03.2016, had gone ahead in their attempts to give recognition to the assignment deeds dated 19.07.2012 and 28.03.2019 and, therefore, withdrawal/ cancellation applications dated 16.03.2016 lost their significance. No finding has been recorded by the trial court on the said aspect and, hence, quick acceptance of the contention of the defendant in relation to applications dated 16.03.2016 does not appear to be justified.

28. As regards *prima facie* case, balance of convenience and irreparable injury, findings are too lacking and the trial court has, in one line, observed that

plaintiffs have failed to establish their *prima facie* case and balance of convenience and that since the defendant and his predecessor were using the product "Musa-Ka-Gul" with bust photograph of Mohd Musa, prior to the plaintiffs, it has been observed that plaintiffs have no right to injunct the defendant and that they would not suffer any irreparable loss in the event of rejection of their claim for injunction.

29. This Court is of the considered opinion at this stage of proceedings that by voluminous documents, the plaintiffs have succeeded to establish all the three ingredients existing in their favour and in case injunction, as prayed for, is not granted, they would suffer day-to-day damages and losses on account of continuous infringement of their trade mark. It has been brought on record by way of affidavits before the trial court and also before this Court that sales of the plaintiffs have drastically dropped on account of use of their goodwill by the defendant, who is misleading the customers about the product and, consequently, the plaintiffs are loosing their customers.

30. Consequently, the Court finds rejection of injunction application by the trial court as unsustainable and sufficient force in appeal.

31. The appeal, accordingly, stands **allowed.**

32. The order impugned dated 30.01.2024, passed by the District Judge, Varanasi, rejecting the injunction application paper No. 6-C is set aside. The injunction application is also allowed and the defendant-respondent is restrained, either himself or through any camouflaged company, assignee, nominee, employee or agent from producing, selling or trading tooth powder ("Asli Musa-Ka-Gul") and from writing "Asli Musa-Ka-Gul" on the container and wrappers or name of the company, i.e. Mohd. Musa and sons or M.M.I. and Company during the pendency of Original Suit No. 20 of 2022 (M/s M.M.I. Tobacco Pvt. Ltd. And another vs. Iftikhar Alam).

33. Considering the importance of the matter for both the parties, the Court feels it appropriate to expedite the suit proceedings, as also observed by this Court in the judgment dated 13.10.2023 passed in First Appeal From Order No. 2170 of 2022 (Salik Mukhtar and 4 Others vs. M/s M.M.I. Tobacco Pvt. Ltd. and 2 Others) and the Supreme Court in the judgment dated 15.12.2023 passed in Special Leave to Appeal (C) No. 27265/2023 (Salik Mukhtar and others vs M/s M.M.I. Tobacco Pvt. Ltd.) in relation to the same trade mark. Therefore, following directions are also issued:

(i) Remaining pleadings, if any, shall be exchanged between the parties by the end of August, 2024.

(ii) The trial court will frame issues with the assistance of learned counsel for the parties by the end of September, 2024.

(iii) The entire plaintiffs' evidence shall be recorded and concluded by the end of March, 2025.

(iv) The entire defendant's evidence shall be recorded and concluded by the end of September, 2025.

(v) The original suit shall be decided on or before 31.03.2026 on merits and strictly in accordance with law by fixing short dates and without being influenced by any observations made in

this judgment, as it is restricted only to the stage of claim for injunction.

(vi) No party shall take any unnecessary adjournment and strict time schedule framed by this Court shall be followed by all concerned. Adjournment, is necessary, shall be subject to payment of cost to be determined as per the wisdom and discretion of the trial court.

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**(2024) 7 ILRA 839**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 05.07.2024**

**BEFORE**

**THE HON'BLE VIPIN CHANDRA DIXIT, J.**

First Appeal From Order No. 3996 of 2018

**Smt. Preeti Pandey & Ors. ...Appellants**
**Versus**
**Mohit Khandelwal & Ors. ...Respondents**

**Counsel for the Appellants:**
Satya Deo Ojha, Som Dutt Pandey

**Counsel for the Respondents:**
Ashutosh Srivastava

**(A) CIVIL LAW – - Motor Vehicles Act, 1988, Sections 140 & 166 – Indian Penal Code, 1860 - Sections 279 & 304-A** - Appeal against rejection of claim – Accident - due to offending car rashly and negligently hit the motorcycle of the deceased from back side – delay in FIR – claim was contested by both owner & insurer of the vehicle – trial court rejection claim petition - on the ground due to delay in lodging FIR and involvement of car in the accident was not proved – court finds that, involvement of car was not denied either by the owner or by insurer company and they have also not led any evidence in rebuttal and even the driver was also not produced to deny the involvement of car – held, it is well settled law that strict proof of evidence are not applicable in the case of motor accident and the claim petition under Motor Vehicle Act would not be dismissed on the ground of delay in lodging the FIR – claimants have fully proved the involvement of insured car in the accident - Trial court has committed gross illegality in dismissing the claim petition - hence, appeal is allowed and matter is remanded back to trial court to decide the claim as fresh – directions issued accordingly. (Para – 18, 19, 20, 21)

**Appeal Allowed.** (E-11)

**List of Cases cited:**

1. Ravi Vs Badrinarayan & ors.(AIR 2011 SC 1226),

2. Smt. Sumitra Kaur & anr.Vs New India Assurance Company Ltd. & anr.(2012 (4) TAC 799(All),

3. Meenakshamma Vs B. Hanumanthappa & anr.(1997 (1) TAC 50(Kant.),

4. Sunita and others Vs Rajasthan State Road Transport Corporation & anr.(AIR 2019 SC 994),

5. Anita Sharma & ors. Vs The New India Assurance Co. Ltd. & anr. (2021 (1) SCC 171).

(Delivered by Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri S.D. Ojha and Sri Som Dutt Pandey, learned counsels for the claimants-appellants and Sri Shreyas Srivastava, learned counsel for respondent no.1, who is owner of the vehicle and Sri Anubhav Sinha, learned counsel appearing on behalf of respondent no.2, New India Assurance Company Ltd. No one is present on behalf of respondent no.3, driver of the vehicle.

2. This First Appeal From Order has been filed on behalf of claimants-appellants against the judgment and order dated 04.09.2018 passed by Additional District Judge, Court No.10/Motor Accidents Claims Tribunal, Allahabad in MACP No.178 of 2016 (Smt. Preeti Pandey and others vs. Mohit Khandelwal

and others), by which claim petition filed by claimants-appellants was rejected.

3. Brief facts of the case are that the claimants-appellants have filed claim petition under Section 140 and 166 of Motor Vehicle Act, 1988 claiming compensation of Rs.54,62,000/- along with 12 per cent interest on account of death of Sunil Kumar Pandey, who died in the road accident on 26.12.2015. It was the case of claimants before the claims tribunal that on fateful day 26.12.2015 at 2:45 p.m. the deceased Sunil Kumar Pandey with his motorcycle along with Padam Sharma was standing left patri of the road near culvert (pullia) at Kichha Road, P.S. Rudrapur, District Udhampur when the offending car hit the deceased and his motorcycle from back side. The accident was caused by driver of offending car bearing no.UK06V-7805 which was being driven by its driver very rashly and negligently. The FIR was lodged on 28.12.2015 at 9:30 pm in Police Station Rudrapur, Udham Singh Nagar against the driver of offending car and case was registered as Case Crime No.542 of 2015 under Sections 279, 304-A IPC. The Investigating Officer after due investigation has submitted charge sheet against the driver of the insured car. The claimants had produced one Padam Sharma as PW2, who was an eye witness of the accident to prove the factum of accident.

4. The claim petition was contested by owner of vehicle as well as insurer of vehicle denying rash and negligent driving of driver. The factum of accident was not disputed by the owner and insurer of offending car.

5. The claims tribunal has framed four issues for determination as rash and negligent driving of car driver, validity of driving licence of car driver, insurance of car and quantum of compensation and liability of payment.

6. The claims tribunal after considering the evidence and materials, which are available on record has dismissed the claim petition vide judgment and order dated 04.09.2018, which is impugned in the present appeal.

7. The claims tribunal has recorded the findings while deciding the issue no.1 that the first information report was lodged after two days of the accident on 28.12.2015 whereas, the accident occurred on 26.12.2015 and the claimants failed to explain the delay in lodging the first information report. The claims tribunal has further recorded the finding that the owner of the vehicle is resident of District Bareilly whereas the vehicle was insured at the office of insurance company at Allahabad as such there must be some connection of owner to Allahabad. The claimants are also resident of Allahabad and it appears that the claimants with the collusion of owner of vehicle has planted the insured car in the accident only to get compensation from the respondent insurance company. The claims tribunal has dismissed the claim petition on the ground that the involvement of insured car in the accident was not proved.

8. It is submitted by learned counsel for the appellants that the claims tribunal has recorded a perverse finding of fact while dismissing the claim petition. The FIR was lodged just after two days of the accident and the delay has already been explained by the claimants before the claims tribunal. The informant who appeared as PW2 before the claims tribunal has stated that he was busy in providing medical assistance to the deceased. He

immediately brought the deceased to Narayan Trauma Centre, Bilaspur Road, Rudrapur. Looking at the critical position he was referred to Braj Lal Hospital, Haldwani, where he died during the course of treatment. After death, the body of the deceased was brought to Allahabad and after returning from Allahabad, he lodged the first information report. The Investigating Officer after due investigation found that the accident was caused by car bearing no.UK06V7805 which was being driven by its driver very rashly and negligently, has submitted charge sheet against the driver of offending car. The presence of informant PW2 Padam Sharma at the place of accident was fully established. It is further submitted that the claims tribunal has recorded a perverse findings of fact that the vehicle was insured by New India Assurance Co. Ltd. at Allahabad whereas as per insurance policy the issuing office of insurance policy is Bareilly. The copy of insurance policy has been annexed as Annexure 6 of the affidavit filed in support of the appeal. Lastly it is submitted that the claims tribunal has misread the insurance policy which was issued by the Office of Insurance Company at Bareilly and perverse findings of fact has been recorded that the insurance policy was issued by the Allahabad Office and there was some connection of the owner of vehicle to District Allahabad. The claims tribunal has rejected the claim petition only on the presumption that there must be some relation of owner with the claimants where as there was no evidence or material before the claims tribunal that there was any connection of claimants with the owner of the vehicle as the claimants are residents of Allahabad whereas, the owner is resident of District Bareilly. The claims Tribunal has also failed to consider that the independent agency has already submitted charge sheet against the driver of offending car. Lastly it is submitted that the claim petition was dismissed on the ground of non-involvement of insured car whereas the owner as well as insurer of car have not denied the involvement of car in the accident but only rash and negligent driving of car driver was denied.

9. On the other hand, learned counsel appearing on behalf of owner of the vehicle has denied the involvement of car in the accident and it is submitted that the accident was caused by some unknown vehicle and his car has been planted by the claimants. Similarly, the insurance company has also denied the involvement of car and it is submitted by learned counsel of insurance company that the claims tribunal has recorded the finding that the driver of offending car was not having valid and effective driving license and the insured car was plied in violation of terms and conditions of Insurane Policy and as such the insurance company is not liable to pay any compensation to the claimants.

10. Considered the rival submission of learned counsel for the parties and perused the records.

11. The claim petition filed by claimants claiming compensation on account of death of Sunil Kumar Pandey, who died in a road accident, which occurred on 26.12.2015 was dismissed by claims tribunal mainly on two grounds-

a) Delay of two days in lodging the first informatin report.

b) Collusion of claimants with the owner of insured car.

12. So far as delay in lodging the first information report, it has been explained by the informant that he was accompanying with the deceased at the time of accident. The deceased had received grevious injuries in the accident. He brought the deceased to the hospital and after the death, brought the dead body to Allahabad. After returning from Allahabad, the first information report was lodged by him. There is only two days delay and delay has been properly explained by the informant before the claims Tribunal. The Investigating Officer after due investigation has submitted charge sheet against the driver of offending car. The claimants had produced Padam Sharma as PW2, who was an eye witness of the accident and had proved the factum of accident as well as involvement of insured car in the accident.

13. The Hon'ble Apex Court in the case **of Ravi versus Badrinarayan & Ors. reported in AIR 2011 Supreme Court 1226** has held that the delay in lodging the first information report would not be fatal and claim petition under the Motor Vehilce Act need not be dismissed on that ground. Relevant paragraph nos.20 and 21 are reproduced herein below :

*"20. It is well-settled that delay in lodging FIR cannot be a ground to doubt the claimant's case. Knowing the Indian conditions as they are, we cannot expect a common man to first rush to the Police Station immediately after an accident. Human nature and family responsibilities occupy the mind of kith and kin to such an extent that they give more importance to get the victim treated rather than to rush to the Police Station. Under such circumstances, they are not expected to act mechanically with promptitude in lodging the FIR with the Police. Delay in lodging the FIR thus, cannot be the ground to deny justice to the victim. In cases of delay, the courts are required to examine the evidence with a closer scrutiny and in doing so; the contents of the FIR should also be scrutinized more carefully. If court finds that there is no indication of fabrication or it has not been concocted or engineered to implicate innocent persons then, even if there is a delay in lodging the FIR, the claim case cannot be dismissed merely on that ground.*

*21. The purpose of lodging the FIR in such type of cases is primarily to intimate the police to initiate investigation of criminal offences. Lodging of FIR certainly proves factum of accident so that the victim is able to lodge a case for compensation but delay in doing so cannot be the main ground for rejecting the claim petition. In other words, although lodging of FIR is vital in deciding motor accident claim cases, delay in lodging the same should not be treated as fatal for such proceedings, if claimant has been able to demonstrate satisfactory and cogent reasons for it. There could be variety of reasons in genuine cases for delayed lodgment of FIR. Unless kith and kin of the victim are able to regain a certain level of tranquility of mind and are composed to lodge it, even if, there is delay, the same deserves to be condoned. In such circumstances, the authenticity of the FIR assumes much more significance than delay in lodging thereof supported by cogent reasons."*

14. A Division Bench of this Court in the case of **Smt. Sumitra Kaur and another vs. New India Assurance Company Ltd. through Divisional Manager and another reported in 2012 (4) T.A.C. 799 (All.)** has held that

registration of first information report is not necessary to decide the claim petition filed under the Motor Vehicles Act, if the claimants have proved the involvement of vehicle as well as rash and negligent driving of offending vehicle by producing cogent evidence. The claims tribunal may decide the claim petition on merits and non-registration of first information report will not defeat the case of the claimants. Relevant paragraphs 7 and 8 are reproduced hereinbelow:

*"7. Power conferred to Tribunal under Section 168 of the Motor Vehicles Act is an independent power whereby the Tribunal has been required to hold an inquiry with regard to accidet and award of compensation. This should be done after providing opportunity of hearing to both parties. Even where no first information report is lodged the Tribunal has ample power to hold an inquiry and admit or reject the claim petition keeping in view the evidence on record.*

*8. Under U.P. Motor Vehilce Rules, 1998 it has been provided that how the Tribunal shall record evidence and deal with the case. Lodging the first information report or inquest report is not necessary. What is required for the Tribunal is that it must ascertain the involvement of the victim in the accident and genuineness of claim. In case the Tribunal is satisfied from the evidence on record that accident occurred and the victim suffered injuries then even if no first information report has been lodged and postmortem is made available it may award the compensation."*

15. A similar view was also taken by Karnataka High Court in the case of **Meenakshamma vs. B. Hanumanthappa and another reported in 1997(1) T.A.C. 50 (Kant)** that non-registration of criminal case regarding the accident does not give rise to any adverse inference that no such motor accident occurred. Relevant paragraph 6 is reproduced hereinbelow:

*"6. Sri O. Mahesh - learned Counsel for respondent No. 2 contended that an adverse inference will have to be drawn for non-registration of a criminal case against the driver in a given case. This contention cannot be accepted. The claim is a summary civil proceedings wherein the claimant is required to prove the rash and negligent driving of the vehicle by independent evidence. Hence, non-registration of a police case regarding the accident does not give rise to any adverse inference that no such motor accident occurred. The further contention of the learned Counsel for respondent No. 2 that the Medical Officer, who is duty bound to report the lego-medical case to the police, has not reported the same and this circumstance also is adverse to the claim of the claimant has no merit. It is not unusual for a Medical Officer of the hospital in not reporting the lego-medical case to the police. The failure on the part of the Medical Officer to exercise the basic/primary duty to report the lego-medical case to the police is also no circumstance to deny the claim of the claimant if the evidence on record establishes the claim from other acceptable evidence. The Tribunal on consideration of the evidence of PWs.1 and 3 has held that the accident was due to negligent driving of the tiller causing injuries, to the claimant. I find from the discussion made above that the finding is based on evidence and there is no ground to deviate from the finding."*

16. Similarly in the case of Sunita and Ors. Versus Rajasthan State Road

Transport Corporation and Anr. reported in AIR 2019 Supreme Court 994, it has been held by Hon'ble Apex Court that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in motor accident claims cases. The relevant paragraph no.28 is reproduced herein below :

*"28. Clearly, the evidence given by Bhagchand withstood the respondents' scrutiny and the respondents were unable to shake his evidence. In turn, the High Court has failed to take note of the absence of cross examination of this witness by the respondents, leave alone the Tribunal's finding on the same, and instead, deliberated on the reliability of Bhagchand's (A.D.2) evidence from the viewpoint of him not being named in the list of eye witnesses in the criminal proceedings, without even mentioning as to why such absence from the list is fatal to the case of the appellants. This approach of the High Court is mystifying, especially in light of this Court's observation [as set out in Parmeshwari (supra) and reiterated in Mangla Ram (supra)] that the strict principles of proof in a criminal case will not be applicable in a claim for compensation under the Act and further, that the standard to be followed in such claims is one of preponderance of probability rather than one of proof beyond reasonable doubt. There is nothing in the Act to preclude citing of a witness in motor accident claim who has not been named in the list of witnesses in the criminal case. What is essential is that the opposite party should get a fair opportunity to cross examine the concerned witness. Once that is done, it will not be open to them to complain about any prejudice caused to them. If there was any doubt to be cast on the veracity of the witness, the same should have come out in cross examination, for which opportunity was granted to the respondents by the Tribunal."*

17. Similar view was taken by Hon'ble Apex Court in the case of **Anita Sharma & Ors. Versus The New India Assurance Co. Ltd. & Anr. reported in 2021 (1) SCC 171**. The relevant paragraph no.22 is reproduced herein below:

*"22. Equally, we are concerned over the failure of the High Court to be cognizant of the fact that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in MACT claim cases. The standard of proof in such like matters is one of preponderance of probabilities, rather than beyond reasonable doubt. One needs to be mindful that the approach and role of Courts while examining evidence in accident claim cases ought not to be to find fault with nonexamination of some best eyewitnesses, as may happen in a criminal trial; but, instead should be only to analyze the material placed on record by the parties to ascertain whether the claimant's version is more likely than not true. A somewhat similar situation arose in Dulcina Fernandes v. Joaquim Xavier Cruz, (2013) 10 SCC 646 wherein this Court reiterated that:*

*"7. It would hardly need a mention that the plea of negligence on the part of the first respondent who was driving the pickup van as setup by the claimants was required to be decided by the learned Tribunal on the touchstone of preponderance of probabilities and certainly not on the basis of proof beyond reasonable doubt. (Bimla Devi v. Himachal RTC [(2009) 13 SCC 530)"*

18. It is well settled law that strict proof of evidence are not applicable in the

case of motor accident and the claim petition under the Motor Vehicle Act would not be dismissed on the ground of delay in lodging the first informant report.

19. The claims tribunal has recorded perverse findings of fact that there was collusion in between the claimants and owner of the vehicle as the owner is resident of Bareilly but the vehicle was insured at Allahabad and the claimants are also resident of Allahabad whereas, from the bare perusal of insurance policy, it is apparent that the vehicle was insured by the Bareilly office. The finding recorded by the claims tribunal in this regard is against the evidence and materials which are available on record and it appears that the claims tribunal without examining the evidence in proper manner and without application of judicial mind has recorded the incorrect finding that the vehicle was insured from Allahabad. The claims Tribunal has also erred in holding that the involvement of car was not proved whereas, the involvement of car was not denied either by the owner or by the insurance company before the claims Tribunal and only negligence of driver was denied. The claimants has fully established the involvement of the car in the accident and the opposite parties have not led any evidence in rebuttal and even the driver of car was not produced to deny the involvement of car.

20. In view of the above discussion, the order impugned dated 04.09.2018 passed by the claims Tribunal is without application of judicial mind and the finding recorded by the claims Tribunal with regard to non-involvement of insured car in the accident is perverse and is against the evidence and materials which are available on record. The claims Tribunal has committed gross illegality in dismissing the claim petition. The court is of the view that the claimants have fully proved the involvement of insured car in the accident as well as rash and negligent driving of driver of insured car by producing cogent evidence. The issue no.1 is decided in favour of claimants/appellants.

21. The first appeal from order filed by the claimants-appellants is allowed. The judgment and order dated 04.09.2018 passed by the Additional District Judge, Court no.10/Motor Accidents Claims Tribunal, Allahabad in MACP No.178 of 2016 is set aside. The matter is remanded back to the concerned claims Tribunal to decide the claim petition as fresh. The claims Tribunal is directed to decide issue nos. 2, 3 and 4 regarding validity of driving licence, insurance of offending car, quantum of compensation and liability of payment, as fresh after affording opportunity of hearing to the parties concerned expeditiously preferably within a period of six months from the date of production of certified copy of this order without granting any undue adjournment to either of the parties.

22. Office is directed to remit back the record of claims tribunal immediately to the concerned claims Tribunal.

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**(2024) 7 ILRA 845**
**CIVIL JURISDICTION**
**ORIGINAL SIDE**
**DATED: ALLAHABAD 10.07.2024**

**BEFORE**

**THE HON'BLE SIDDHARTH, J.**
**THE HON'BLE VINOD DIWAKAR, J.**

Government Appeal No. 31 of 1991

**State of U.P.** **...Appellant**
**Versus**
**Karan Singh & Ors.** **...Respondents**

**Counsel for the Appellant:**
A.G.A., Brij Mohan Singh, Gaurav Khare, Mahesh Kumar Kuntal, Rashtrapati Khare, S.C. Saxena

**Counsel for the Respondents:**
S.V. Goswami, A.K. Verma, Ajatshatru Pandey, B.P. Verma, Chandra Kumar Singh, Lalit Kumar Shukla, Rahul Chaudhary, Rajeev Goswami, S.R. Verma

**A. Criminal Law – Government Appeal- Accused acquitted from the charges under Sections 148, 302/149 and 307/149 IPC.**

**B.** Reversal of acquittal-appellate court-usually reluctant to interfere with a judgement acquitting an accused- principle that the presumption of innocence in favour of the accused isreinforced by such a judgment- Article 136 of the Constitution of India-Sections 378 and 86 (a) CrPC- settled proposition that enmity is a double-edged weapon and cuts both ways-oral testimony of eyewitnesses needs to be scrutinised cautiously and with great circumspection-**. (Paragraphs 28 and 44)**

**HELD:**
As the case in hand is a case of reversal of acquittal, it isprudent to have a bird's eye view of the judgment passed by the Supreme Court in this regard. The appellate Court is usually reluctantto interfere with a judgment acquitting an accused on the principlethat the presumption of innocence in favour of the accused isreinforced by such a judgment. The above principle has beenconsistently followed by the Constitutional Court while decidingappeals against acquittal by way of Article 136 of the Constitution orappeals filed under Section 378 and 386 (a) Cr.P.C. **(Para 28)**

After giving thoughtful consideration to the documentsexhibited by the accused in support of their plaint and taking into consideration the fact that the deceased- Kanni had also initiated acomplaint against accused Padam Singh, Mahendra, Fateh, KaranSingh, Teji, Kunwar Pal, Virendra, Tara, Har Gulab, Lakhmi andSiddhi indicates that the relationship between the accused personsand the complainant side were acrimonious and there has been badblood among the parties. It is a settled proposition that enmity is adouble-edged weapon and cuts both ways. Therefore, the oraltestimony of eyewitnesses needs to be scrutinised cautiously and withgreat circumspection. **(Para 44)**

**C.** Three types of witnesses- one who is wholly reliable- one who is wholly unreliable- one who is neither wholly reliable norwholly unreliable- court is required to separate the chaff from thegrain to find the genesis of the incident- suspicion,however strong, cannot take the place of proof- long-standingbad blood between the parties- a major contradiction in the mode andmanner of recovery of weapons has been effected from the accused-pursuant to it, the role assigned are sufficient to hold that theoffence has not been committed in the manner as has been explainedby the prosecution- probability of two views-if two views on the evidence adduced are suggestive, one pointing to the guilt of accused and the other his innocence-view in favour of the accused should beadopted-the contesting accused are entitled to the benefit of the doubt.

**Government Appeal dismissed. (Paragraphs 51, 52)**

**HELD:**
The 3-Judge Bench of the Supreme Court in **Balaram's** caseagain reiterated the well-established law that there are three types ofwitnesses: (i) one who is wholly reliable, (ii) one who is wholly unreliable and lastly, (iii) one who is neither wholly reliable norwholly unreliable and placed the reliance upon landmark decision of ***Vedivelu Thevar v. State of Madras***. So far as the first two scenariosare concerned, the testimony of the witnesses can be wholly acceptedor discarded, but with respect to the third scenario, where thetestimony is partly reliable or partly unreliable, the Court facesdifficulty, then the court is required to separate the chaff from thegrain to find the genesis of the incident. **(Para 51)**

There is another canon of the criminal jurisprudence withrespect to the appreciation of the evidence that the suspicion,however strong,

cannot take the place of proof. In the instant case, the incident was taken on 14.10.1987, in which one person died onthe spot, and another had received severe injuries and remainedunconscious for 3 days, as per the testimony of an injured witness.The incident was seen by PW-1, PW-2 and PW-3, who is himselfinjured in the incident. Admittedly, there was a long-standinglitigation between the parties, and numerous cases were filed andcontested, therefore, possibility of false implication cannot be ruledout. Its again a admitted and proved fact that the accused Tara Chandand Virendra Singh were minors at the time of the incident. Thetestimony of injured PW-3 and eye-witnesses PW-1 and PW-2 doesnot corroborate with the medical evidence. There was long-standingbad blood between the parties, a major contradiction in the mode andmanner of recovery of weapons has been effected from the accused,and pursuant to it, the role assigned are sufficient to hold that theoffence has not been committed in the manner as has been explainedby the prosecution, and on taking a cumulative effect of thetestimonies of the PW-1, PW-2, PW-3, PW-4, PW-5 and PW-8suggest the probability of two views and if two views on the evidenceadduced are suggestive, one pointing to the guilt of accused and theother his innocence, the view in favour of the accused should beadopted. Moreover, applying the laid down text in Doshi's case(supra), we don't find any manifest error in the trial court's approachin acquitting the accused. **(Para 52)**

**Government Appeal dismissed.** (E-14)

**<u>List of Cases cited:</u>**

1.Laxman Singh & ors. Vs St. of Bih., (2021) 9 SCC 191

2. Ravindra Kumar & ors. Vs St. of Pun. Criminal Appeal No.881 of 2001

3.Abdul Sayeed Vs St. of M.P., (2010) 10 SCC 259

4. St. of M.P. Vs Man Singh & ors., (2003) 10 SCC 414

5. Ramesh Babulal Doshi Vs St. of Guj., (1996) 9 SCC 225

6. St. of M.P. Vs Sharad Goswami, (2021) 17 SCC 783

7. St. of Raj. Vs SheraRam, (2012)1 SCC 602

8. Shivaji Sahabrao Bobade Vs St. of Mah., (1973) 2 SCC 793

9. Sadhu Saran Singh Vs St. of U.P., (2016) 4 SCC 357

10. Basheera Begam Vs Mohd. Ibrahim, (2020) 11 SCC 174

11. Kali Ram Vs St. of H.P., (1973) 2 SCC 808

12. St. of Odisha Vs Banabihari Mohapatra & ors., (2021) 15 SCC 268

13. Sujit Biswas Vs St. of Assam, (2013) 12 SCC 406

14. Balaram Vs St. of M.P. 2023 SCC OnLine SC 1468

15. Vedivelu Thevar Vs St. of Madras, 1957 SCC OnLine SC 13

(Delivered by Hon'ble Vinod Diwakar, J.)

1. We have heard Ms. Puruhuta Lodha, Shri Vijay and Shri Prem Shanker Prasad, learned A.G.A. for the State-appellant, Shri G.S. Chaturvedi, learned Senior Counsel assisted by Shri Ajatshatru Pandey, learned counsel for the respondents, and perused the record.

2. The instant Government Appeal has been preferred against the judgment and order dated 13.9.1990 passed by learned Special/Additional Sessions Judge, Mathura in Sessions Trial No.225 of 1998, titled as State v. Karan Singh and others, arising out of Case Crime No.276 of 1987, under Sections 147, 148, 307, 302 IPC read

with Section 149 IPC; and Sessions Trial No.226 of 1988 titled as State v. Kunwar Singh and others, arising out of Case Crime Nos.277 of 1987, 278 of 1987 & 279 of 1987, under Sections 25 & 4/25 of Arms Act respectively, both the cases registered at Police Station Kosi Kalan, District Mathura, in which the accused, namely, Karan Singh, Har Gulab, Padam Singh, Fateh Singh, Kunwar Singh and Lakhmi Singh have been acquitted from the charges of Sections 148, 302/149 and 307/149 IPC, whereas the accused, namely, Tara Chand, Virendra Singh, Mahendra Singh, Teji, Shiv Singh and Lal Singh have been acquitted from the charges framed under Sections 147, 302/149 and 307/149 IPC, and further the accused Lakhmi Singh, Fateh Singh and Kunwar Singh have been acquitted from the charge framed under Section 25 Arms Act.

3. Aggrieved by the acquittal of all the 12 accused, namely, Karan Singh, Har Gulab, Padam Singh, Fateh Singh, Kunwar Singh, Lakhmi Singh, Tara Chand, Virendra Singh, Mahendra Singh, Teji, Shiv Singh and Lal Singh, the State-appellant has preferred the instant appeal challenging the order of acquittal qua the aforesaid accused persons.

4. During the pendency of the appeal, the accused, namely, Karan Singh, Tara Chand, Teji @ Tej Singh, Lachhi @ Lakhmi, and Lal Singh died. Hence, the instant Government Appeal against them stands abated.

5. Succinctly, the prosecution case is that the complainant- Hudri approached the Police Station Kosi Kalan with a tehreer with regard to his brother's murder. On the basis of which the police initiated the investigation and subsequently the accused persons faced the trial. For clarity, the contents of tehreer are extracted herein below:

*"सेवा में श्रीमान् थानाध्यक्ष महोदय थाना कोसी कलॉ मथुरा निवेदन है कि आज दिनांक 14.10.87 को सुबह मेरा भाई कन्नी व मेरा चचेरा भाई हेती पुत्र सुखपाल उर्फ पाला अपने खेतों से (का०फटा) घर वापिस आ रहे थे। कि जब यह दोनों नारायन के घर के सामने आये तो गिर्राज के घेर के सामने (1) करन सिंह एस/ओ० राम सिंह के हाथ में फर्शा (2) हरगुलाब एस / ओ० तेज सिंह के हाथ मे कुल्हाड़ी (3) पदम सिंह एस/ओ० गिर्राज के हाथ में फर्शा (4) फतेसिंह एस/ओ० राम सिंह के हाथ में बन्दूक 12 बोर (5) कुमर सिंह एस/ओ० भूदल सिंह के हाथ में कट्टा (6) ताराचन्द्र एस/ओ० करन सिंह (7) बीरेन्द्र सिंह एस/ओ० भूदल सिंह (8) महेन्द्र सिंह एस/ओ० गिर्राज सिंह (9) तेजी सिंह एस/ओ० रघुनाथ के हाथों मे लाठियों (10) लखमी एस/ओ० गोबिन सिंह के हाथों में फर्शा (11) शिव सिंह एस/ओ० गोविन्द सिंह व (12) लाल सिंह एस/ओ० पीतम सिंह निवासी महराना थाना बरसाना के हाथों में लाठियों लिये हुए खड़े थे। उनमे से पदम सिंह ने कहा इन दोनों को पकड़ लो और इनको जान से खत्म कर दो। आज अच्छा मौका है इन्होने हमसे मुकदमे बाजी चला रक्खी है। इस पर सभी ने एक राय होकर एक दम कन्नी व हेती को पकड़ कर करीब पौने नौ बजे अपने नौहरे में खीच कर ले गये और डूंगर के पेड़ के नीचे फर्शा लाठी बन्दूक कट्टों आदि से मारपीट करने लग कन्नी व हेती चिल्लाये तो मै व मेरे ही गॉव के बसंत व रमेश पुत्रगण नानगा व गोवर्धन सिंह एस/ओ० खूबी आदि बहुत से आदमी आ गये लेकिन उनके डर के कारण हम अपने भाइयों को नही छुड़ा सके मेरे भाई कन्नी की जान से मारकर हत्या कर दी है तथा हेती को गम्भीर रूप से घायल कर दिया है। दोनों मौके पर पड़े है। रिपोर्ट लिखकर कानूनी कार्यवाही की जावे। ता० 14.10.87 प्रार्थी हुदरी एस/ओ० मेदी गॉव दहगाँव थाना कोसी कलाँ (मथुरा) ता० 14.10.87 नि०अं० हुदरी लेखक अमीचन्द पुत्र जग्गी मल कोसी कलां मनीराम वास ता० 14.10.87*

*नोटः- मै एच०एम० प्रमाणित करता हूँ कि तहरीर की नकल चिक हाजा पर शब्द ब शब्द अंकित की है।*

*ह०अस्पष्ट एच०एम०*
*14.10.87"*

6. On the tehreer of complainant-Hudri (PW-1), the First Information Report bearing Case Crime no. 276, under

Sections 147, 148, 149, 307, 302 IPC and FIR No. 277 and 278, u/s Section 25(1)(a) and 25(1)(b) of Arms Act was registered on 14.10.1987 at P.S. Kosi Kalan, District Mathura, against the accused persons.

7. After registration of the FIRs, the police conducted the investigation and recorded the statement of the witnesses under Section 161 Cr.P.C. and filed the charge-sheet against all the 12 accused persons named in the F.I.R. viz (i) Karan Singh, (ii) Har Gulab, (iii) Padam Singh, (iv) Fateh Singh, (v) Kunwar Singh, (vi) Lakshmi, (vii) Tara Chand, (viii) Virendra Singh, (ix) Mahendra Singh, (x) Teji, (xi) Shiv Singh, (xii) Lal Singh. The Chief Judicial Magistrate took the cognizance and after complying with the provisions of Section 207 Cr.P.C., committed the case to the court of sessions for its trial.

8. The trial court framed the charges under Sections 302/149, 307/149, 147, 148 IPC against all twelve accused persons and separate charges were framed under section Section 25(1)(a) and Section 25(1)(b) of the Arms Act against accused Fateh Singh and Kunwar Singh, the same were read over and explained to the accused persons, who pleaded not guilty and claimed trial.

9. The prosecution has produced the following documentary evidence to prove its case:

*"(i) Written Report dated 14.10.1987, Ex. Ka-1*

*(ii) FIR dated 14.10.1987 at 10:15 a.m., Ex. Ka-13 and FIR dated 14.10.1987 at 11:00 p.m., Ex. Ka-2*

*(iii) Recovery memo of Axe 'Ahni', Bamboo & Farsa, Ex. Ka-16*

*(iv) Recovery memo of blood-stained and plain earth, Ex. Ka-17 and Ex. Ka-18*

*(v) Recovery memo of blood-stained clothes, Ex. Ka-22*

*(vi) Recovery memo of S.B.B.L. Gun, Ex. Ka-1*

*(vii) Injury reports, Ex. Ka-2 and Ka-27*

*(viii) Post-mortem report, Ex. Ka-3*

*(ix) Permission for prosecution under Section 39 of Arms Act, Ex. Ka-8 and Ka-9"*

10. Besides the above documentary evidences, the prosecution has examined the complainant- Hudri as PW-1; Ramesh as PW-2; Cousin of complainant Heti as PW-3; Dr. P.C. Vyas as PW-4; Dr. U.C. Vaishya as PW-5; S.I. Matadeen Verma as PW-6; Ct. Ashok Kumar as PW-7; Dr. R.C. Sharma as PW-8; Phool Singh as PW-9, S.I. Mohd. Zahid as PW-10.

11. Complainant Hudri- the deceased's brother - was examined as PW-1. In examination-in-chief, he reiterated the facts mentioned in the impugned FIR and stated that all the accused persons in the court are residents of his village except the accused, Lal Singh, who is a resident of village Mahrana, Police Station Barsana. The accused, Fateh Singh, is married to his real sister. Except accused Lal Singh, all the accused persons are members of one family, and their ancestors were common. Before the date of the unfortunate incident, there was previous litigation between the accused, Padam Singh, and the deceased and his brother Hudri (PW-1) with respect to the construction of the drain, and various orders were passed by the civil courts. The accused, Padam Singh, wanted to construct a drain in the field belonging to the

informant Hudri (PW-1). He instituted a complaint before the Canal Magistrate for having damaged the drain. The complaint was decided in favour of the informant and his brother, Kanni- since deceased. The deceased was doing *Pairvi* in the said case, therefore, the accused Padam Singh, along with other accused persons, became inimical with the deceased.

12. He further deposed that in the morning of 14.10.1987, the deceased- Kanni, along with his cousin Heti, had gone to cut the green fodder from their fields, and while on return, when he reached near the Gher1 of Giriraj Singh at about 08:45 a.m., all the 12 accused persons surrounded him and his cousin- Heti. The accused Fateh Singh and Kunwar Singh were armed with guns and country-made pistols; the accused Padam Singh, Lakhmi and Karan Singh were armed with *Farsa*; the accused Har Gulab was armed with an axe, and the remaining accused persons Teji, Lal Singh, Shiv Singh, Mahendra, Tara and Virendra were having *Laathis* in their hands. The accused, Padam Singh, exhorted by having stated that today it is a good occasion to finish the deceased Kanni as he instituted a case against him for having damaged the water canal. On the exhortation of the accused Padam Singh, all the 12 accused persons attacked Kanni by having wielded their respective weapons. They dragged and took the Kanni inside the Gher of Giriraj Singh and caused severe injuries. When Heti (PW-3), the cousin of the deceased, tried to rescue him, he was also beaten and inflicted with severe injuries by all the accused persons with their respective weapons. On having raised the alarm by Kanni and Heti, the informant PW-1 Hudri, who is the real brother of the deceased Kanni, Ramesh PW-2, Basant, Goverdhan and others came there, but could not rescue Kanni and his cousin Heti due to fear of loss to their lives. Due to severe injuries, Kanni died on the spot. Heti also sustained a number of simple and grievous injuries on his person. The informant PW-1 Hudri, after having left his brother deceased- Kanni, and injured cousin Heti at the spot, went to market at the shop of one Amichand son of Jaggi Mal and dictated *tehreer* to him, who at that time was present at his shop. On the dictation of informant Hudri (PW-1), a written report was prepared, and thereafter, it was registered as FIR No.276 of 1987 at Police Station Kosi Kalan on 14.10.1987 at about 10:45 a.m.

13. The witness Hudri (PW-1) was put to a lengthy cross-examination by all the accused persons. Initially, the witness was put to various questions with regard to the relationship *inter se* between the parties to the civil litigation pending between the accused party *viz-a-viz* complainant party; certain cases previously lodged by the accused Padam Singh against the witness and his relatives under Section 70 of Northern Indian Canal and Drainage Act; the location of agricultural field of the accused Giriraj Singh, and the direction of the house of Giriraj Singh and a few questions about the site plan. In response to one of the questions, the witness stated that he does not know as to why the Investigating Officer has not shown the correct geography and demography of his village in the site plan.

14. Ramesh (PW-2) stated that he reached the place of occurrence after the rescue call by the deceased- Kanni and injured Heti (PW-3). He supported the prosecution's case in his examination-in-chief. In cross-examination, PW-2 has stated that he had seen the incident from

the eastern side of the *Gher*, which fell towards the main road. The main gate of *Gher* was on the northern side, and it was closed by the accused from the inside. They could have entered the *Gher*, but he did not choose to enter because of fear of his death. After the incident, he could enter into the *Gher*. A lot of co-villagers also reached there by the time and opened the gate of the *Gher*. He knows the informant Hudri (PW-1). He further stated that Basanta, Khajan and Suresh are his real brothers. The accused, Padam Singh, had lodged a case against the deceased Kanni. Thereafter, PW-2 was asked various questions related to the civil and criminal litigations between the parties, to which he replied affirmatively. PW-2 has stated that the Investigating Officer came to the house on the date of the incident, and when the Investigating Officer came to his village, he was at his agriculture field and had seen the Investigating Officer at *Gher* of Giriraj Singh, the place of incident. He told the Investigating Officer that he had seen the incident and had also taken the Investigating Officer to the place of incident. Thereafter, the witness was put to several questions about the demography of the village and the neighbour's house. First, there was a *maar-peet* on the road, and thereafter, the accused took the deceased- Kanni and Heti (PW-3) inside the *Gher*, where they murdered the deceased- Kanni. On raising rescue calls by the deceased and injured, the witness, along with other co-villagers, reached the place of incident. The witness was confronted with the site plan and was asked several questions, to which he stated that he did not approach the Investigating Officer; in fact, the Investigating Officer asked questions to him.

15. Heti (PW-3) is the real brother of the deceased and was all along with him at the time of the incident. He has also received injuries on his person. He supported the prosecution's case and stated in his examination-in-chief that it was around 01:45 p.m., he along with his cousin- Kanni, after cutting the green fodder from the fields was going back to the house, and when they reached at the *Gher* of Giriraj Singh, all the 12 accused persons surrounded him and his cousin-Kanni. The accused Fateh Singh and Kunwar Singh were armed with guns and country-made pistols; the accused Padam Singh, Lakhmi and Karan Singh were armed with Farsa; the accused Har Gulab was armed with an axe, and the remaining accused persons *viz-a-viz* Teji, Lal Singh, Shiv Singh, Mahendra, Tara and Virendra were having *Laathis* in their hands. The accused, Padam Singh, exhorted by having stated that today it is a good occasion to finish the deceased- Kanni as he instituted a case against him for having damaged the water canal. On the exhortation of the accused Padam Singh, all the 12 accused persons attacked over Kanni by having wielded their respective weapons. They dragged and took him inside the Gher of Giriraj Singh, who is the father of accused Padam Singh and caused severe injuries. The witness further stated that he was also beaten and received injuries from all the accused persons with their respective weapons. Hudri, Basant, Ramesh and Goverdhan reached the place of the incident. The witness further stated that all the accused persons had brutally beaten them. The deceased, Kanni, was shot by a firearm. They were inflicted injuries by *Laathi*, Axe, and *Farsa*. He received injury from *Laathi*, Axe, and *Farsa*, and the deceased- Kanni sustained firearm injury and died on the spot. His medical examination was conducted twice as in the first medical report, the doctor did not mention the details of the injuries, and

subsequently, on the direction of the Chief Medical Officer, a separate injury report was prepared. The witness remained in the hospital for 9-10 days. The witness says that he does not know when the accused, Lal Singh, was arrested by the police. He gained consciousness three days after the incident, and he does not know who took him to the hospital. He further states that it is hard to suggest that he was conscious when he was taken to the doctor. The accused have caused injuries to the injured by Axe and *Farsa*. The accused fired at the deceased with a country-made pistol and was also assaulted by *Laathi*, Axe and *Farsa*.

16. Dr. P.C. Vyas (PW-4), who examined the injuries of the witness Heti (PW-3) on 14.10.1987. The first injury report suggests the following injuries on the person of the injured- Heti:

*"(i) Lacerated wound 2 cm x 0.5 cm x scalp deep vertically placed on right side forehead, 5 cm above right eyebrow. Margins lacerated, bleeds on cleaning, read colour.*

*(ii) Lacerated wound 4 cm x 0.5 cm x muscle deep vertically placed on back of left forearm middle part 10 cm below elbow joint.*

*(iii) Lacerated wound 3 cm x 05. cm x muscle deep obliquely placed on right hand with right thumb hand. Advised x-ray.*

*(iv) Multiple lacerated wounds five in number on front of right leg with contused swelling measuring 2.5 cm x 0.5 cm x muscle deep to 1 cm x 0.2 cm muscle deep in an area of 28 cm x 8 cm with restricted and painful movements. Advised x-ray.*

*(v) Lacerated wound with traumatic swelling in an area of 14 cm x 12 cm varying in size from 5.5 cm x 1.5 cm bone deep to 2 cm x 0.5 cm x bone deep with restricted and painful movements. Bleeds. Red colour Advised x-ray.*

*(vi) Contused swelling right shoulder 7 cm x 4 cm. Red colour. Advised X-ray."*

Dr. P.C. Vyas (PW-4) opined that the injuries were fresh at the time of examination, and except injury nos.3 to 6, the injuries were simple in nature. X-ray was advised to ascertain the nature of injury nos.3 to 6. As per the witness, the injuries could have been caused by some heavy and blunt object, like the blunt side of an Axe and Farsa.

17. The witness was again medically examined on 7.12.1987 by Dr. U.C. Vaishya (PW-5), Senior Radiologist of the District Hospital, Mathura, on the direction of the Chief Judicial Magistrate. On X-ray, the witness found a comminuted fracture of the right tibia, fibula, right proximal half part and mid-distal part. He further found a comminuted fracture of the left leg, both the bones, tibia and fibula at different levels. Dislocation at the distal I.P. joint of the right thumb was also revealed. The details of the injuries are mentioned herein below:

*"(i) Unhealed wound (septic) 2.8 cm x 0.7 cm x bone (over left leg distal mid third part anterior and medially having discharge in the wound.*

*(ii) Septic wound on the right leg medially superior aspect 2 cm x 0.4 cm x S.C. and tissues (having discharge).*

*(iii) Healed mark of injury (fresh red scar) 3 cm x 1.8 cm on the left knee distal part.*

*(iv) Scar (healed injury on right forehead), left forearm and just right hand wrist (thumb side) right leg remedially and*

*left leg and two medially present of healed injuries.”*

As per opinion of the doctor, all the injuries were healed. It could not be opined as to which weapon was used to cause injury nos.1 and 2.

18. Dr. U.C. Vaishya (PW-5), the Senior Grade E.N.T. Surgeon of the District Hospital, Mathura, conducted the autopsy of the deceased on 15.10.1987 and found the following ante-mortem injuries on the person of the deceased:

*“(i) Multiple LWs ranging in size from 4 cm x 1 cm x scalp deep to 1 cm x o.25 cm x scalp deep on the front of head and forehead in an area of 18 cm x 14 cm.*

*(ii) Two LWs 1.5 cm x 0.25 cm x bone deep, 0.5 cm x 0.25 cm x bone deep on back of left elbow.*

*(iii) right collar fractured.*

*(iv) Multiple contusion on back of whole chest, abdomen and left buttock.*

*(v) Contused 28 cm x 2 cm on front of right side chest and abdomen.*

*(vi) 3 LWs 2 cm x 0.5 cm x bone deep and rest two 1 cm x 0.5 cm x bone deep on front of left leg middle part with fracture.*

*(vii) Multiple abrasions on both upper exts.*

*(viii) Multiple abrasions on front of left knee.*

*(ix) Multiple firearm injuries ranging 0.75 cm x 0.5 cm x bone deep to 0.5 cm x 0.4 cm x bone deep on whole of right leg front and back side. No tattooing and charring. No F.B. present in muscle tissue.”*

The doctor opined that the death of the deceased was caused by coma as a result of ante-mortem injuries. No pellets were recovered from the body of the deceased. There was a firearm injury on the right leg, which is not fatal, and it could have been caused from a distance of six feet. The deceased died because of injury no.1, which was caused on his head.

19. S.I. Matadeen Verma (PW-6) deposed that on 14.10.1987, he was posted at Police Station Kosi Kalan, and in his presence, informant- Hudri (PW-1) brought a written report and on the basis of which a *chik* was prepared, and he has endorsed his signatures on the chik. After taking necessary documents, he proceeded to the place of incident, where he examined the dead body of the deceased and prepared the *Panchayatnama* and other necessary documents. He made a seizure of the Axe, and *Farsa*, which was found lying near the dead body. He further made a seizure of blood-stained soil and recorded the statement of the witnesses. On the basis of the information from the informer, he conducted a raid at around 06:00 p.m. and arrested two accused persons at 08:00 p.m. Thereafter, recoveries were effected in the following manner:

“S.B.B.L. country-made pistol with 12 bores and four cartridges was recovered from accused Fateh Singh; a country-made pistol with 12 bores and two cartridges from Kunwar Singh; Farsa from accused Lakhmi, and Laathi was recovered from the accused Karan Singh, Har Gulab, Tarachand, Virendra, Mahendra, Teji, and Lal Singh. After collecting all the materials and upon concluding the investigation against the accused persons, he filed the charge sheet on 24.10.1987 under Sections 147, 148, 307 and 302 IPC against the accused-appellants.”

20. The Investigating Officer was questioned about the place of the incident

and the village's demography, to which he supported the prosecution's case. Further, the witness was asked various questions regarding the site plan, to which he replied in accordance with section 161 Cr.P.C statement.

21. Dr. R.C. Sharma (PW-8) has stated that he was posted as a Senior Radiologist in District Hospital, Mathura and conducted the X-ray of the injured Heti (PW-3) on 15.10.1987.

22. Constable Phool Singh (PW-9) has stated that he was posted at Police Station Kosi Kalan at the time of the incident, and he is a witness to the inquest report. He stated that the inquest proceedings were conducted in his presence, and he along with Ashok Kumar, had taken the deceased to Mathura by Govind Singh's tractor for the post-mortem. After collecting the necessary documents, the same was submitted to the police station.

23. S.I. Mohd. Jahid (PW-10) stated that he was posted as S.I.-II in the Police Station Kosi Kalan at the time of the incident, and he is the witness to recovery and has supported the prosecution's case.

24. The incriminating material produced by the prosecution during the trial was then confronted by the accused persons for recording their statements under Section 313 Cr.P.C. The accused persons have stated that police have falsely implicated them due to previous enmity between the parties to save the real culprit.

25. The trial court discussed the evidence adduced by the prosecution in support of each of the circumstances at great length and held that the prosecution could not satisfactorily prove any of them, and therefore, acquitted all the accused persons. The State and complainant both preferred the appeal before this Court challenging the impugned judgment and order of acquittal dated 13.9.1990.

26. Learned counsel for the complainant vehemently espoused the cause of the complainant and argued that the order passed by the trial court is cryptic, perverse and untenable, rendering the impugned judgment unsustainable in the eyes of law in presence of overwhelming evidence in the form of eye-witnesses, injured, medical reports comprising injury reports, post-mortem report and recovery of weapons, used by the accused for committing the crime. In support of his contentions, learned counsel for the complainant relied upon the decisions of the Supreme Court in ***Laxman Singh & Ors v. State of Bihar2; and Ravindra Kumar & Ors v. State of Punjab***3.

26.1 The trial court gravely erred in not taking into consideration the unimpeachable testimony of eye-witnesses, Hudri (PW-1), Ramesh (PW-2), and injured- Heti (PW-3), which is cogent, consistent, reliable, corroborating and establishes the guilt of accused persons beyond all reasonable doubts. All the eye-witnesses and injured PW-3 are reliable and trustworthy witnesses. It is submitted that all the aforesaid three witnesses were thoroughly cross-examined, and on cross-examination, nothing adverse to the prosecution's case has been brought on record by the accused.

26.2 The place of occurrence, recovery of the dead body, recovery of weapons used, and injury report of the injured Heti clearly establish the case of

prosecution, and the trial Court completely ignored to delve into these material facts.

26.3 The injured PW-3 was examined twice; firstly on 14.10.1987 by Dr. P.C. Vyas, who was examined as PW-4, and subsequently on 15.10.1987 by Dr. U.C. Vaishya, who was examined as PW-5, on the direction of Chief Judicial Magistrate. Both the injury reports support the prosecution's case, and there was no reason for the trial court to disbelieve the testimony of PW-4 and PW-5.

26.4 Right from the beginning, the accused were named in the F.I.R., and their role and complicity have been established by trustworthy, reliable and cogent evidence. All the accused persons formed the unlawful assembly in furtherance of the common object to commit the murder of deceased- Kanni. So far as the conviction under Section 147 IPC is concerned, the presence of all the accused persons at the time of the incident and their active participation has been established and proved by the prosecution by examining the witnesses as PW-1, PW-2 and PW-3. The accused formed the unlawful assembly at the *Gher* of Giriraj Singh and committed the offence.

26.5 The evidence of the injured witness has greater evidentiary value; unless compelling reasons exist, their statements are not to be discarded lightly. It is further argued that the minor discrepancies do not corrode the credibility of otherwise acceptable evidence. In cases where there are large number of assailants, it can be difficult for the witnesses to identify each assailant and attribute a specific role to him; moreover, when the incident concluded within a few minutes, it is natural to the exact version of the incident, each minute detail meticulously is not possible by an individual4. Therefore, the deposition of injured witnesses should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies5.

26.6 The PW-3 has clearly stated that the accused persons dragged him and the deceased- Kanni into the *Gher* of Giriraj Singh and caused injuries to them, and as a consequence thereof, the deceased died on the spot, whereas the witness received severe injuries on his person and remained hospitalised for almost ten days and could only gain conscious after three days. The said incident was also witnessed by PW-1 and PW-2.

26.7 The motive is well established from the evidence of PW-2, who states that there was long-standing litigation between the parties regarding the construction of the drain, therefore, the motive is proved beyond reasonable doubt.

26.8 There was no inordinate delay in registration of the F.I.R. The incident occurred at 08:45 a.m. on 14.10.1987, and the complaint was registered at 10:15 a.m. on the same date. The delay in registration of the F.I.R. by itself cannot be a ground to doubt the prosecution's case. There can be a variety of genuine causes for delayed registration of F.I.R. It's a common rule in India, and lapse of time, if any, cannot be attributed to fatal to the prosecution's case.

26.9 The accused were arrested on the same day, and pursuant to their pointing out, recoveries were effected from them.

27. *Per-contra*, learned counsel for the accused-respondents contended that the eye-witnesses PWs 1, 2 and 3 were interested witnesses, being the brother and close relatives of the deceased, therefore, their testimonies were rightly rejected by the trial court. There was a possibility of

the complainant group to falsely implicating the accused, who are resident of the same village and born out of a common ancestry. Thus, the chances of false implication are greater being admittedly proven indulged in long pending litigation. The approach of the trial court was justified and has strictly proceeded and appreciated the evidence in the manner, the law laid down by the Supreme Court.

27.1 The trial Court rightly disbelieved the statements of PW-1, PW-2, and PW-3 regarding motive, and raised serious suspicion regarding the recovery made under Section 27 of the Evidence Act.

27.2 The trial Court order is a well-merited judgment, and this Court ought not to re-appreciate the evidence unless and until the parameters of ***Ramesh Babulal Doshi v. State of Gujarat***6 are met. The appellate court hearing an appeal against acquittal must first report its conclusion on the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable and then re-appreciate the evidence to arrive at its own conclusion. The appellate court, while hearing the appeal against the judgment of acquittal, must satisfy itself that the approach of the trial court was patently illegal and its conclusion is unsustainable in the eye of law.

27.3 The FIR is ante timed, and there is a gross delay in the registration of the F.I.R. The prosecution has not satisfactorily explained the delay.

27.4 The injuries of injured- Heti (PW-3) are self explained to demonstrate that the same has not been caused in the manner, which has been stated to be inflicted on the injured in the manner stated by PW-1, PW-2 and PW-3.

27.5 There is a huge and material contradiction between the statements of injured- Heti (PW-3), the complainant and eye-witness- Hudri (PW-1), and Ramesh (PW-2). PW-1 stated that the accused Fateh Singh was carrying a gun; Kunwar Singh was carrying country-made pistol; Padam Singh and Lakhmi were carrying *Farsa*; Har Gulab had an Axe; Teji, Lal Singh, Shiv Singh, Mahendra, Tara Chand and Virendra were carrying *Laathis*, whereas sole injured- Heti (PW-3) states that the accused Mahendra, Virendra, Tara, Shiv Singh, Teji and Lal Singh were carrying *Laathi*; accused Fateh Singh was carrying gun; Kunwar Singh was carrying country-made pistol; accused Padam Singh, Lakhmi and Karan Singh were carrying *Farsa* and accused Har Gulab was carrying Axe. Likewise PW-2 Ramesh, an eye-witness, stated that the accused Karan Singh, Padam, and Lakhmi were carrying *Farsa*; accused Fateh Singh was carrying a gun; Kunwar Singh was carrying a country-made pistol; Har Gulab was carrying an Axe; and Tara, Virendra, Mahendra, Shiv Singh, Teji and Lal Singh were carrying *Laathis*. On examination of the testimony of PW-1, PW-2 and PW-3 *qua* the allegations levelled in *tehreer* and deposition of PW-6, the I.O. shows significant contradiction so far the possession of the weapons is concerned, which was sufficient to disbelieve and, thus, discards the testimony of the aforesaid witnesses. More particularly, in light of the facts, the accused and witnesses are connected to each other through common ancestry and resident of the same village. Therefore, it can safely be presumed that the witnesses ordinarily would not commit the mistake of identifying the name of the accused and the nature of the weapon carried by them in a case of a broad daylight murder.

27.6 The injury reports dated 14.10.1987 and 15.10.1987 of the injured witness Heti (PW-3) show the significant variations so far as the injuries are concerned. Dr. P.C. Vyas (PW-4), who examined the injured Heti on 14.10.1987, stated that all the injuries were simple in nature. No internal part was damaged. There was no incised or penetrated wound, and the time of injury was approximately 04:00 a.m. (± one or two hours). He also stated that no injury from dragging was observed. Whereas the testimony of Dr. R.C. Sharma (PW-8), Senior Radiologist, who conducted the examination of injured Heti on 7.12.1987, on the direction of Chief Judicial Magistrate, also observed significant variation in the nature of injuries.

27.7 Not a single injury of the incised wound by a sharp edged weapon was observed by the doctor on PW-3, and there was no blackening or tattooing observed on PW-3 and the deceased.

27.8 No pellet or used cartridges were recovered from the place of the incident.

27.9 The Investigating Officer could not prove the items and details mentioned in the site plan in accordance with the law.

28. As the case in hand is a case of reversal of acquittal, it is prudent to have a bird's eye view of the judgment passed by the Supreme Court in this regard. The appellate Court is usually reluctant to interfere with a judgment acquitting an accused on the principle that the presumption of innocence in favour of the accused is reinforced by such a judgment. The above principle has been consistently followed by the Constitutional Court while deciding appeals against acquittal by way of Article 136 of the Constitution or appeals filed under Section 378 and 386 (a) Cr.P.C.7

29. The Supreme Court in *Doshi's* case (supra) has observed that the High Court must examine the reason given by the trial Court for recording their acquittal before disturbing the same by re-appraising the evidence recorded by the trial court. For clarity, para 7 is extracted herein below:

*" Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial Court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above quoted conclusions. This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellant Court is first required to seek an answer to the question whether the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellant Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellant Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of*

*the above infirmities it can then - and then only - reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial Court are sustainable or not."*

30. The Supreme Court in ***Sadhu Saran Singh's***8 case has observed that an appeal against acquittal has always been on an altogether different pedestal from 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.

31. The Supreme Court in ***Basheera Begam's***9 has held that the burden of proving an accused guilty beyond all reasonable doubt lies on the prosecution. If, upon analysis of evidence, two views are possible, one which points to the guilt of the accused and the other which is inconsistent with the guilt of the accused, the latter must be preferred. Reversal of a judgment and other of conviction and acquittal of the accused should not ordinarily be interfered with unless such reversal/acquittal is vitiated by perversity. In other words, the court might reverse an order of acquittal if the court finds that no person properly instructed in law could have, upon analysis of the evidence on record, found the accused to be "not guilty". When circumstantial evidence points to the guilt of the accused, it is necessary to prove a motive for the crime. However, motive need not be proved where there is direct evidence. In this case, there is no direct evidence of the crime.

32. The Supreme Court in ***Kali Ram's***10 case has observed as under:

*"25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought is to established by circumstantial evidence."*

33. The Supreme Court again examined in ***State of Odisha v. Banabihari Mohapatra & Ors***11 the effect of the probability of two views in cases of appeal against acquittal and held that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused, and the other to his innocence, the view which is favourable to the accused should be adopted.

34. The Supreme Court in ***Sujit Biswas v. State of Assam***12 has reiterated the position that suspicion, however strong, cannot replace proof. An accused is presumed to be innocent unless proven guilty beyond a reasonable doubt.

35. In the background of the law discussed herein above, we will examine the trial court's findings and evidence adduced during the trial by the witnesses to test the legality and validity of the impugned order.

36. It is an admitted position that; **(a)** deceased- Kanni was found dead in the *Gher* of Giriraj Singh and Dr. U.C. Vaishya (PW-5), conducted the post-mortem of the deceased on 15.10.1987 at District Hospital, Mathura- a day after the date of incident, has observed that the deceased had suffered injuries outlined herein; **(i)**

multiple LWs ranging in size from 4 cm x 1 cm x scalp deep to 1 cm x 0.25 cm x scalp deep on the front of head and forehead in an area of 18 cm x 14 cm, **(ii)** two LWs 1.5 cm x 0.25 cm x bone deep, 0.5 cm x 0.25 cm x bone deep on back of left elbow, **(iii)** right collar fractured, **(iv)** multiple contusion on back of whole chest, abdomen and left buttock, **(v)** contused 28 cm x 2 cm on front of right side chest and abdomen, **(vi)** three LWs 2 cm x 0.5 cm x bone deep and rest two 1 cm x 0.5 cm x bone deep on front of left leg middle part with fracture, **(vii)** multiple abrasions on both upper ext, **(viii)** multiple abrasions on front of left knee, **(ix)** multiple firearm injuries ranging 0.75 cm x 0.5 cm x bone deep to 0.5 cm x 0.4 cm x bone deep on whole of right leg front and back side. No tattooing and charring. No F.B. present in muscle tissue; **(b)** PW-3 Heti, an injured witness, stated in his examination-in-chief that he has suffered injuries from *Laathi*, Axe and *Farsa*, and he remained hospitalised firstly in District Hospital Mathura for 3-4 days, and thereafter, in a Private Nursing Home for next 9-10 days. He gained consciousness after three days and does not know, who had admitted him to the hospital, and he had not suffered any firearm injury. He was assaulted by all accused with Axe, *Farsa* and *Laathi* for almost three minutes. The injury report was first prepared by PW-4 Dr P.C. Vyas on 14.10.1987, and thereafter, by PW-8 Dr R.C. Sharma, Senior Radiologist, on 7.12.1987. On cross-examination of the accused, Lal Chand, this witness has said, *"all the injuries of injured were simple in nature as no internal part was damaged, and therefore, there was no threat to the life of the injured"* he again stated that no incised and penetrated wound was observed on the person of injured. PW-8 Dr. R.C. Sharma, who examined the injuries of injured Heti on 7.12.1987, opined that all the injuries were healed, and no definite opinion was given about the nature of the weapon that has caused the injuries. The wound had developed septic, and no specific reason could be attributed to the same.

37. To reach a logical conclusion, it would be safe to examine the trial court's finding in light of the contents of the *tehreer*, the testimony of PW-1, PW-2 and PW-3, the recoveries of weapons recovered by the Investigating Officer from the accused persons, and the injury suffered by deceased and injured- Heti (PW-3).

38. Given the nature of the fatal blow and injuries sustained by the deceased Kanni @ Karan Singh and the injuries inflicted on injured- Heti (PW-3), it is proved that the deceased Kanni met with homicidal death and PW-3 Heti sustained injuries in the same incident allegedly occurred on 14.10.1987.

39. All the accused have challenged the allegation of the incident on the ground whether the incident had happened in the manner as suggested by the prosecution and the accused persons participated in the crime as mentioned in the *tehreer* and subsequent thereto, whether the recoveries of the weapon was effected in the manner as suggested by initially in *tehreer*, and thereafter, shown in recovery memo dated 14.10.1987, and subsequently, stated by PW-1, PW-2 and PW-3, who all are eye-witnesses of the incident and closely related to each other.

40. The trial court finds that there is no dispute or challenge on either side about the place of the incident. It is the prosecution's case that the incident

happened in the *Gher* of Giriraj Singh, the father of Padam Singh, and there is consistent evidence to this effect.

41. The prosecution's case is that the incident happened on 14.10.1987 at about 08:55 p.m. when the deceased- Kanni, along with his cousin PW-3 Heti, was coming to the village after having cut green fodder from their fields and reached near the house of one Narayan, he and his brother were surrounded, dragged and taken inside the Gher and caused injuries by means of weapons carried by the accused persons. Deceased- Kanni sustained fatal injuries and died on the spot, whereas injured Heti sustained severe injuries and hardly could survive.

42. The accused seriously challenged the time and the manner of commission of the offence as adduced by the eye-witnesses. The defence case is that the deceased and the injured PW-3 were attacked by some unknown assailants in the wee hours of 14.10.1987, and since the accused, Padam Singh, had a long-standing civil dispute with the deceased, and therefore, the accused has been falsely implicated.

43. To supplement their defence, the accused relied upon Ex. Kha-1, which is the certified copy of the complaint dated 21.3.1987 lodged by Padam Singh son of Giriraj Singh, one of the accused against deceased Kanni @ Karan Singh, PW-1 Hudri- complainant, PW-3 Heti- injured, Tulli and Pala, both sons of Lohrey; Basant, Mahesh, Khajan and Suresh, all sons of Nanga- all mentioned as eye-witnesses in the F.I.R. Ex. Kha-1 in the court of Special Judicial Magistrate, Upper Canal Division, Agra alleging that the deceased and other persons had caused damaged to their drain, and the same was decided on 23.9.1988. It also appears from the record that the deceased and his cousin were convicted under Section 17 of the Northern India Canal and Damage Act, 1873 and sentenced to till rising of the court. An appeal was also preferred to vide Criminal Appeal No.119 of 1988, and the same was dismissed vide judgment dated 22.5.1989. The certified copy of the judgment dated 22.5.1989 is exhibited as Ex. Kha-3. Likewise, there were other litigation pending between the parties under the various provisions of IPC, the Cattle Trespass Act, an Original Suit No.783 of 1987, *etc*. between the parties.

44. After giving thoughtful consideration to the documents exhibited by the accused in support of their plaint and taking into consideration the fact that the deceased- Kanni had also initiated a complaint against accused Padam Singh, Mahendra, Fateh, Karan Singh, Teji, Kunwar Pal, Virendra, Tara, Har Gulab, Lakhmi and Siddhi indicates that the relationship between the accused persons and the complainant side were acrimonious and there has been bad blood among the parties. It is a settled proposition that enmity is a double-edged weapon and cuts both ways. Therefore, the oral testimony of eyewitnesses needs to be scrutinised cautiously and with great circumspection.

45. The net cumulative effect of the deposition of PW-1, PW-2 and PW-3 is that the deceased and injured PW-3 Heti sustained severe injuries from the sharp-edged weapon (*Farsa* and Axe) and *Laathi* by the continuous assault of accused persons for three minutes. The accused persons gave numerous blows to the deceased and injured Heti with sharp-edged weapons, and additionally, 5-6 shots were

also fired from close range. The deceased-Kanni died on the spot, whereas the injured PW-3 gained consciousness after three days and remained hospitalised for 9-10 days. All the eye-witnesses, including the Investigating Officer PW-6 and his companion PW-7 and PW-9 Constable Ashok Kumar and Constable Phool Singh respectively, deposed that an Axe and a *Farsa*- a sharp-edged weapon, stained with blood, were seized *vide* seizure memo Ex. Ka-16 from the place of incident, i.e. near the deceased body.

46. On careful examination of the testimony of PW-4 Dr. P.C. Vyas, who examined injured- Heti on 14.10.1987, PW-5 Dr. U.C. Vaishya, who conducted post-mortem of deceased- Kanni and PW-8 Dr. R.C. Sharma, Senior Radiologist, who again examined injured Heti on 7.12.1987, it is concluded by the trial court that; **(i)** PW-5 Dr. U.C. Vaishya conducted the autopsy of deceased on 15.10.1987 at 03:30 p.m. and the autopsy report Ex. Kha-3 suggests not a single wound on the deceased by a sharp-edged weapon noticed; **(ii)** single firearm injury of multiple pellets ranging from 0.5 cm x bone deep to 0.5 cm x 0.4 cm x bone deep on the whole of the right leg front and back side were found; **(iii)** no tattooing, charring and no foreign body was found in the muscle tissue of the deceased; **(iv)** the firearm injury was on the right leg of the deceased and did not prove fatal. On the basis of the testimony of PW-5 and careful examination of the autopsy report, it appears to the trial court that the injuries caused by firearms were superficial in nature.

47. On examination of the testimony of the injured- Heti PW-3, trial court observed that the injured witness did not sustain even a single injury on their person by sharp-edged weapon, even though there is positive evidence by the eye-witnesses that accused Padam Singh, Lakhmi, Har Gulab and Karan Singh were carrying *Farsa* and Axe and assaulted the injured witness continuously for three minutes. It reflects that no blow was given by the sharp-edged weapons on the dead body of the deceased and injured- Heti. Therefore, there was no active participation of the accused Padam Singh, Lakhmi, Har Gulab and Karan Singh in the said incident.

48. As per the testimony of injured PW-3, the accused Fateh Singh and Kunwar Singh were carrying guns and country pistols, respectively, but the Investigating Officer did not recover even a single used cartridge, bullet or pellet on his reaching at the spot at 11:00 a.m., on the same day. The testimony of PW-2 Ramesh- an eye-witness, who has seen the incident from 15-20 paces, suggests that two gunshots hit the deceased- Kanni on his right leg; each was fired from a gun and country-made pistol. The fire was shot at a distance of 5-6 pace. Whereas PW-3 stated that initially, the injured were attacked by an Axe, *Farsa* and *Laathis*. Thereafter, fire was shot at the deceased- Kanni, and the man who shot the fire was 4-5 paces away from the deceased. The trial court observed that the medical evidence adduced by PW-4, PW-5 and PW-8 is contrary to the deposition of PW-2 and PW-3. It is the prosecution's case that the accused, Fateh Singh, was armed with a 0.12 bore gun, and the accused, Kunwar Singh, was armed with a country-made pistol, but when the witness was put to cross-examination showed ignorance about the bore of the gun and also could not attribute the specific role of accused Fateh Singh and Kunwar Singh.

49. The Investigating Officer S.I. Matadeen was examined as PW-6 who, after having dispatched the body of the

deceased, conducted a search of the accused persons and, at 06:00 p.m., on the same day, arrested all 12 accused from the tube-well of accused Padam Singh and recovered *Laathis* at the pointing out of accused Karan Singh, Har Gulab, Tara Chand, Mahendra Singh, Teji Singh, Shiv Singh and Lal Singh, whereas the FIR states that the accused Karan Singh was carrying *Farsa* and accused Har Gulab was carrying Axe. The FIR suggests that the accused, Padam Singh, was carrying *Farsa*, whereas no weapon has been shown to be recovered by the Investigating Officer on the pointing out of the accused. Likewise, in the case of accused Virendra Singh, no weapon was recovered at his pointing out. On examination of the testimonies of PW-1, PW-2, and PW-3 in the light of the testimony of PW-6 S.I. Matadeen, material contradictions have been observed by the trial court, so far as recovery of respective weapons is concerned from the accused persons.

50. The trial court observed that; **(i)** litigation between the parties was going on for the last 4-5 years, and there was no immediate motive for the commission of the alleged offence. In a case of direct evidence based on account of evidence of eye-witnesses, the absence of motive is not significant for awarding conviction but, at the same time, assumes significance when there are greater chances of false implication of the entire family contrary to the scientific and medical evidence at the behest of the complainant, to settle the personal score; **(ii)** right from the beginning, the prosecution case is that all the 12 accused took active participation in the commission of the offence. The accused Padam Singh, Karan Singh, and Lakhmi were carrying a sharp-edged weapon; accused Fateh Singh and Kunwar Singh were carrying 12 bore guns, and country made pistol respectively, whereas other accused were carrying *Laathis*, but no injury was observed in medical evidence, which stated to be caused by sharp-edged weapons, and as to who used the blunt or sharp-edged weapon to cause injuries; **(iii)** the mode and manner of the arrest of the accused persons on the same day from the tube-well of one of the co-accused is highly unbelievable, unprovable and seems an artificial. The arrest of accused Lal Singh, who is a resident of village Mahrana, 8-10 Kosh from the place of the incident, also appears to be artificial; **(iv)** accused Tara Chand and Virendra Singh were minors at the time of the incident and High School mark-sheet issued by the Educational Board, Allahabad was brought on record as Exs. Kha-7 and Kha-8. Accused Tara Chand was 13 years, 3 months, and 24 days and the accused Virendra Singh was 13 years, 5 months and 4 days on the date of incident; **(v)** minor accused Tara Chand is the son of accused Karan Singh, and it does not stand for the reason that a father would take his minor son to participate in such heinous offence. Similarly minor Virendra Singh was the son of Bhupendra Singh, who is the brother of accused Kunwar Singh, the same reason would also stand for him; **(vi)** the scriber of the FIR, the writer of the G.D. entry and the *chik* FIR at the police station were not produced by the prosecution, which strengthen the case of defence that FIR is ante-time, also for the reason that the FIR was registered after much deliberation with a shop-keeper, who was present at his shop in the market and there was no reason for the complainant to first go to the market and get the ***tehreer*** scribed, and thereafter return to the police station and get the FIR registered. The *tehreer* could have been scribed by any of the co-villagers, who were present at the

time of the incident; **(vii)** it is unnatural behaviour of the PW-1 Hudri, who left the injured PW-3 in an unconscious state to get a *tehreer* scribed by a person, who was present at the shop in the market. No responsible and reasonable person leave his brother in such a critical condition and proceeded to register the FIR; **(viii)** there is overwriting and interpolation on the inquest report with respect to the date and time of the inquest proceedings; **(ix)** there is a material contradiction in the time of conclusion of the inquest proceedings, recording of statement of PW-7 Constable Ashok Kumar and PW-9 Constable Phool Singh, so far as the dispatch and taking of the deceased body to the hospital and Police Headquarter are concerned; **(x)** PW-2 Ramesh had all along with the deceased and his brother PW-3 to support their litigation, therefore, his testimony smacks doubt and could not be believed in the manner the witness has adduced it, **(xi)** the trial court concluded not to accept the prosecution's case against the accused persons as alleged to have been committed. The cumulative effect of the prosecution's evidence is that the prosecution could not establish the time and the mode and manner of the incident, as suggested, beyond reasonable doubt. The medical officer PW-4 Dr. P.C. Vyas, who examined the injured Heti PW-3, has opined that the injuries could have been caused at around 04:00 a.m., and a similar opinion has been given by PW-5 Dr. U.C. Vaishya, who conducted the autopsy of the deceased- Kanni.

51. The 3-Judge Bench of the Supreme Court in ***Balaram's***13 case again reiterated the well-established law that there are three types of witnesses: **(i)** one who is wholly reliable, **(ii)** one who is wholly unreliable and lastly, **(iii)** one who is neither wholly reliable nor wholly unreliable and placed the reliance upon landmark decision of ***Vedivelu Thevar v. State of Madras***14. So far as the first two scenarios are concerned, the testimony of the witnesses can be wholly accepted or discarded, but with respect to the third scenario, where the testimony is partly reliable or partly unreliable, the Court faces difficulty, then the court is required to separate the chaff from the grain to find the genesis of the incident.

52. There is another canon of the criminal jurisprudence with respect to the appreciation of the evidence that the suspicion, however strong, cannot take the place of proof. In the instant case, the incident was taken on 14.10.1987, in which one person died on the spot, and another had received severe injuries and remained unconscious for 3 days, as per the testimony of an injured witness. The incident was seen by PW-1, PW-2 and PW-3, who is himself injured in the incident. Admittedly, there was a long-standing litigation between the parties, and numerous cases were filed and contested, therefore, possibility of false implication cannot be ruled out. Its again a admitted and proved fact that the accused Tara Chand and Virendra Singh were minors at the time of the incident. The testimony of injured PW-3 and eye-witnesses PW-1 and PW-2 does not corroborate with the medical evidence. There was long-standing bad blood between the parties, a major contradiction in the mode and manner of recovery of weapons has been effected from the accused, and pursuant to it, the role assigned are sufficient to hold that the offence has not been committed in the manner as has been explained by the prosecution, and on taking a cumulative effect of the testimonies of the PW-1, PW-2, PW-3, PW-4, PW-5 and PW-8 suggest

the probability of two views and if two views on the evidence adduced are suggestive, one pointing to the guilt of accused and the other his innocence, the view in favour of the accused should be adopted. Moreover, applying the laid down text in ***Doshi's case (supra)***, we don't find any manifest error in the trial court's approach in acquitting the accused.

53. We find it difficult to accept the testimony of PW-1, PW-2 and PW-3 in the manner the same has been deposed before the trial court. We consider that the testimony of PW-1, PW-2 and PW-3 would come in the third category of neither wholly reliable nor wholly unreliable for the reasons recorded herein above. Therefore, the contesting accused are entitled to the benefit of the doubt.

54. As a result, the Government Appeal No.31 of 1991, arising out of impugned judgment and order dated 13.9.1990 passed by learned Special/Additional Sessions Judge, Mathura in leading Sessions Trial No.225 of 1998 titled as State v. Karan Singh and others, is devoid of merits, and is accordingly ***dismissed***, and thus, the impugned judgment and order dated 13.9.1990 passed by the learned Special/Additional Sessions Judge, Mathura in the aforesaid sessions trial is upheld.

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**(2024) 7 ILRA 864**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 11.07.2024**

**BEFORE**

**THE HON'BLE NEERAJ TIWARI, J.**

Matters Under Article 227 No. 1512 of 2024 (CIVIL)

**C.A. Kriti Tandon ...Petitioner**

**Versus**

**M/s Mehta Sai Das Jewelers, Kanpur Nagar ...Respondent**

**Counsel for the Petitioner:**
Sri Prakhar Tandon

**Counsel for the Respondent:**
Sri Rajnish Sahai Saxena, Sri Vikash Mathur, Sri Varun Mathur

**A. Constitution of India, 1950-Article 227-U.P. Act No. 13 of 1972-Sections 21(1)(a)-suit for eviction and arrears of rent-rejection-revision-rejection-the issue is about the procedure and practice of argument by a counsel-counsel of a party is not supposed to know any facts beyond the pleadings-if any order passed considering such facts, which are not pleaded, is liable to set aside-It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. (Para 1 to 19)**

**B. The second issue pertains to procedure and practice applicable to Judge of a Court-It is settled principle of law that the parties to the suit cannot travel beyond the pleadings so also the Court cannot record any finding on the issues which are not part of pleadings-Any finding recorded on an issue de hors the pleadings is without jurisdiction-Para 16, 17)**

**C. The third issue pertains to the finding of Revisional court that SCC court has taken suo moto cognizance of SCC suit –the judgment of Revisional Court is self contradictory-on one hand, Revisional Court has taken view that finding of SCC Court is bad and on the other hand, rejected the revision, which is not permissible as the judgment of a Court cannot be contrary to its finding-Thus, the impugned orders are bad and liable to set aside-Matter is remanded back. (Para 26 to 29)**

**The writ petition is allowed.** (E-6)

**List of Cases cited:**

1. Sri Shivaji Balaram Haibatti Vs Sri Avinash Maruthi Pawar (2017) 0 Supreme (SC) 1109

2. Girish Chandra Gupta Vs St. of U.P. (2005) 0 Supreme (All) 1347

3. H.P., shimla in re Shri S.C. Kainthla Vs St. of H.P. & or.s (CWP Nos. 2061 of 2018, CWP 2292 of 2018)

4. Ram Sarup Gupta (dead) by LRs Vs Bishun Narain Inter College & ors. (1987) 0 Supreme (SC) 409

5. Virendra Kashinath Ravat & anr. Vs Vinayak N. Joshi & ors. (1998) 0 Supreme (SC) 1133

6. Bachhaj Nahar Vs Nilima Mandal & anr. (2008) 0 Supreme (SC) 1421

7. St. of Mah. Vs Ramdas Shrinivas Nayak & anr. (1982) 0 Supreme (SC) 131

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Prakhar Tandon, learned counsel for petitioner and Sri Vikash Mathur along with Sri Rajnish Sahai Saxena, learned counsel for respondent.

2. Present petition has been filed seeking following relief:-

"i. Set aside the impugned judgment and decree dated 02.02.2022 passed by learned Judge Small Cause Courts, Kanpur Nagar in SCC Suit No. 72 of 2015 (CA Kriti Tandon vs. M/s Mehta Sai Das Jewelers).

ii. Set aside the impugned judgment and decree dated 18.08.2023 passed by learned Revision Court in SCC Revision No. 42 of 2022 (CA Kriti Tandon vs. M/s Mehta Sai Das Jewelers)."

3. Brief facts of the case are that petitioner-plaintiff has filed SCC Suit No. 72 of 2015 for eviction and arrears of rent, upon which, notices were issued and pleadings have also been exchanged. After exchange of pleadings, points of determination have been framed and ultimately suit was rejected by the SCC Court vide order dated 02.02.2022. Against the said order, petitioner-plaintiff has filed SCC Revision No. 42 of 2022, which was also rejected vide order dated 18.08.2023. Against both the orders, present petition has been filed under Article 227 of Constitution of India.

4. Apart from many other grounds, learned counsel for petitioner has firmly argued that while deciding the point no. 4, there is reference of SCC Suit No. 288 of 2021 (Prakhar Tandon vs. M/s Mehta Sai Das Jewelers). SCC Court has taken note of above referred SCC Suit and given its finding that in case, the present SCC Suit is allowed, Rent Case No. 101 of 2016 (Prakhar Tandon vs. M/s Mehta Sai Das Jewelers) under Section 21(1)(a) of U.P. Act No. 13 of 1972 as well as SCC Suit No. 288 of 2021 (Prakhar Tandon vs. M/s Mehta Sai Das Jewelers) shall become infructuous.

5. He firmly submitted that there is no whisper of SCC Suit No. 288 of 2021 in the pleadings of SCC Suit i.e. plaint, written submissions or replica. In fact, reference of SCC Suit No. 288 of 2021 is beyond the pleadings, therefore, considering the said suit, any finding returned by the SCC Court is bad and solely on this ground, order is liable to be set aside.

6. He next submitted that there is apparent error in order dated 02.02.2022 of SCC Court, therefore, petitioner-plaintiff has filed SCC Revision with this specific

ground and surprisingly, Revisional Court while deciding the revision has admitted this fact that SCC Court has taken suo moto cognizance of SCC Suit No. 288 of 2021, which is bad, but rejected the SCC Revision. He further submitted that this fact has not been disputed by the counsel for respondent that facts of SCC Suit No. 288 of 2021 is beyond pleadings, therefore, once, this is the factual situation, both the orders are bad and liable to be set aside. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matter of ***Sri Shivaji Balaram Haibatti vs. Sri Avinash Maruthi Pawar; 2017 0 Supreme(SC) 1109*** and this Court in the matter of ***Girish Chandra Gupta vs. State of U.P.; 2005 0 Supreme (All) 1347.*** He also argued about the conduct of a Judge while deciding the case and ultimately submitted that if a Judge is having any personal interest in the matter or having personal knowledge of facts, he must recuse himself from the hearing of the case. In support of his contention, he has placed reliance of Division Bench judgment of High Court of ***Himachal Pradesh, Shimla in the matter of Shri S.C. Kainthla vs. State of H.P. & Ors. (CWP Nos. 2061 of 2018 alongwith CWP 2292 of 2018)*** decided on 12.12.2018.

7. Per contra, Sri Vikash Mathur along with Sri Rajnish Sahai Saxena, learned counsel for respondent has not disputed this fact that facts of SCC Suit No. 288 of 2021 is not part of pleadings, but submitted that reference of SCC Suit No. 288 of 2021 is based upon the argument made by learned counsel for respondent-defendant, therefore, it cannot be said that SCC Court has taken suo moto cognizance. He firmly submitted that the said issue was not so relevant, therefore, even if it is beyond pleadings, this cannot be a ground for allowing the present petition. In support of his contention he has placed reliance upon the judgments of Apex Court in the matters of ***Ram Sarup Gupta (dead) by L.Rs. vs. Bishun Narai Inter College and others; (1987) 0 Supreme(SC) 409, Virendra Kashinath Ravat & Anr. vs. Vinayak N. Joshi & Ors.; (1998) 0 Supreme(SC) 1133, Bachhaj Nahar vs. Nilima Mandal & Anr.; (2008) 0 Supreme(SC) 1421 and State of Maharashtra vs. Ramdas Shrinivas Nayak and another; 1982 0 Supreme (SC) 131.***

8. Earlier case was heard on 30.05.2024 and this Court has reserved the order to decide as to whether a counsel can argue a fact beyond pleadings or not. Further, a Judge can record a finding based upon his personal knowledge taking suo moto cognizance under the law or not.

9. I have considered the submissions advanced by counsels for parties, perused the records as well as judgments relied upon.

10. After summarizing the arguments, there are three questions, which are to be answered by this Court.

(i) as to whether a counsel beyond the pleadings can place a fact before the Court based upon his personal knowledge ?

(ii) as to whether a Judge while deciding the case can consider a fact, which is not the part of pleading and returns its finding upon that ?

(iii) as to whether once Revisional Court has accepted that SCC

Court has taken suo moto cognizance of the facts which are not the part of pleading and same is bad, can reject revision ?

11. The first issue is about the procedure and practice of argument by a counsel. There is no dispute on the point that any legal issue can be raised by a counsel before a Court either pleaded or not. Any provision of Constitution, Act, Statutes or Court made law i.e. judgments of Courts including Coordinate Court, High Courts or Supreme Court can be placed before the Court at any stage, for which no pleading is required.

12. So far as argument based upon facts are concerned, Counsel of a party is not supposed to know any facts beyond the pleadings. In fact, while representing a client, he is having only source of knowledge of facts arising out of pleadings and in case any fact is not pleaded in the pleadings, he cannot raise such facts before the Court based upon his personal knowledge. To bring any new facts before the Court, an affidavit is required to be filed by the plaintiff or defendant, as the case may be, alongwith opportunity of rebuttal to other side. In case any such facts are raised beyond the pleadings, same is absolutely bad, it is required on the part of Court to depreciate and reject the same. Therefore, this Court is of the firm view that a counsel cannot be given liberty to argue a fact before the Court which is not the part of pleadings and in case any such argument is made, that may be recorded by the Courts, but ultimately should have been rejected. If any order has been passed considering such facts, which are not pleaded, is bad and liable to be set aside.

13. Therefore, answer of the first question is that a counsel can not be permitted to argued a fact, which is not the part of pleadings. In case, it is argued, it is required on the part of Court to reject the same.

14. Now, coming to the second issue which pertains to the procedure and practice applicable to the Judge of a Court. One thing is common here that apart from law, Judge is supposed to know the facts only from the pleadings. Here, in the present case, there is no dispute on the point that SCC Suit No. 288 of 2021 is not part of the pleadings and it is argued by learned counsel for defendant. The said argument was recorded by the SCC Judge, but surprisingly, while deciding the suit, he was opined that in case present suit is allowed, Rent Case No. 101 of 2016 and SCC Suit No. 288 of 2021 shall become infructuous. Now, it is clear that SCC Judge has taken note of SCC Suit No. 288 of 2021 and decided the case to save the proceedings of SCC Suit No. 288 of 2021 also. Relevant part of judgment is being quoted below:-

"यदि वर्तमान वाद में प्रतिवादी को बेदखल करके प्रश्नगत दुकान का कब्जा वादिनी को दिलाया जाता है, तब अन्य सहस्वामी प्रखर टण्डन द्वारा दाखिल रेण्ट वाद संख्या 101/2016 प्रखर टण्डन बनाम मेसर्स मेहता साईदास ज्वैलर्स धारा 21 (1) (ए) यू०पी०एक्ट 13 सन् 1972 की कार्यवाही निष्फल हो जाएगी। **इसके अलावा इसी प्रश्नगतं दुकान से प्रतिवादी के निष्कासन एवं किराया वसूली के लिए दाखिल किये गए लघुवाद सं0-288/2021 प्रखर टण्डन बनाम मेसर्स मेहता साईदास ज्वैलर्स, जो इस न्यायालय में लम्बित है। यह लघुवाद भी निष्फल हो जाएगा।** इन परिस्थितियों में वाद बाहुल्यता एवं कानूनी पेचीदगियां अत्यधिक बढ़ जायेंगे और अन्य सहस्वामी प्रखर टण्डन, सहित अन्य

सहस्वामीगणों के हित प्रभावित हो जायेंगे। मामले के समस्त तथ्यों एवं परिस्थितियों को दृष्टिगत रखते हुए एवं माननीय उच्चतम् न्यायालय द्वारा उपरोक्त सभी विधि व्यवस्थाओं में प्रतिपादित विधि सिद्धान्त के अनुसार अन्य सहस्वामीगण / भूस्वामीगण की सहमति के बिना वादिनी को वर्तमान वाद प्रतिवादी की बेदखली के लिए संस्थित करने का अधिकार नहीं है। तदनुसार विचारणीय बिन्दु सं० 2 वादिनी के विरूद्ध निर्णीत किया जाता है।"

15. Similar issue was before the Court in the matter of ***Girish Chandra Gupta (Supra)*** in which Court has held that without pleading, no one can be permitted to lead evidence beyond pleadings. Relevant paragraph no. 5 of the said judgment is quoted below:-

"(5) BEFORE this Court, learned Counsel appearing on behalf of the petitioners- tenants contended that the plea of Sub-section (4) of Section 20 of the Act being not available to the tenants-petitioners in view of the proviso to Section 20 (4) of the Act has neither been taken in the plaint, nor by way of any amendment, therefore the revisional court have gone beyond its jurisdiction in decreeing the suit filed by the landlord. It is settled law that without pleadings, no one can be permitted to led evidence beyond the pleadings. Learned counsel for the respondents-landlord referred to the plaint, which has been annexed as Annexure-CA I to the counter-affidavit. A perusal thereof reveals that there was no such plea that the petitioners-tenants are not entitled to get the benefit of Section 20 (4) of the Act, has been taken by the respondents-landlord. In this view of the matter, the orders passed by the trial court as well as by the revisional court deserve to be quashed and are hereby quashed. The matter will now go back to the trial court to decide the suit afresh in the light of the observations made in this judgment and in accordance with law."

16. This issue was also before the Apex Court in the matter of ***Sri Shivaji Balaram Haibatti (Supra)*** and the Apex Court has taken strict view that parties to the suit cannot travel beyond pleadings. Relevant paragraph no. 28 of the said judgment is quoted below:-

"28. It is these issues, which were gone into by the two Courts and were concurrently decided by them against the respondent. These issues, in our opinion, should have been examined by the High Court with a view to find out as to whether these findings contain any legal error so as to call for any interference in second appeal. The High Court, however, did not undertake this exercise and rather affirmed these findings when it did not consider it proper to frame any substantial question of law. **It is a settled principle of law that the parties to the suit cannot travel beyond the pleadings so also the Court cannot record any finding on the issues which are not part of pleadings**. In other words, the Court has to record the findings only on the issues which are part of the pleadings on which parties are contesting the case. Any finding recorded on an issue de hors the pleadings is without jurisdiction. Such is the case here. "

17. From the perusal of judgments of this Court as well as Apex Court, it is apparently clear that Courts cannot be permitted to travel beyond pleadings in the matter of facts and in case any finding recorded beyond pleadings and judgment

given considering the same, such judgment is not sustainable.

18. Sri Vikash Mathur, learned counsel for respondent has placed reliance upon upon paragraph no. 6 of the judgment of ***Ram Sarup Gupta (Supra).*** From the perusal of paragraph no. 6 of the said judgment, it is apparently clear that fact of the case is entirely different and in that matter Apex Court has taken view that once the facts are known to the parties and evidence are also led in trial, absence of pleading cannot be a ground to reject the suit. Relevant paragraph no. 6 of the said judgment is quoted below:-

"The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the license was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings, instead; the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal. In Bhagwati Prasad v. Shri Chandramaul, [1956] 1 SCR 286 a Constitution Bench of this Court considering this question observed:

"If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that

the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to reply upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another." ”

19. Another judgment relied by learned counsel for respondent is ***Bachhaj Nahar (Supra)***. Relevant paragraph nos. 10-11 of the said judgment is quoted below:-

“10. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief. The High Court has ignored the aforesaid principles relating to the object and necessity of pleadings. Even though right of easement was not pleaded or claimed by the plaintiffs, and even though parties were at issue only in regard to title and possession, it made out for the first time in second appeal, a case of easement and granted relief based on an easementary right. For this purpose, it relied upon the following observations of this Court in Nedunuri Kameswaramma v. Sampati Subba Rao [AIR 1963 SC 884]: “No doubt, no issue was framed, and the one, which was framed, could have been more elaborate, but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion.” But the said observations were made in the context of absence of an issue, and not absence of pleadings. The relevant principle relating to circumstances in which the deficiency in, or absence of, pleadings could be ignored, was stated by a Constitution Bench of this Court in Bhagwati Prasad vs. Shri Chandramaul – AIR 1966 SC 735 : “If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that

the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matter relating to the title of both parties to the suit was touched, tough indirectly or even obscurely in the issues, and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another. The principle was reiterated by this Court in Ram Sarup Gupta (dead) by LRs., vs. Bishun Narain Inter College [AIR 1987 SC 1242]: "It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the court to ascertain the substance if the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on those issue by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal."

20 . In both the cases too, facts are entirely different and as per the facts of the case, parties are known to all facts, which are not pleaded and also proceeded to lead evidence, therefore, they cannot take ground of absence of pleadings.

21. He has also placed reliance upon the judgment of ***Virendra Kashinath Ravat (Supra).*** Relevant paragraph nos. 14 & 16 of the said judgment is quoted below:-

"14. Learned Single Judge treated the aforesaid pleading as insufficient to make out a case for subletting. This was not a point considered by or even raised before the two fact finding forums. Order 6 Rule 5

of the Code of Civil Procedure (For short 'the Code') confers powers on the Court to order a party to make a further statement or even a better statement or further and better particulars of any matter already mentioned in the pleading. This is incorporated in the Code to indicate that no suit shall be dismissed merely on the ground that more particulars are not stated in the pleadings. If the contesting respondents, or any of them had raised objection that the pleading was scanty perhaps appellants would have further elaborated it as provided in Rule 5 above. At any rate this should not have been a premise on which interference by the High Court should have been made in exercising a jurisdiction of superintendence under Article 227 of the Constitution.

15. That apart, the averment extracted above cannot by any standard be dubbed as bereft of sufficiency in pleading. Under Order 6 Rule 2(1) of the Code the requirement is the following:

"Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

16. The object of the Rule is two-fold. First is to afford the other said intimation regarding the particular facts of his case so that they may be met by the other side. Second is to enable the court to determine what is really the issue between the parties. The words in the sub-rule "a statement in a concise form" are definitely suggestive that brevity should be adhered to while drafting pleadings. Of course brevity should not be at the cost of setting out necessary facts, but it does not mean niggling in the pleadings. If care is taken in the syntactic process, pleadings can be saved from tautology. Elaboration of facts in pleadings is not the ideal measure and that is why the sub-rule embodied the words "and contain only" just before the succeeding words "a statement in a concise form of the material facts"."

22. Here also facts of the case are entirely different and having no relevance in the present case.

23. Lastly, he placed reliance upon the judgment of Apex Court in the matter of ***State of Maharashtra(Supra)***. Issue before the Apex Court was as to whether any concession given by the counsel before the Court and also recorded can be resile from the same or not. In the present matter, there is no such concession given by the counsel, but counsel brought a fact into the knowledge of the Court, which is beyond the pleadings and considering the same, order impugned has been passed. Therefore, this judgment is not relevant for present case.

24. In the present case, the issue is entirely different and creating doubt over the fairness and conduct of the Judge concerned, who has passed the order. It is undisputed between the parties that there is no reference of SCC Suit No. 288 of 2021 in the pleading and as per Sri Mathur, learned counsel for respondent, it was argued by counsel for defendant before the SCC Court. Once such is the situation, a Judge must have discard such arguments at the very threshold and certainly while deciding the issue that argument should not be taken care of. In the matter of ***Ram Sarup Gupta (Supra),*** Apex Court in a very strong words has said that parties in the suit cannot travel beyond pleadings. In fact such finding of facts beyond pleadings

made by Court creates doubts and fairness of a Judge. In the case of ***Shri S.C. Kainthla (Supra)***, the Court has dealt in detail about the conduct and fairness of a Judge based upon the Principle that Judgeship should not only be done but must be seem to be done. Relevant paragraph no. 28 of the said judgment is quoted below:-

"28. Hon'ble Apex Court in the aforesaid judgment has reiterated that impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. "

25. Therefore, in the light of law laid down by the Courts, answer of question no. 2 is that in case any fact is not part of pleadings, a Judge should never place reliance upon such facts while deciding the case. In case reliance is placed, judgment is bad and alone on this ground, liable to be set aside.

26 . Now, coming to the third issue which is about the judgment of Revisional Court. Against the order dated 02.02.2022, revision was filed and in paragraph no. 15 of the judgment dated 18.08.2023, there is categorical finding of Revisional Court that SCC Court has taken suo moto cognizance of SCC Suit No. 288 of 2021 which is bad. Paragraph No. 15 of the judgment of Revisional Court dated 18.08.2023 is quoted below:-

"15. यहाँ यह उल्लेखनीय है कि अवर न्यायालय द्वारा अपने निर्णय में वाद संख्या- 288/2021 का उल्लेख करते हुये यह कहा गया है कि इसी दुकान के इसी प्रतिवादी के विरुद्ध प्रखर टण्डन द्वारा किराया वसूली एवं निष्कासन के लिये वाद दाखिल किया गया है जबकि इस वाद का कहीं कोई उल्लेख पत्रावली पर नहीं है। **पत्रावली के अवलोकन से विदित होता है कि अवर न्यायालय द्वारा अपने निर्णय में वाद संख्या-288/2021 प्रखर टण्डन बनाम मेसर्स मेहता सांई दास ज्वैलर्स का उल्लेख किया गया है व कहा गया है कि यह वाद न्यायालय में लंबित है, परंतु पत्रावली में इस वाद के विषय में कहीं कोई उल्लेख नहीं है। अतः ऐसा प्रकट होता है कि अवर न्यायालय द्वारा इस बात का स्वतः ही संज्ञान ले लिया गया है, जोकि यद्यपि त्रुटिपूर्ण है**, परंतु उपर्युक्त संपूर्ण विवेचन एवं विश्लेषण के परिप्रेक्ष्य में यह स्पष्ट है कि विद्वान लघुवाद न्यायालय द्वारा पारित आक्षेपित निर्णय, तथ्यों, साक्ष्यों एवं विधि के विश्लेषण के सापेक्ष तार्किक निष्कर्ष पर आधारित है। विद्वान विचारण न्यायालय द्वारा पारित आक्षेपित आदेश में कोई तथ्यात्मक या विधिक संबंधी त्रुटि परिलक्षित नहीं होती है। अतः उपर्युक्त संपूर्ण विवेचन एवं विश्लेषण के परिप्रेक्ष्य में आक्षेपित आदेश में किसी हस्तक्षेप की आवश्यकता नहीं रह जाती है। तदनुसार यह पुनरीक्षण बलहीन है, तदैव निरस्त किये जाने योग्य है।"

27. Once, such is the finding, it is very surprising as to how revision has been rejected. In fact the judgment of Revisional Court is self-contradictory as on one hand, Revisional Court has taken a view that finding of SCC Court is bad and on other

hand, rejected the revision, which is not permissible.

28. Therefore, answer of question no. 3 is that this Court is of the firm view that judgment of a Court cannot be contrary to its finding. While deciding any issue, a categorical and reasonable finding is required from the Court and based upon that, judgment has to be pronounced. Further, it is not permissible to give a contrary judgment not corroborating with the finding given. Therefore, such judgment of Revisional Court is bad and liable to be set aside.

29. In the light of observations made here-in above, impugned orders dated 02.02.2022 & 18.08.2023 are bad and hereby set aside.

30. Matter is remanded back to Judge, Small Cause Court, Kanpur Nagar to decide SCC Suit No. 72 of 2015 afresh, maximum within a period of three months from the date of production of certified copy of this order.

31. With the aforesaid observations, writ petition is ***allowed.***

32. No order as to costs.

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**(2024) 7 ILRA 874**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 15.07.2024**

**BEFORE**

**THE HON'BLE ASHUTOSH SRIVASTAVA, J.**

Matters Under Article 227 No. 3112 of 2023
Alongwith
other cases

**Nirmal Agarwal ...Petitioner**

**Versus**

**Pradeep Kumar Gupta ...Respondent**

**Counsel for the Petitioner:**
Sri Rishab Agarwal, Sri Tarun Agarwal

**Counsel for the Respondents:**
Sri Rama Goel Bansal

**A. Civil Law – Landlord-tenant dispute- Sections 2(b), 2 (d), 10, 33 & 34 of the U.P. Act No. 16 of 2021- Petition filed by the tenant- Challenge to the order of the Rent Authority- Section 10 application by landlord Trust for determination of rent- Decided without considering tenant's objection regarding maintainability.**

**B. Definition of landlord under Section 2(b) of the Act- includes a person who receives rent on behalf of owner/lessor- Secretary of the landlord trust in present case covered by the definition of landlord- Form of Information of Tenancy under Section 4(1) as provided in First Schedule of the Act- contains correct information- Application filed by the trust through its secretary- Application under Section 10 not filed by Secretary in his personal capacity. (Paragraphs 17 and 18)**
**HELD:**
The definition of Landlord under Section 2 (b) embraces within its scope landowner or lessor called by any other name, a person who receives or is entitled to receive the rent of any premises, on his own account and includes the successor, transferee or assignee of such person as also a trustee or guardian or receiver receiving rent for the premises on account of or on behalf of or for the benefit of any other person such as minor or person of unsound mind who cannot enter into a contract. (Para 17)

Thus, the definition includes a person who receives rent on behalf of the owner/lessor as per Section 2 (b) (ii) of the Act. In the case at hand, admittedly the tenant petitioner has been tendering rent of the premises to the respondent who is the Secretary of Seth Girwar Lal Pyare Lal Shiksha Trust, Agra/owner/lessor of the premises as is evident from the rent

receipt filed on record as Annexure-CA-1 to the counter affidavit which bears the signatures of the tenant petitioner. The Court is not impressed by the submissions of learned counsel for the petitioner that the respondent cannot come within the definition of Landlord under the Act in view of the fact that the respondent is merely a Secretary of the Trust and even though entitled to collect rent at best would qualify as a Property Manager under Section 2 (d) of the Act and a Property Manager has not been conferred with rights to institute any application on behalf of the landlord for determination of rent or for the eviction of the tenant. In the opinion of the Court, the argument is based upon the cause title of the application under Section 10 of the U.P. Act No. 16 of 2021 wherein the proceedings have been drawn in the name of the respondent discharging himself as Secretary of the lessor Trust. The Court finds substance in the submissions of the learned counsel for the respondent that though in the Form for information of Tenancy under Section 4 (1) of the Act No. 16 of 2021 before the Rent Authority, Trust has been described as Landlord through the Secretary, but in the application under Section 10 of the Act, the description has been wrongly mentioned and the error has been sought to be rectified by moving appropriate amendment application, which is pending consideration. This Court finds that the attempt made by the respondent in curing the defect of the Section 10. Application is of utmost importance in view of it being a curable defect. The Form of Information of Tenancy under Section 4 (1) of the Act as provided in the First Schedule of the Act 16 of 2021 has been brought on record as Annexure-CA-1 to the counter affidavit. From the materials brought on record, it does not appear to be a case of challenge to the title of the landlord. The Court after perusal of the materials on record comes to the conclusion that the application under Section 10 of the U.P. Act No. 16 of 2021 has been filed by the Trust Seth Girwar Lal Pyare Lal Shiksha Trust, Agra through the Secretary Shri Pradeep Kumar Gupta and not by Shri Pradeep Kumar Gupta in his own capacity claiming exclusive ownership of the premises and is maintainable. The issue No. 1 is decided accordingly. (Para 18)

**C. Application preferred by tenant under Order VII Rule 11 of CPC- read with Section 34 (1) (h) of the Act- Held not maintainable- Section 33 of the Act- Nothing contained in CPC would apply to Rent Authority and Rent Tribunal- Order VII Rule 11 of CPC not covered under Section 34 (1) (h) of the Act- Contrary to the scheme of the Act . (Paragraphs 19 to 24)**

**HELD:**

In the opinion of the Court, the provisions of Order 7 Rule 11 would not be covered under Section 34 (1) (h) of the Act since it would run contrary to the scheme of the Act. A bare perusal of Section 33 of the Act goes onto show that the legislature has specifically excluded the application of the provisions of the Code of Civil Procedure, 1908 except as provided for in the Act. The same provision further provides that the Rent Authority/Tribunal shall be guided by the principles of natural justice and have the power to regulate their own procedure subject to the sub-clauses (a) to (e). Sub-clauses (a) to (e) lay down the procedure that is to be followed by a Rent Authority/Tribunal on receipt of an application/appeal by a landlord or a tenant. Thereafter, sub-clause (b) provides for notices to be issued to the other party. Sub-clause (c) permits the other party to file their reply to the application/appeal. Sub-clause (d) allows the original applicant/appellant to file their rejoinder, if they so wish to. Thereafter, sub-clause (e) provides that the Rent Authority/Tribunal shall fix a date for hearing/disposing off the application/appeal finally. (Para 21)

The Court finds substance in the submissions of learned counsel for the respondent that the application under Section 7 Rule 11 CPC would not be maintainable even otherwise as liberty has already been granted to the tenant/petitioner to take all objections in the written statement to the application under Section 10 of the Act. The issue No. 2 is decided accordingly. (Para 24)

**D. Impugned order upheld- No illegality in declining to decide the application of the petitioner under Order VII Rule 11 of CPC read with Section 34 (1) (h) of the Act- More so as opportunity to raise objections in written statement already given- Petition dismissed.**

**HELD:**

Now, coming to the issue No. 3, the Court after hearing the parties and perusing the materials on record and in view of the discussion hereinabove comes to the conclusion that the impugned order dated 1.3.2023 passed by the Rent Authority cannot be said to suffer from patent illegality by declining to decide the application of the petitioner under Order 7 Rule 11 CPC read with Section 34 (1) (h) of the U.P. Act No. 16 of 2021 inasmuch as opportunity has already been granted to the petitioner to take all objections as to the maintainability of the application under Section 10 of the Act in the written statement to be considered at the final hearing stage. (Para 25)

**Petition dismissed.** (E-14)

**List of Cases cited:**

1. 2005 (10) SCC 274

2. 2017 SCC Online All 1356

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

1. All the above referred petitions involve identical questions of law and facts. The petition, being Matters under Article 227 No. - 3112 of 2023 is being treated as the leading petition and the facts pertaining to the same are being considered for deciding the controversy involved.

2. Heard Shri Rishabh Agarwal, learned counsel for the petitioner and Smt. Rama Goel Bansal, learned counsel who has put in appearance on behalf of the sole respondent.

3. The petition, being No. 3112 of 2023, under Article 227 of the Constitution of India has been filed questioning the order dated 1.3.2023 passed by the Addl. District Magistrate (EC)/Rent Authority, Agra in Case No. 1116 of 2022 (Pradeep Kumar Gupta versus Nirmal Kumar Agarwal). A suitable direction to the Addl. District Magistrate (EC)/Rent Authority, Agra to adjudicate upon the issue of maintainability of the application under Section 10 of the U.P. Act No. 16 of 2021 at the instance of the sole respondent has been sought.

4. By the order impugned, the Addl. District Magistrate (EC)/Rent Authority, Agra has entertained the application of the sole respondent for determination of rent under Section 10 of the U.P. Act No. 16 of 2021 without considering the objection of the tenant petitioner to the maintainability of the application itself granting liberty to take all objections at the time of filing reply to the application under Section 10 of the Act.

5. The undisputed facts necessary for adjudicating the controversy involved in the instant petition under Article 227 of the Constitution of India are that the petitioner herein is tenant of a shop on the ground floor of property No. 31/58-59, Kokamal Market, Rawatpara, Agra let out to him by Seth Girwar Lal Pyare Lal Shiksha Trust. The petitioner has been regularly tendering the rent of the tenanted premises to the aforesaid Trust and receipts have been issued by the Trust.

6. It has been submitted that an application under Section 10 of the Act for determination of the rent of the premises has been filed by the sole respondent Shri Padeep Kumar Gupta in the capacity of Secretary of Girwar Lal Pyare Lal Shiksha Trust. The said application under Section 10 has been objected to by the petitioner by filing an application dated 20.1.2023 under Order 7 Rule 11 CPC read with Section 34 (1) (h) of the U.P. Act No. 16 of 2021. In the said application besides an objection as

to the deficiency in the payment of the Court Fee, the petitioner has raised specific objection to the maintainability of the application at the behest of the respondent on the ground that the Trust has not been impleaded as a party to the application under Section 10 of the U.P. Act No. 16 of 2021.

7. Learned counsel for the petitioner submits that the learned Addl. District Magistrate (EC)/Rent Authority, Agra has manifestly erred in not considering the objections of the petitioner to the maintainability of the application and instead of deciding the same upfront has directed the petitioner to instead file his written statement and take all objections which shall be considered at the time of final arguments.

8. Learned counsel for the petitioner vehemently submits that an application under Section 10 of the U.P. Act No. 16 of 2021 can be filed only by the landlord. As per Section 2(b) of the U.P. Act No. 16 of 2021 'Landlord' means a person who receives or is entitled to receive the rent of any premises and includes a Trustee. The respondent admittedly is only a Secretary of the Trust. The Secretary of the Trust is not statutorily recognized as Landlord and even though he may be entitled to collect rent, at best, he would qualify as a property Manager under Section 2 (d) and a property manager has not been conferred with any rights to institute any application on behalf of the Landlord for determination of rent or for eviction.

9. Learned counsel for the petitioner has tried to draw a distinction between the definition of 'Landlord' as contained in U.P. Act No. 13 of 1972 and U.P. Act No. 16 of 2021. Landlord as per the U.P. Act No. 13 of 1972 in relation to a building has been described to mean a person to whom its rent is or if the buildings were let, would be payable and includes except in Clause (g) the agent or attorney, or such person. Thus, according to learned counsel for the petitioner under the U.P. Act No. 13 of 1972 it is only the actual owner or person authorized by him for receiving notice or letting out the premises who will be the landlord. The position under the U.P. Act No. 16 of 2021 is, however, different and landlord means a person who receives or is entitled to receive the rent of any premises and includes a Trustee. Learned counsel for the petitioner further submits that all the trustees of the Trust have since expired and the respondent cannot continue to act on behalf of the Trust and maintain any application on behalf of the Landlord/Trust. Reliance is placed upon the decision of the Apex Court reported in ***2005 (10) SCC 274*** and a decision of the co-ordinate Bench of this Court reported in ***2017 SCC Online All 1356*** to buttress the point that the issue of maintainability of a proceeding is to be decided first before passing any order. It is accordingly prayed that this Court may either decide the issue of maintainability or remit the matter to the Rent Authority for decision on the issue of maintainability.

10. Smt. Rama Goel Bansal, learned counsel appearing for the sole respondent has filed counter affidavit in opposition to the petition and submits that the petitioner is a tenant of the ground floor of the premises No. 31/58-59 Kokamal Market, Rawatpura, Agra at the rate of Rs. 1212/- per month. The rent is very low considering the location of the premises which can command a rental of at least Rs. 100/- per square feet, which works out to

Rs. 14,500/- per month besides taxes and GST. The petitioner is a defaulter in payment of rent since 01.04.2021 and legal notice has already been sent on 12.09.2022 through registered post which has been duly served on 14.09.2022. Proceedings under Section 10 of the UP Act No. 16 of 2021 has been drawn against the petitioner. The petitioner has taken an objection to the maintainability of the application under Section 10 of the UP Act No. 16 of 2021 which does not merit consideration. In the form for information of tenancy under Section 4 (1) of the Act No. 16 of 2021 before the Rent Authority as specified in the 1st Schedule, in the first column description of landlord has been mentioned as Seth Girwar Lal Pyare Lal Shiksha Trust 31/58-59, Kokamal Market Rawatpura, Agra through Secretary Mr. Pradeep Kumar Gupta but in the application under Section 10 the description has been wrongly mentioned by typographical error which is a curable defect and to remove the said defect an amendment has already been sought which is pending. The objections have been taken just to delay the proceedings. It is also stated in the counter affidavit that the application moved by the petitioner purportedly under Order 7 Rule 11 CPC is not maintainable in view of the provisions made under Section 33 of the UP Act No. 16 of 2021 which provides for the procedure to be followed by the Rent Authority and Rent Tribunal and further provides that nothing contained in CPC, 1908 shall be applied to the Rent Authority or Rent Tribunal which shall be guided by the principles of natural justice and shall have power to regulate their own procedure in the manner as provided in the section itself. It has also been stated that the application under Order 7 Rule 11 CPC is not maintainable and liberty has already been granted to the petitioner to take all objections in the written statement to be filed to the proceedings under Section 10 of the Act. It is also stated that no prejudice/injustice has been caused to the petitioner as full opportunity to raise the issue of non maintainability of the application under Section 10 has been provided to the petitioner.

11. In the supplementary counter affidavit certain exemplars have been brought on record to demonstrate that the premises under the tenancy of the petitioner can fetch rent to the tune of Rs.14,500/- per month.

12. In the rejoinder affidavit the averments made in the counter affidavit have been denied and averments made in the petition have been reiterated.

13. By way of a supplementary rejoinder affidavit, learned counsel for the petitioner has brought on record proceedings of Civil Suit No. 32 of 2014 filed for eviction of a tenant before the Civil Court at Morina (MP) by Shri Pradeep Gupta in which evidence of Shri Pradeep Gupta was recorded and the said Pradeep Gupta admitted in his cross examination that the registered trustees of the Trust had already expired and the Application under Section 10 of the UP Act No. 16 of 2021 is clearly without Authority.

14. I have heard the learned counsels for the parties and have perused the record. From the arguments advanced and perusal of the materials on record. The following questions fall for consideration in the present petition:

"I. Whether the Application under Section 10 of the UP Act No. 16 of 2021

has been filed at the behest of Sri Pradeep Kumar Gupta describing himself as Secretary Seth Girwar Lal Pyare Lal Shiksha Trust and claiming himself to be exclusive landlord of the premises under the tenancy of the petitioner rendering the application non maintainable as asserted by the petitioner or has been filed by the Trust through the Secretary Sri Pradeep Kumar Gupta of the Trust as asserted by the respondent?

ii. Whether the Application under Order 7 Rule 11 CPC read with Section 34 (1)(h) of the UP Act No. 16 of 2021 is maintainable?

iii. Whether the order dated 01.03.2023 passed by the Rent Authority can be said to suffer from patent illegality by declining to decide the Application of the petitioner under Order 7, Rule 11 CPC read with Section 34 (1)(h) of the UP Act No. 16 of 2021 but at the same time granting opportunity to the petitioner to take all objections as to the maintainability of the Application under Section 10 of the Act in the written statement to the Application under Section 10 to be considered at the final hearing stage?"

15. Admittedly, the petitioner is a tenant of the ground floor of the premises No. 31/58-59 Kokamal Market, Rawatpura, Agra which premises is owned by Seth Girwar Lal Pyare Lal Shiksha Trust, Agra.

16. In order to appreciate the rival contentions of the learned counsels for the parties, it would be apt to analyze the definition of "Landlord" under the U.P. Regulation of Urban Premises Tenancy Act, 2021. The definition is contained in Section 2 (b) of the Act which is quoted as under:-

***<u>2. (b) "Landlord",</u>***

*"landlord", whether called landowner or lessor or by any other name, means a person who receives or is entitled to receive, the rent of any premises, on his own account, if the premises were let to a tenant, and shall include ?*

*(i) successor, transferee or assignee;*

*(ii) a trustee or guardian or receiver receiving rent for any premises or entitled to so receive, on account of or on behalf of or for the benefit of, any other person such as minor or person of unsound mind who cannot enter into a contract;*

17. The definition of Landlord under Section 2 (b) embraces within its scope landowner or lessor called by any other name, a person who receives or is entitled to receive the rent of any premises, on his own account and includes the successor, transferee or assignee of such person as also a trustee or guardian or receiver receiving rent for the premises on account of or on behalf of or for the benefit of any other person such as minor or person of unsound mind who cannot enter into a contract.

18. Thus, the definition includes a person who receives rent on behalf of the owner/lessor as per Section 2 (b) (ii) of the Act. In the case at hand, admittedly the tenant petitioner has been tendering rent of the premises to the respondent who is the Secretary of Seth Girwar Lal Pyare Lal Shiksha Trust, Agra/owner/lessor of the premises as is evident from the rent receipt filed on record as Annexure-CA-1 to the counter affidavit which bears the signatures of the tenant petitioner. The Court is not

impressed by the submissions of learned counsel for the petitioner that the respondent cannot come within the definition of Landlord under the Act in view of the fact that the respondent is merely a Secretary of the Trust and even though entitled to collect rent at best would qualify as a Property Manager under Section 2 (d) of the Act and a Property Manager has not been conferred with rights to institute any application on behalf of the landlord for determination of rent or for the eviction of the tenant. In the opinion of the Court, the argument is based upon the cause title of the application under Section 10 of the U.P. Act No. 16 of 2021 wherein the proceedings have been drawn in the name of the respondent discharging himself as Secretary of the lessor Trust. The Court finds substance in the submissions of the learned counsel for the respondent that though in the Form for information of Tenancy under Section 4 (1) of the Act No. 16 of 2021 before the Rent Authority, Trust has been described as Landlord through the Secretary, but in the application under Section 10 of the Act, the description has been wrongly mentioned and the error has been sought to be rectified by moving appropriate amendment application, which is pending consideration. This Court finds that the attempt made by the respondent in curing the defect of the Section 10. Application is of utmost importance in view of it being a curable defect. The Form of Information of Tenancy under Section 4 (1) of the Act as provided in the First Schedule of the Act 16 of 2021 has been brought on record as Annexure-CA-1 to the counter affidavit. From the materials brought on record, it does not appear to be a case of challenge to the title of the landlord. The Court after perusal of the materials on record comes to the conclusion that the application under Section 10 of the U.P. Act No. 16 of 2021 has been filed by the Trust Seth Girwar Lal Pyare Lal Shiksha Trust, Agra through the Secretary Shri Pradeep Kumar Gupta and not by Shri Pradeep Kumar Gupta in his own capacity claiming exclusive ownership of the premises and is maintainable. The issue No. 1 is decided accordingly.

19. Now coming to the issue No. 2 as to whether the application under Order 7 Rule 11 CPC read with Section 34 (i) (h) of the U.P. Act No. 16 of 2021 is maintainable or not, the Court finds that Section 33 of the U.P. Act No. 16 of 2021 which deals with the procedure to be followed by the Rent Authority and Rent Tribunal has specifically laid down that nothing contained in the Code of Civil Procedure, 1908 (Act No. 5 of 1908) shall apply to the Rent Authority and Rent Tribunal and they have been conferred with power to regulate their own procedure in the manner detailed in the section and such authorities shall be guided by the principles of natural justice. The provision of Section 33 of the U.P. Act No. 16 of 2021 is quoted hereunder:-

**33. Procedure to be followed in Rent Authority and Rent Tribunal** - (1) Save as provided in this Act, nothing contained in the Code of Civil Procedure 1908 (Act No. 5 of 1908) shall apply to the Rent Authority and Rent Tribunal, which shall be guided by the principles of natural justice and shall have power to regulate their own procedure in the following manner, namely :?

(a) the landlord or the tenant may file an application or appeal before the Rent Authority or Rent Tribunal, as the case may be, accompanied by affidavit and documents, if any;

(b) the Rent Authority or Rent Tribunal, as the case may be, shall then issue notice to the opposite party, accompanied by copies of application or appeal, affidavit and documents;

(c) the opposite party shall file a reply accompanied by affidavit and documents, if any, after serving a copy of the same to the applicant;

(d) the applicant may file a rejoinder, if any, after serving the copy to the opposite party;

(e) the Rent Authority or Rent Tribunal, as the case may be, shall fix a date of hearing and may hold such summary inquiry as it deems necessary.

(2) The Rent Authority or Rent Tribunal, as the case may be, shall endeavour to dispose the case as expeditiously as possible, not exceeding a period of more than sixty days from the date of receipt of the application or appeal:

Provided that where any such application or appeal, as the case may be could not be disposed of within the said period of sixty days, the Rent Authority or Rent Tribunal, as the case may be, shall record its reasons in writing for not disposing of the application or appeal within that period.

(3) In every application or appeal, before the Rent Authority or Rent Tribunal, as the case may be, the evidence of a witness shall be given by affidavit:

Provided that the Rent Authority or Rent Tribunal, as the case may be, may where it appears to it that it is necessary in the interest of justice to call a witness for examination or cross-examination, order attendance of such witness to be present for examination or cross-examination.

(4) The provisions of the Code of Civil Procedure, 1908 (Act No. 5 of 1908) regarding service of summons shall be applicable mutatis mutandis for service of notice by the Rent Authority or Rent Tribunal. In addition to the said mode of service, the service of notice to landlord or tenant may also be effected through e-mail, Whatsapp, SMS or other recognized electronic mode.

(5) Every application or appeal shall be in such form as may be prescribed.

(6) The Rent Authority or Rent Tribunal, as the case may be, shall not allow more than three adjournment at the request of a party throughout the proceedings and in case of reasonable and sufficient cause to do so, it shall record the reasons for the same in writing and order the party requesting adjournment to pay a reasonable cost.

(7) Every application under clauses (a), (b), (e), (f) and (g) of sub-section (2) of Section 21 or under Section 22 shall be decided within ninety days from the date of filing of such application before the Rent Authority.

(8) The Rent Authority shall decide every application filed under clause (c) and (d) of sub-section (2) of Section 21 within thirty days from the date of filing of such application.

20. Section 34 of the U.P. Act No. 16 of 2021 permits limited application of the provisions of the Code of Civil

Procedure, 1908 as is evident from the Section 34 of the U.P. Act No. 16 of 2021 quoted hereunder:-

***34. Powers of Rent Authority and Rent Tribunal.-****(1) The Rent Authority and the Rent Tribunal shall, for discharging their functions under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (Act No. 5 of 1908) for the purposes of, ?*

*(a) summoning and enforcing the attendance of any person and examining him on oath;*

*(b) requiring the discovery and production of documents;*

*(c) issuing commission for examination of the witnesses or documents;*

*(d) issuing commission for local investigation;*

*(e) receiving evidence on affidavits;*

*(f ) dismissing an application or appeal for default or deciding it ex-parte;*

*(g) setting aside any order of dismissal of any application or appeal for default or any other order passed by it ex-parte;*

*(h) any other matter, which may be prescribed.*

*(2) Any proceedings before the Rent Authority or Rent Tribunal shall be deemed to be a judicial proceeding within the meaning of Section 193 and 228, and for the purpose of Section 196, of the Indian Penal Code, 1860 (Act No. 45 of 1860); and the Rent Authority and the Rent Tribunal shall be deemed to be a civil court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974).*

*(3) For the purposes of holding any inquiry or discharging any duty under this Act, the Rent Authority may,?*

*(a) after giving not less than twenty-four hours' notice in writing, enter and inspect or authorize any officer, subordinate to it, to enter and inspect, any premises at any time between sunrise and sunset;*

*(b) by written order, require any person to produce for its inspection such books or documents relevant to the inquiry, at such time and at such place as may be specified in the order.*

*(4) The Rent Authority may, if it thinks fit, appoint one or more persons having special knowledge of the matter under consideration as an assessor or valuer to advise it in the proceedings before it.*

*(5) Any clerical or arithmetical mistake in any order passed by the Rent Authority or any other error arising out of any accidental omission may, at any time, be corrected by the Rent Authority on an application received by it in this behalf from any of the parties or otherwise.*

*(6) The Rent Authority may exercise the powers of a Judicial Magistrate of the first class for the recovery of the fine under the provisions of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974) and the Rent Authority shall*

*be deemed to be a Magistrate under the said Code for the purposes of such recovery.*

*(7) An order made by a Rent Authority or an order passed in appeal under this Chapter shall be executable by the Rent Authority as a decree of a Civil Court and for this purpose, the Rent Authority shall have the powers of a Civil Court.*

*(8) The Rent Authority may set aside or recall any order passed ex-parte if the aggrieved party files an application and satisfies it that the notice was not duly served or that he was prevented by any sufficient cause from appearing when the case was taken up for hearing.*

*(9) Save as otherwise expressly provided in this Act, every order made by the Rent Authority shall, subject to decision in appeal, be final and shall not be called in question in any original suit, application or execution proceedings.*

21. In the opinion of the Court, the provisions of Order 7 Rule 11 would not be covered under Section 34 (1) (h) of the Act since it would run contrary to the scheme of the Act. A bare perusal of Section 33 of the Act goes onto show that the legislature has specifically excluded the application of the provisions of the Code of Civil Procedure, 1908 except as provided for in the Act. The same provision further provides that the Rent Authority/Tribunal shall be guided by the principles of natural justice and have the power to regulate their own procedure subject to the sub-clauses (a) to (e). Sub-clauses (a) to (e) lay down the procedure that is to be followed by a Rent Authority/Tribunal on receipt of an application/appeal by a landlord or a tenant. Thereafter, sub-clause (b) provides for notices to be issued to the other party. Sub-clause (c) permits the other party to file their reply to the application/appeal. Sub-clause (d) allows the original applicant/appellant to file their rejoinder, if they so wish to. Thereafter, sub-clause (e) provides that the Rent Authority/Tribunal shall fix a date for hearing/disposing off the application/appeal finally.

22. It is pertinent to note here that as per the Scheme of the Act, the entire exercise is to be completed within a specific period and reasons have to be mandatorily recorded in case the application/appeal is not disposed of within the stipulated period.

23. Section 33 (4) of the Act makes the provisions regarding service of summons (particularly Order 5 of the Code of Civil Procedure, 1908) applicable to the proceedings before the Rent Authority/Tribunal. This Court finds that there is no similar provision adopting the provision relating to rejection of Plaint (Order 7 Rule 11 of the Code of Civil Procedure, 1908) in the entirety of the Act. Even otherwise, in the opinion of the Court, the adoption of the provisions of Order 7 Rule 11 CPC would run counter productive to the scheme of the Act as it would result in unnecessary delays. Importantly, it is to be noted that the other party can raise the same objections which would have raised in an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 in their reply which is permitted under sub-clause (c) of Section 33 (1) of the Act.

24. The Court finds substance in the submissions of learned counsel for the respondent that the application under Section 7 Rule 11 CPC would not be

maintainable even otherwise as liberty has already been granted to the tenant/petitioner to take all objections in the written statement to the application under Section 10 of the Act. The issue No. 2 is decided accordingly.

25. Now, coming to the issue No. 3, the Court after hearing the parties and perusing the materials on record and in view of the discussion hereinabove comes to the conclusion that the impugned order dated 1.3.2023 passed by the Rent Authority cannot be said to suffer from patent illegality by declining to decide the application of the petitioner under Order 7 Rule 11 CPC read with Section 34 (1) (h) of the U.P. Act No. 16 of 2021 inasmuch as opportunity has already been granted to the petitioner to take all objections as to the maintainability of the application under Section 10 of the Act in the written statement to be considered at the final hearing stage.

26. Consequently, the Court finds no merit in all the aforesaid writ petitions. All the aforesaid writ petitions are accordingly ***dismissed***. The interim order operating is discharged. The Rent Authority is, however, directed to decide the application under Section 10 of the Act No. 16 of 2021 with all expedition preferably within Sixty days as mandated by Section 33 (2) of the U.P. Act No. 16 of 2021 from the date of service of certified copy of the order of this Court. No order as to costs.

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**(2024) 7 ILRA 884**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 19.07.2024**

**BEFORE**

**THE HON'BLE MANISH KUMAR, J.**

Matters Under Article 227 No. 4420 of 2022

**Mrs. Anupama Dwivedi & Ors. ...Petitioners**
**Versus**
**Bharti Axa Life Insurance Co. Ltd. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Pradeep Kumar Shukla, Sri Skand Bajpai

**Counsel for the Respondents:**
Sri Abhishek Bhatnagar, A.S.G.I., C.S.C., Sri Saurabh Misra

**A. Civil Law – Consumer protection law- Consumer Protection Act, 2019- Consumer Protection (Consumer Commission Procedure) Regulations 2020- Respondent insurance company repudiated the insurance claim of the petitioner- Petitioners filed complaint before DCDRC- Notice issued- written statement filed and accepted after passage of statutory period of 45 days- Order challenged in revision before UPSCDRC- UPSCDRC upheld the order passed by DCDRC- both orders under challenge.**

**B. DCDRC accepted the written statement after 30 days- without any application by respondents seeking 15 days extra time- Section 38 (2) (a) of the Act, 2019- verbatim similar to Section 13(1) (a) of the Consumer Protection Act, 1986- Written statement cannot be accepted after 45 days- DCDRC does not have jurisdiction to accept written statement after 45 days- amounts to unwarranted jurisdiction not possessed- gross abuse of exercise of jurisdiction- objection, if any, has to be raised on the first date of appearance. (Paras 18 to 22)**
**HELD:**
From the perusal of the statutory provisions and judgments, it is clear that after 45 days, the written statement cannot be accepted meaning thereby after 45 days, D.C.D.R.C. is not having any jurisdiction to accept the written statement. In the present case, after about more than 168 days as far as it is related to the notice upon respondent no. 4 and after about more than 155

days as far as it is related to respondent nos. 1, 2 and 3 as notice was served upon respondent no. 4 on 02.04.2022 and the notice upon respondent no. 1, 2 and 3 were served on 05.04.2022 and the tracking report has been enclosed along with the writ petition which is on record, the written statement was permitted to be filed. (Para 20)

Hence, accepting the written statement after the expiry of 30 days period and more so, in absence of any application for extension of 15 days period before the DCDRC and accepting the written statement by the DCDRC after 45 days is nothing but amounts to an unwarranted assumption of jurisdiction not possessed or gross abuse of exercise of jurisdiction. (Para 21)

**C. Availability of remedy of review under Section 40 of the Act- challenge to the order on the ground- order passed without jurisdiction- violation of principles of natural justice- Alternative remedy held not to be an absolute bar. (Paras 23 and 24)**
**HELD:**
Section 40 of the Act, 2019 empowers DCDRC to review any of the order passed by it but in the present case, the challenge of the impugned order is on the basis that the order of DCDRC is without jurisdiction and in violation of principles of natural justice as no opportunity was given to file objections against the recall application. Under these circumstances and as per the settled law, the alternative remedy is not an absolute bar as held in the case of **Godrej Sara Lee Limited Vs Excise and Taxation Officer Cum Assessing Officers & ors.: 2023 SCC online Supreme Court 95. (Para 24)**

**D. Availability of alternative remedy under Section 51(2) of the Act, 2019- Appeal to National Commission maintainable- Only where the case involves substantial question of law- issue finally settled by the court- it is not a substantial question of law of general importance- this remedy not available to the petitioners- it merely involves application of a statutory provision. (Paras 25 to 27)**
**Held:**
The Hon'ble Supreme Court has held that where the issue is finally settled by the Court then it cannot be said that it is substantial question of law of general importance. Filing of written statement after a period of 45 days is not permissible under the law. Here it is only a question of applying the provision of law contained in Section 38(2)(a) of the Consumer Protection Act, 2019 and further applying the settled as laid down by the Hon'ble Supreme Court that the written statement cannot be accepted after lapse of 45 days. Here, no substantial question of law of general importance is involved. Hence the remedy under Section 51 (2) of the Act is not attracted in case of the petitioners. (Para 27)

**E. Remedy under Section 58 (1) (a) (iii) of the Act, 2019- it is available only against the order passed by the St. Commission in its original jurisdiction- this plea of petitioners is not maintainable- Appeal is maintainable- Impugned order passed without jurisdiction- hence, petition under Art. 227 held to be maintainable- petition allowed- DCDRC to hear the matter ignoring the written statement filed by the respondents. (Paras 28 to 30)**
**Held:**
A reading of these provisions makes it clear that the appeal is maintainable before the National Commission, for the reason Section 51(1) provides an appeal before the National Commission only against the orders passed under Section 47 (1)(a)(i) and Section 47 (1)(a)(ii). Section 47 (1)(a)(i) and Section 47(1)(a)(ii) deals with the matters where the orders are passed by the St. Commission in its original jurisdiction and Section 47(1)(a)(iii) is for appeals against the order of any District Commission within the St. Against which the remedy of appeal is available under Section 58 (1) of the Act, 2019. But here, as discussed above, the order passed by the DCDRC is without jurisdiction in the light of judgment in the case of ***New India Insurance (supra).*** Hence as per the law laid down in the case ***of Godrej Sara Lee Limited (supra***) which has been passed by placing reliance upon the judgment in the case of ***Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai, 1998, 8 SCC 1,*** the writ petition under Article 227 of the Constitution of India is maintainable. The judgments relied upon by learned counsel for respondents with regard to

the availability of alternative remedy and maintainability of the writ petition in the case of ***Mohamed Ali Vs V. Jaya & ors.passed in Civil Appeal No. 4113 of 2022, judgment and order dated 11.7.2022*** and judgment dated 13.10.2022 passed in the case of ***Raj Shri Agarwal & Ram Shri Agarwal & anr.Vs Sudheer Mohan & ors.(Civil Appeal No. 7266 of 2022)*** are not applicable in the facts of the present case as in those cases no such question was involved as in the present case. (Para 29)

**Petition allowed.** (E-14)

**List of Cases cited:**

1. New India Assurance Company Limited Vs Hilli Multipurpose Cold Storage Pvt Ltd. reported in (2020) 5 SCC 757

2. Mohamed Ali Vs Vs Jaya & ors. passed in Civil Appeal No. 4113 of 2022

3. Raj Shri Agarwal & Ram Shri Agarwal & anr.Vs Sudheer Mohan & ors.(Civil Appeal No. 7266 of 2022)

4. A.R.N. Infrastructure India Limited Vs Hara Prasad Singh (Civil Appeal Diary Nos. 31182 of 2023)

5. Jodhey & ors. Vs the St.through Ram Sahai reported in AIR 1952 All 788

6. Godrej Sara Lee Limited Vs Excise and Taxation Officer Cum Assessing Officers & ors.: 2023 SCC online Supreme Court 95

7. V. Valla Swami Vs Inspector General of Police, Tamilnadu Madras & anr.1981 (4) SCC 246

8. Appaiya Vs Andimuthu @ Thangapandi & ors.: 2023 SCC Online Supreme Court 1183

9. Principal Maharani Lal Kunwari Post Graduate College, Balrampur Vs Stae Consumer Dispute Redressal Commission, U.P. Lko through its President & ors.

10. Achutananda Baidya Vs Prafullya Kumar Gayen & ors.reported in AIR 1997 SC 2077

11. Ajay Singh & ors. Vs St. of Chattisgarh & ors. reported in AIR 2017 SC 310

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

1. Heard Shri Skand Bajpai, learned counsel for petitioner, Shri Abhishek Bhatnagar, learned counsel for respondent as well as learned State Counsel and perused the record.

2. The present writ petition has been preferred for setting aside the order dated 21.10.2022 passed by Uttar Pradesh State Consumer Disputes Redressal Commission, Lucknow (hereinafter referred as UPSCDRC) in RP/73/2022 titled as Mrs. Anupama Dwivedi and others versus Bharti Axa Life Insurance Co. Ltd, through Managing Director and CEO, Mumbai and others; impugned order dated 15.10.2022 passed by learned District Court Disputes Consumer Redressal Commision (hereinafter referred as DCDRC) in CC/81/22 titled as Mrs. Anupama Dwivedi and others versus Bharti Axa Life Insurance Co. Ltd Through Managing Director and CEO and others; and with a further prayer to pass an order declaring the Consumer Protection Procedure Regulations, 2020 as mandatory and binding on the Consumer Commission and direct strict observance of all the regulations contained therein and pass an order fixing a short date for evidence of the complainant before the learned DCDRC with a direction to dispose the matter in a time bound manner on priority basis and in line with Regulation 26 of the Consumer Protection (Consumer Commission Procedure) Regulations 2020.

3. Learned counsel for petitioners has submitted that a complaint was filed by the petitioners before the DCDRC, against

the respondents when the respondents have repudiated the insurance claim of the petitioners after the demise of husband of petitioner no. 1 and father of petitioner nos. 2 and 3, who was insured with the respondent company. In the said complaint case, the notice was issued on 01.04.2022 and the notice was served upon respondent no. 4 on 02.04.2022 and the respondent nos. 1, 2 and 3 on 05.04.2022. The first date was fixed thereafter on 13.05.2022, on that date, a counsel had put in appearance on behalf of respondents and filed Vakalatnama and the case was next fixed for 23.06.2022. On the date fixed i.e. 23.06.2022, no one had either put in appearance or filed written statement on behalf of respondents and the court had passed an order closing the opportunity of filing of the written statement and fixed the case on 15.10.2022.

4. It is further submitted that on 15.10.2022, a recall application was preferred by the counsel along with the copy of the written statement which was allowed on the very same date by recalling the order dated 23.06.2022, the order by which the opportunity of filing the written statement was closed and accepted the written statement filed on behalf of the respondents. The said order was passed without providing any opportunity of hearing to the petitioners to file an objection against the recall application though the counsel was present and apprised the court that after the lapse of 45 days, as per Section 38(2)(a) of the Consumer Protection Act, 2019, written statement could be accepted and that there was no illegality in the order dated 23.06.2022.

5. It is further contended that against the order dated 15.10.2022, a revision under Section 47(1)(b) was preferred by the petitioners before the Commission taking all the pleas by placing reliance upon Section 13(1)(a) of the Act, 1986 and the judgments of the Hon'ble Supreme Court particularly on the point that after 45 days' period, the written submission could not be accepted.

6. The said revision preferred by the petitioners was dismissed by judgment and order dated 20.10.2022 by the State Commission without recording any finding on the legal plea raised by the petitioners regarding the jurisdiction of the DCDRC and dismissed the revision only on the point that the recall application was allowed after imposing cost, hence no interference is called for.

7. It is further submitted that as per Section 38(2)(a) of the Consumer Protection Act, 2019 (hereinafter referred as Act, 2019), 30 days' period is provided or such extended period not exceeding 15 days as may be granted to it. The same provision is in the earlier Act i.e. Section 13(1)(a) in Consumer Protection Act, 1986 (hereinafter referred as Act, 1986). Both the Sections are in verbatim the same. Section 13(1)(a) was interpreted by the Hon'ble Supreme Court in the case of ***New India Assurance Company Limited Vs. Hilli Multipurpose Cold Storage Pvt Limited reported in (2020) 5 SCC 757***, wherein it has been held that Consumer Commission did not have jurisdiction to accept written statement of opposite parties beyond 45 days of service of notice.

8. It is further submitted that the application for recall preferred on 15.10.2022 was signed by counsel and the same was not supported by an affidavit of

the respondents i.e. the client or the party to the complaint case.

9. It is further submitted that in the judgment in the case ***of New India Assurance (supra),*** it has been held that if the respondents have any objection regarding notice, it must be raised on the first date of hearing whereas no objection was raised on the first date of hearing when the counsel for the respondent had filed his vakalatnama on 13.05.2022.

10. It is further submitted that in the counter affidavit before this court, the respondents have come with a case that it had wrongly been mentioned in the order dated 23.06.2022 that no one had appeared on behalf of respondents whereas one Shri Arpit Pandey on behalf of Shri Abhishek Bhatnagar, Advocate was present and his signature is there on the order sheet but the said signature for appearance of Shri Arpit Pandey is subsequent to the passing of the order not of the same date for the reason the petitioners had obtained the certified copy of the order dated 23.06.2022, on the very same day, wherein no such endorsement or appearance signed by Shri Arpit Pandey on the order sheet dated 23.06.2022, copy of which has been enclosed as R.A. No. 1 and secondly, Shri Arpit Pandey could not appear on behalf of Shri Abhishek Bhatnagar as Shri Arpit Pandey was neither the counsel nor the party to the case as he has enrolled subsequently, as an advocate with the Bar Council on 31.12.2022 (R.A-3) which shows that manipulation or fraud has been played with the record of the court.

11. On the other hand, Shri Abhishek Bhatnagar, learned counsel for the respondents has raised a preliminary objection regarding maintainability of the present petition on the ground that the petitioners have an alternative remedy to file a review under Section 40 or an appeal under Section 51 (2) and Section 58 before the National Commission as such, the writ petition is not maintainable under Article 227 of the Constitution of India. In support of his submissions learned counsel for the respondent has relied upon the judgments of Hon'ble Supreme Court in the case ***of Mohamed Ali Vs. V. Jaya and others passed in Civil Appeal No. 4113 of 2022,*** judgment and order dated 11.7.2022 and judgment dated 13.10.2022 passed in the case of ***Raj Shri Agarwal & Ram Shri Agarwal and another Vs. Sudheer Mohan and others (Civil Appeal No. 7266 of 2022),*** and in the case of ***A.R.N. Infrastructure India Limited Vs. Hara Prasad Singh (Civil Appeal Diary Nos. 31182 of 2023***), judgment and order dated 04.09.2023.

12. It is further submitted that this Court, under Article 227 of the Constitution of India, has no jurisdiction to look into the merits of the case.

13. It is further submitted that the notice was never received from the Court but the notices were sent by the petitioners that too incomplete as certain documents were not enclosed with the notice.

14. In reply to the preliminary objections raised by the learned counsel for the petitioner has relied upon the judgment of this Court in the case of ***Jodhey and others Vs. the State through Ram Sahai reported in AIR 1952 All 788,*** where the scope of Article 227 of the Constitution of India has been discussed and it has been held that the powers under Article 227 cannot be exercised unless there has been an unwarranted assumption of jurisdiction

not possessed by the Courts or a gross abuse of jurisdiction possessed by them or an unjustifiable refusal to exercise a jurisdiction vested in them by law.

15. Learned counsel for the petitioner has submitted that the remedy of review under Section 40 of the Act, 2019 is not an bar for filing the present writ petition when the proceedings are wholly without jurisdiction and in violation of principles of natural justice and in support of his submission learned counsel for the petitioner has relied on the judgment of the Hon'ble Supreme Court in the case of ***Godrej Sara Lee Limited Vs. Excise and Taxation Officer Cum Assessing Officers and others: 2023 SCC online Supreme Court 95*** and judgment of the Hon'ble Supreme Court in the case of ***V. Valla Swami Vs. Inspector General of Police, Tamilnadu Madras and another 1981 (4) SCC 246.***

16. It is further submitted that as far as availability of remedy to file an appeal under Section 51(2) of the Act, 2019 is concerned, it is also not available to the petitioner, as no substantial question of law is involved in the present case. The issue has already attained finality by the judgment of the Hon'ble Supreme Court and in support of his submission, learned counsel for the petitioner has relied upon the judgment of the the Hon'ble Supreme Court in the case of ***Appaiya vs Andimuthu @ Thangapandi and others: 2023 SCC Online Supreme Court 1183.***

17. As far as availability of remedy to file an appeal under Section 58(1)(a)(iii) of the Consumer Protection Act, 2019 is concerned, is also not available, as the same is available, only if the State Commission has exercised its original jurisdiction under Section 47(1)(a)(i) and 47 (1)(a)(ii) and passed an order, as Section 58 of the Act, 2019 is subject to Section 51 of the Act, 2019. In support of his submission, learned counsel for the petitioner has relied upon a judgment of this Court in the case of ***Principal Maharani Lal Kunwari Post Graduate College, Balrampur versus Stae Consumer Dispute Redressal Commission, U.P. Lko through its President and others.***

18. After hearing learned counsel for the parties, going through the record of the case and the judgments relied by the learned counsel for the respective parties, the issue involved in this case is whether accepting the written statement filed by the respondents after 30 days and without moving any application for extension of 15 days time, it would amount to an unwarranted assumption of jurisdiction not possessed by the courts or a gross abuse of jurisdiction vested in them after expiry of 45 days period, as prescribed under the statute. It is necessary to first go through Section 38(2)(a) of the Act, 2019 and 13(1)(a) of the Act 1986 and for convenience both the provisions are quoted hereinbelow:-

**Section 38 (2) (a) of the Act, 2019** *:-*

***38. Procedure on admission of complaint.-(1)*** The District Commission shall, on admission of a complaint, proceed with such complaint.

(2) Where the complaint relates to any goods, the District Commission shall,-

(a) refer a copy of the admitted complaint, within twenty one days from the

date of its admission to the opposite party mentioned in the complaint directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by it;

**Section 13 (1) A of the Act, 1986**

***13. Procedure on admission of complaint.-***

(1) The District Forum shall, on admission of a complaint, if it relates to any goods, refer a copy of the admitted complaint, within twenty-one days from the date of its admission to the opposite party mentioned in the complaint directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum.'

19. The language of both the provisions are in verbatim the same and prescribed period for filing the written statement i.e. initially 30 days, which is extendable to 15 more days i.e. total 45 days. The said provision 13 (1) (a) of the Act, 1986 was considered by the Hon'ble Supreme Court in the case ***of New India Insurance Company Limited Vs. Hill Multi Purpose Cold Storage Pvt Ltd***. The relevant paras nos. 61 and 62 of the same are quoted herein-below:-

*'61. Now reverting to the provisions of the Consumer Protection Act, a conjoint reading of clauses (a) and (b) of sub-section (2) of Section 13 would make the position absolutely clear that the commencing point of limitation of 30 days, under the aforesaid provisions, would be from the date of receipt of notice accompanied by a copy of the complaint, and not merely receipt of the notice, as the response has to be given, within the stipulated time, to the averments made in the complaint and unless a copy the complaint is served on the opposite party, he would not be in a position to furnish its reply. Thus, mere service of notice, without service of the copy of the complaint, would not suffice and cannot be the commencing point of 30 days under the aforesaid section of the Act. We may, however, clarify that the objection of not having received a copy of the complaint along with the notice should be raised on the first date itself and not thereafter, otherwise if permitted to be raised at any point later would defeat the very purpose of the Act, which is to provide simple and speedy redressal of consumer disputes.*

*62. To conclude, we hold that our answer to the first question is that the District Forum has no power to extend the time for filing the response to the complaint beyond the period of 15 days in addition to 30 days as is envisaged under Section 13 of the Consumer Protection Act and the answer to the second question is that the commencing point of limitation of 30 days under Section 13 of the Consumer Protection Act would be from the date of receipt of the notice accompanied with the complaint by the opposite party, and not mere receipt of the notice of the complaint.'*

20. From the perusal of the statutory provisions and judgments, it is clear that after 45 days, the written statement cannot be accepted meaning thereby after 45 days, D.C.D.R.C. is not having any jurisdiction to accept the written statement. In the present case, after about more than 168 days as far as it is related to the notice upon respondent no. 4 and after about more than 155 days as far

as it is related to respondent nos. 1, 2 and 3 as notice was served upon respondent no. 4 on 02.04.2022 and the notice upon respondent no. 1, 2 and 3 were served on 05.04.2022 and the tracking report has been enclosed along with the writ petition which is on record, the written statement was permitted to be filed.

21. Hence, accepting the written statement after the expiry of 30 days period and more so, in absence of any application for extension of 15 days period before the DCDRC and accepting the written statement by the DCDRC after 45 days is nothing but amounts to an unwarranted assumption of jurisdiction not possessed or gross abuse of exercise of jurisdiction.

22. The submission of learned counsel for the respondent that the notice was not received from the District Commission, it was sent by the petitioners so it is no notice in the eyes of law. The another contention of the learned counsel for the respondent, that too the notice was with incomplete papers is not acceptable as per the law laid down by Hon'ble Supreme Court in the case of ***New India Insurance (supra),*** wherein it has been held that if any objection is to be made that is to be raised on the first date of appearance i.e. in the present case respondent had put in appearance before DCDRC on 13.05.2022 through their counsel and no such objection was raised by them. Hence, now at this stage, the respondents cannot take this plea. Apart from that in their recall application, the respondents have disclosed that they have received the complete notice on the previous date i.e. 23.06.2022. If the period is to be calculated from 23.06.2022, even the period of 45 days had expired on 08.08.2022 since written statement was filed on 15.10.2022. Even as per the case of the respondents, the written statement was not filed within 45 days.

23. The submission of learned counsel for respondents regarding availability of remedy of review before DCDRC under Section 40 of the Act, 2019, for that Section 40 of the Act, 2019 is quoted hereinbelow:-

*'**40. Review by District Commission in certain cases**.-The District Commission shall have the power to review any of the order passed by it if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within thirty days of such order.'*

24. Section 40 of the Act, 2019 empowers DCDRC to review any of the order passed by it but in the present case, the challenge of the impugned order is on the basis that the order of DCDRC is without jurisdiction and in violation of principles of natural justice as no opportunity was given to file objections against the recall application. Under these circumstances and as per the settled law, the alternative remedy is not an absolute bar as held in the case of **Godrej Sara Lee Limited Vs. Excise and Taxation Officer Cum Assessing Officers and others: 2023 SCC online Supreme Court 95.** The relevant paragraphs are quoted hereinbelow:-

*'6. At the end of last century, this Court in paragraph-15 of its decision report in (1998) 8 SCC 1 (Whirlpool Corporation versus Registrar of Trade Marks, Mumbai) carved out the exceptions on the existence whereof a writ Court would be justified in entertaining a writ*

*petition despite party approaching it not having availed the alternative remedy provided by the statute. The same reads as under:*

*(i) where the writ petition seeks enforcement of any of the fundamental rights;*
*(ii) where there is violation of principles of natural justice;*

*(iii) where the order or the proceedings are wholly without jurisdiction; or*

*(iv) where the vires of an Act is challenged.'*

25. The learned counsel for respondents has submitted regarding availability of alternative remedy under Section 51 (2) of the Act, 2019 for filing an appeal before the National Commission. For convenience, Section 51(2) is quoted hereinbelow:-

***'Section 51(2) of the Act, 2019**:- An appeal shall lie to the National Commission from any order passed in appeal by any State Commission, if the National Commission is satisfied that the case involves a substantial question of law'*

26. A reading of Section 51 (2) clearly provides that if the National Commission is satisfied that the case involves substantial question of law only then an appeal is maintainable under Section 51(2) and the substantial question of law has been decided by the Hon'ble Supreme Court in the case of ***Appaiya Vs. Andimuthu alias Thangapandi and others reported in 2023 SCC OnLine SC 1183***. The relevant paragraph nos. 13 and 14 are being reproduced hereunder :-

*"13. In the decision in Lankeshwar Malakar v. R. Deka, it was held that in order to be substantial question of law, the test is whether it is of general public importance or whether it directly or substantially affects the right of the parties or whether the question is still open i.e.. it is not finally settled by the Supreme Court, Federal Court or Privy Council.*

*14. In fact, in Santosh Hazari v. Purushottam Tiwar while exploring the meaning of the phrase "substantial question of law" this Court held:*

*"12. The phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means of having substance, essential, real, of sound worth, important or considerable It is to be understood as something in contradistinction with technical, of no substance or consequence, or academic merely However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law by suffixing the words "of general importance as has been done in many other provisions such as Section 109 of the Code or Article 13(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. T. Ram Ditta (AIR 1928 PC 172: (1927-28) 55 IA 235], the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 110 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was*

*involved in the case as between the parties. In Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg, and Mfg. Co. Ltd. (1962 Supp (3) SCR 549] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju AIR 1951 Mad 969]: When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand, if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law." and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:*

*"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."*

27. The Hon'ble Supreme Court has held that where the issue is finally settled by the Court then it cannot be said that it is substantial question of law of general importance. Filing of written statement after a period of 45 days is not permissible under the law. Here it is only a question of applying the provision of law contained in Section 38(2)(a) of the Consumer Protection Act, 2019 and further applying the settled as laid down by the Hon'ble Supreme Court that the written statement cannot be accepted after lapse of 45 days. Here, no substantial question of law of general importance is involved. Hence the remedy under Section 51 (2) of the Act is not attracted in case of the petitioners.

28. As far as the submission regarding availability of remedy under Section 58(1)(a)(iii) of the Act, 2019 is concerned, for that, the submission raised by learned counsel for petitioner that the appeal under Section 58(1)(a)(iii) is only against the order passed by the State Commission in its original jurisdiction, which is subject to Section 51(1) of the Act, 2019 is not acceptable. For convenience, Section 47(1), 51(1) and 58 of the Act, 2019 are quoted hereinbelow:-

*'47.* **Jurisdiction of State Commission.-(1**) *Subject to the other provisions of this Act, the State Commission shall have jurisdiction?*

*(a) to entertain?*

*(i) complaints where the value of the goods or services paid as consideration, exceeds rupees one crore, but does not exceed rupees ten crore:*

*Provided that where the Central Government deems it necessary so to do, it*

*may prescribe such other value, as it deems fit;*

*(ii) complaints against unfair contracts, where the value of goods or services paid as consideration does not exceed ten crore rupees;*

*(iii) appeals against the orders of any District Commission within the State;'*

**51. Appeal to National Commission.- (1)** *Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) or (ii) of clause (a) of sub-section (1) of section 47 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:*

*Provided that the National Commission shall not entertain the appeal after the expiry of the said period of thirty days unless it is satisfied that there was sufficient cause for not filing it within that period:*

*Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited fifty per cent. of that amount in the manner as may be prescribed.*

**'58. Jurisdiction of National Commission. (1)** *Subject to the other provisions of this Act, the National Commission shall have jurisdiction-*

*(a) to entertain*

*(i) complaints where the value of the goods or services paid as consideration exceeds rupees ten crore: Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit;*

*(ii) complaints against unfair contracts, where the value of goods or services paid as consideration exceeds ten crore rupees;*

*(iii) appeals against the orders of any State Commission'*

*(iv) appeals against the orders of the Central Authority; and'*

29. A reading of these provisions makes it clear that the appeal is maintainable before the National Commission, for the reason Section 51(1) provides an appeal before the National Commission only against the orders passed under Section 47 (1)(a)(i) and Section 47 (1)(a)(ii). Section 47 (1)(a)(i) and Section 47(1)(a)(ii) deals with the matters where the orders are passed by the State Commission in its original jurisdiction and Section 47(1)(a)(iii) is for appeals against the order of any District Commission within the State against which the remedy of appeal is available under Section 58 (1) of the Act, 2019. But here, as discussed above, the order passed by the DCDRC is without jurisdiction in the light of judgment in the case of ***New India Insurance (supra).*** Hence as per the law laid down in the case ***of Godrej Sara Lee Limited (supra)*** which has been passed by placing reliance upon the judgment in the case of ***Whirlpool Corporation versus Registrar of Trade Marks, Mumbai, 1998, 8 SCC 1,*** the writ petition under Article 227 of the Constitution of India is maintainable. The judgments relied upon by learned counsel for respondents with regard to the

availablilty of alternative remedy and maintainability of the writ petition in the case of ***Mohamed Ali Vs. V. Jaya and others passed in Civil Appeal No. 4113 of 2022, judgment and order dated 11.7.2022*** and judgment dated 13.10.2022 passed in the case of ***Raj Shri Agarwal & Ram Shri Agarwal and another Vs. Sudheer Mohan and others (Civil Appeal No. 7266 of 2022)*** are not applicable in the facts of the present case as in those cases no such question was involved as in the present case.

30. The judgment relied by the learned counsel for the respondent in the case of **ARN Infrastructure Indian Limited Vs. Hara Prasad** is not applicable, as argued and interpreted by the learned counsel for the respondents for the reason that in that case even opportunity of hearing was closed. The Hon'ble Supreme Court has held that the opposite party had a right to do so, even in absence of filing its written version against the complaint and the situation is the same in the present case as well. The opportunity of hearing is not closed. It will be open for the respondents to participate in the further proceedings before the DCDRC. That opportunity is not closed.

31. As far as submission of learned counsel for respondents that this Court under Article 227 of the Constitution of India cannot look into the merits of the case, which was replied by learned counsel for petitioner by placing reliance upon the judgment of this Court in the Case of ***Jodhey and others (supra)*** where the scope of Article 227 has been discussed and it has been held that the powers under Article 227 cannot be exercised unless it has been an unwarranted assumption of jurisdiction not possessed by the Courts or a gross abuse of jurisdiction possessed by them or an unjustifiable refusal to exercise a jurisdiction vested in them by law. The relevant paragraph no. 15 in the case of ***Jodhey and others (supra)*** is quoted hereinbelow:-

*'15. The fact that these unlimited powers are vested in the High Court should however, make the High Court more cautious in its exercise. The self-imposed limits of these powers are established and laid down by the High Courts themselves. It seems to me that these powers cannot be exercised unless there has been an unwarranted assumption of jurisdiction not possessed by Courts or a gross abuse of jurisdiction possessed by them or an unjustifiable refusal to exercise a jurisdiction vested in them by law. Apart from matters relating to jurisdiction, the High Court may be moved to act under it when there has been a flagrant abuse of the elementary principles of justice or a manifest error of law patent on the face of the record or an outrageous miscarriage of justice which calls for remedy. Under this power, the High Court will not be justified in converting itself into a Court of Appeal and subverting findings of fact by a minute scrutiny of evidence or interferring with the discretionary orders of Court. Further, this power should not be exercised, if there is some other remedy open to a party. Above all, it should be remembered that this is a power possessed by the Court and is to be exercised at its discretion and cannot be claimed as a matter of right by any party.'*

32 . Similarly, the above mentioned issue has also been dealt with by the Hon'ble Supreme Court in the case of ***Achutananda Baidya versus Prafullya Kumar Gayen and others reported in AIR 1997 SC 2077*** and which has been

followed recently in the judgment of Hon'ble Supreme Court in the case of ***Ajay Singh and others versus State of Chattisgarh and others reported in AIR 2017 SC 310***. The relevant paragraph no. 21 has been quoted hereinbelow:-

*'21. In Achutananda Baidya MANU/SC/0498/1997 (199705 SCC 76 a two-Judge Bench while dealing with the Prafullya Kumar Gayen power of superintendence of the High Court Under Article 227 has opined that the power of superintendence of the High Court Under Article 227 of the Constitution is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review. The power and duty of the High Court Under Article 227 is essentially to ensure that the courts and tribunals, inferior to High Court, have done what they were required to do. Law is well settled by various decisions of this Court that the High Court can interfere Under Article 227 of the Constitution in cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving at a finding which is perverse or based on no material, or resulting in manifest injustice.'*

33. From the above mentioned judgments, it is clear that the power of High Court under Article 227 is not merely an administrative power but also has power of judicial review and in the present case as discussed above, that after the expiry of 45 days period, the DCDRC cannot accept the written statement in gross violation of specific statutory provision of the Act and by accepting the written statement by recalling its earlier order is nothing but erroneous assumption or acting beyond its jurisdiction and amounts to error of law apparent on record and exercise of such power is arbitrary or capricious exercise by the authority and patent error in procedure. The State Commission also failed to appreciate the legal position as discussed above and dismissed the appeal merely on expressing satisfaction that the written statement was accepted by imposing cost. There was total failure on the part of the State Commission to appreciate the legal position.

34. In view of the discussion made above, the writ petition is **allowed.**

35. The impugned orders dated 21.10.2022 and 15.10.2022 are hereby quashed.

36. The District Consumer Forum will hear the matter ignoring the written statement filed by the respondents. The respondents shall however participate in the further proceedings before the DCDRC.

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**(2024) 7 ILRA 896**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 31.07.2024**

**BEFORE**

**THE HON'BLE NEERAJ TIWARI, J.**

Matters Under Article 227 No. 8286 of 2024

**Shri Om Prakash Upadhya ...Petitioner**
**Versus**
**Shri Vijay Kumar ...Respondent**

**Counsel for the Petitioner:**

Sri Ayush Jain

**Counsel for the Respondent:**
Sri Ram Prakash Srivastava

**Civil Law – Application for rejection of Plaint- Order VII Rule 11 of CPC- Dismissed by the Civil Judge- Revision against this order also dismissed- Both of these orders under challenge in the present petition- plea of suit appear from the statement in the plaint to be barred by any law- Application under Order VII Rule 11 does not reveal that the suit is barred by law- Plea of Order IX Rule 9 available when facts brought to the knowledge of court by means of written statement- Sections 37 and 41 of the Specific Relief Act, 1963- No bar in filing fresh suit in case there is no possession over the property in dispute- Application under Order VII Rulee 11 of CPC to be decided- Only the plaint has to been seen- no such bar of law can be ascertained from the allegations levelled in the plaint- impugned orders upheld- Petition dismissed. (Paras 11, 13, 14, 16 and 20)**

**HELD:**
The above quoted provision provides that decree against the plaintiff by default bars fresh suit. There is no dispute on the point that in case a suit is instituted, another suit for the same cause of action is not maintainable, but without putting all these facts in defence by way of filing written statement, the same cannot be seen from application Under Order VII Rule 11 CPC. From the perusal of the plaint, it does not transpire that another suit filed earlier was for the same cause of action and dismissed in default, therefore, plea of Order IX Rule 9 cannot be seen at this stage without filing of written statement by the petitioner-defendant. (Para 11)

From the perusal of Section 37 & 41of the Act, 1963 it does not transpire that there is any provision or any bar for filing fresh suit in case there is no possession over the property in dispute. (Para 13)

From the perusal of the aforesaid judgment, it is apparently clear that while deciding the application under Order VII Rule 11 CPC, only plaint has to be seen and in case allegation made in the plaint are taken to be correct as a whole on their face value and it shows that suit is barred by any law, only then application for rejection of plaint under Order VII Rule 11 CPC can be entertained. (Para 16)

The Hon'ble Apex Court repeatedly taken the view that while deciding application under Order VII Rule 11 CPC only averment made in the plaint has to be seen and any defence cannot be taken into consideration. (Para 20)

**Petition dismissed.** (E-14)

**<u>List of Cases cited:</u>**

1. Madanuri Sri Rama Chandra Murthy Vs Syed Jalal: 2017(13) SCC 174

2. G. Nagaraj, Anr Vs B.P. Mruthunjayanna & Ors.: 2023 LiveLaw(SC)31

3. St. ofWest Bengal Vs U.O.I.passed in Original Suit No.4 of 2021, delivered on 10.07.2024

(Delivered by Hon'ble Neeraj Tiwari, J.)

1 . Heard Sri Pramod Jain, learned Senior Counsel, assisted by Sri Ayush Jain and Sri Ram Prakash Srivastava, learned counsel for the petitioner.

2. Present petition has been followed with the following prayer:

*"(a) To set-aside the impugned judgment and order dated 21.04.2022 passed by Additional Judge (Senior Division) Court No. 4, Meerut and the impugned judgement and order dated 06.01.2024 passed by Additional District Judge, Court No. 16, Meerut and allow the*

*application dated 06.11.2017 filed by the defendant-petitioner under order 7 Rule 11 of the Code of Civil Procedure, 1908."*

3. Learned Senior Counsel submitted that respondent-plaintiff has filed Original Suit No. 784 of 1999, upon which petitioner has filed application under Order VII Rule 11, CPC on the ground that suit is barred by law, which was rejected vide impugned judgment and order dated 21.04.2022. Against order dated 21.04.2022, petitioner-defendant filed Civil Revision No. 21 of 2022, which was also dismissed vide second impugned order dated 06.01.2024.

4. He next submitted that earlier the very same respondent-plaintiff has filed Original Suit No. 276 of 1992 (Virendra and Others Vs. Om Prakash Upadhya), which was dismissed in default vide order dated 13.07.1992. After dismissal of the Suit No. 276 of 1992, respondent-plaintiff filed application under Order IX Rule 9 CPC, being Misc. Case No. 116 of 1992 to recall the order dated 13.07.1992, which was also dismissed in default vide order dated 22.02.1994. He next submitted that to recall the order dated 22.02.1994 respondent-plaintiff has filed application under Section 151 CPC, being Misc. Case No. 25 of 1994, which was ultimately dismissed in default vide order dated 12.09.2003. He next submitted that respondent-plaintiff has never challenged the aforesaid orders before the higher court, therefore the aforesaid orders have attained finality.

5. He next submitted that for the very same cause of action, respondent-plaintiff has filed Original Suit No. 784 of 1999, upon which petitioner-defendant has filed application under Order VII Rule 11 CPC on the ground that suit is barred under the provision of Order IX Rule 9 CPC. He next submitted that in the Original Suit No. 784 of 1999, it is admitted that petitioner-defendant is not having the possession over the property in dispute, therefore, under Section 37 & 41 of Specific Relief Act, 1963 (hereinafter, referred to as, 'Act, 1963'), no relief may be granted to him. He lastly submitted that without considering the aforesaid facts, application of petitioner under Order VII Rule 11 CPC has been rejected vide impugned order dated 21.04.2022. He firmly submitted that in light of Order IX Rule 9 CPC, once the suit is already dismissed, this suit is not maintainable, therefore, it is required on the part of the Additional Civil Judge(S.D.), Court No. 4, Meerut to allow the application of petitioner under Order VII Rule 11 CPC and reject the Original Suit No. 784 of 1999. Additional District Judge has also rejected the revision without considering aforesaid facts. In support of his contention, learned Senior Counsel placed reliance upon the judgment of Apex Court in the matters ***of Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal: 2017(13)SCC 174 and G. Nagaraj, Anr Vs. B.P. Mruthunjayanna & Ors.: 2023 LiveLaw(SC)311 and State of West Bengal vs. Union of India passed in Original Suit No.4 of 2021, delivered on 10.07.2024.***

6. I have considered the submission advanced by learned Senior Counsel, perused the record and provision of law and judgments relied upon.

7. Petitioner-defendant has filed application under Order VII Rule 11(d) CPC, which is being quoted hereinbelow:

*"**11. Rejection of plaint**.- The plaint shall be rejected in the following cases:-*

*(a)……………………………………………………………………………………..*

*(b)…………………………………………………………………………………….*

*(c)……………………………………………………………………………………*

*(d) where the suit appears from the statement in the plaint to be barred by any law;*

*(e)……………………………………………………………………………………..*

*(f)……………………………………………………………………………………..."*

8. From the perusal of the aforesaid provision, it is required to see as to whether, from the averment made in the plaint, suit appears to be barred by any law or not.

9. In the plaint, respondent-plaintiff has stated that he is the owner of the property in question having symbolic possession. He has also given the reference of Suit No. 276 of 1992, which is shown to be pending for adjudication. Therefore, from the perusal of the averment made in the plaint, it cannot be said that this suit is barred by any law, unless defence so raised by the petitioner-defendant is taken into consideration.

10. I have also perused the order IX Rule 9 CPC, which is being quoted hereinbelow:

*"**9. Decree against plaintiff by default bars fresh suit**.—(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.*

*(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."*

11. The above quoted provision provides that decree against the plaintiff by default bars fresh suit. There is no dispute on the point that in case a suit is instituted, another suit for the same cause of action is not maintainable, but without putting all these facts in defence by way of filing written statement, the same cannot be seen from application Under Order VII Rule 11 CPC. From the perusal of the plaint, it does not transpire that another suit filed earlier was for the same cause of action and dismissed in default, therefore, plea of Order IX Rule 9 cannot be seen at this stage without filing of written statement by the petitioner-defendant.

12. Now, I am coming to another argument about the possession of respondent-plaintiff over the property in dispute as well as provision of Section 37 and 41 of the Act, 1963. Section 37 and 41 of the Act, 1963 are being quoted hereinbelow:

*"**37. Temporary and perpetual injunctions**.—(1) Temporary injunctions are such as are to continue until a specific time, or until the further order of the court, and they may be granted at any stage of a*

*suit, and are regulated by the Code of Civil Procedure, 1908 (5 of 1908).*

*(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.*

***41. Injunction when refused**.— An injunction cannot be granted— (a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings; (b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought; (c) to restrain any person from applying to any legislative body; (d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter; (e) to prevent the breach of a contract the performance of which would not be specifically enforced; (f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance; (g) to prevent a continuing breach in which the plaintiff has acquiesced; (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust; 1 [(ha) if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project.] (i) when the conduct of the plaintiff or his agents has been such as to disentitle him to be the assistance of the court; (j) when the plaintiff has no personal interest in the matter."*

13. From the perusal of Section 37 & 41of the Act, 1963 it does not transpire that there is any provision or any bar for filing fresh suit in case there is no possession over the property in dispute.

14. In the plaint, title over the property in dispute is claimed along with symbolic possession, therefore, in light of Section 37 & 41of the Act, 1963, it cannot be said to be a bar under the provision of said sections.

15. I have also perused judgment and order of Hon'ble Apex Court in the matter of ***Madanuri Sri Rama Chandra Murthy(Supra).*** Relevant paragraph of the said judgment is being quoted hereinbelow:

*"8. The plaint can be rejected under Order VII Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order VII Rule 11, CPC can be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order VII Rule 11, CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order VII Rule 11 of CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the*

*suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when, the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order VII Rule 11 of 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. "*

16. From the perusal of the aforesaid judgment, it is apparently clear that while deciding the application under Order VII Rule 11 CPC, only plaint has to be seen and in case allegation made in the plaint are taken to be correct as a whole on their face value and it shows that suit is barred by any law, only then application for rejection of plaint under Order VII Rule 11 CPC can be entertained.

17. In the present case, from the perusal of plaint, it does not transpire that it is barred by any law.

18. I have also considered judgment of Hon'ble Apex Court in the matter of ***G. Nagaraj(Supra)***. Relevant paragraph of the said judgment is being quoted hereinbelow:

*"6. The law is well settled. For dealing with an application under Rule 11 of Order VII CPC, only the averments made in the plaint and the documents produced along with the plaint are required to be seen. The defence of the defendants cannot be even looked into. When the ground pleaded for rejection of the plaint is the absence of cause of action, the Court has to examine the plaint and see whether any cause of action has been disclosed in the plaint."*

19. There is recent judgment of Apex Court in the matter of ***State of West Bengal vs. Union of India passed in Original Suit No.4 of 2021*** in which Court has discussed about the Order 7 Rule 11 of CPC. Relevant paragraph of the said judgments are quoted below:-

*"22. For appreciating the rival submissions, it will be relevant to refer to Order XXVI Rule 6 of the SC Rules, which reads thus:*

***"Order XXVI***

***Plaints***

…………

*6. The plaint shall be rejected:-*

*(a) where it does not disclose a cause of action;*

*(b) where the suit appears from the statement in the plaint to be barred by any law.*

*23. It can thus be seen that a plaint is liable to be rejected where it does not disclose a cause of action or where the suit appears from the statement in the plaint to be barred by any law.*

*24. As such, it could be seen that the provisions in Order XXVI Rule 6 (a) and (b) are analogous to the provisions in clauses (a) and (d) of Order VII Rule 11 of the CPC.*

*25. It is a settled position of law that, for considering objections under Order VII Rule 11 (a) and (d) of the CPC, what needs to be looked into is only the averments made in the plaint. It is well settled that if the averments made in theplaint are germane then the pleas taken by the defendant inthe written statement would be wholly irrelevant at this stage. Reference in this respect could be made to the judgments of this Court in the cases of Saleem Bhai and Others v. State of Maharashtra and Others14, Sopan Sukhdeo Sable and Others v. Assistant Charity Commissioner and Others15, Bhau Ram v. Janak Singh and Others16 and Chhotanben and Another v. Kirtibhai Jalkrushnabhai Thakkar and Others17.*

*26. In view of the word 'shall' used in the provisions, a duty is cast on the court to examine as to whether the plaint is hit by any of the infirmities provided in the six clauses of Order VII Rule 11 of the CPC. A duty is cast on the court to reject the plaint even without the intervention of the defendant. Reference in this respect could be made to the judgment of this Court in the case of Sopan Sukhdeo Sable (supra).*

27. It is further settled that the averments made in the plaint have to be read as a whole and not in isolation. Reference in this respect could be made to the judgment of this Court in the case of Kirtibhai Jalkrushnabhai Thakkar (supra)."

20. The Hon'ble Apex Court repeatedly taken the view that while deciding application under Order VII Rule 11 CPC only averment made in the plaint has to be seen and any defence cannot be taken into consideration.

21. In the present case, in light of discussion made hereinabove, it is apparently clear that from the perusal of averment made in the plaint there cannot be said to be bar of any provision of law for filing this suit, therefore I found no illegality or infirmity in the impugned orders dated 21.04.2022 & 06.01.2024.

22. Petition lacks merit and accordingly **dismissed**.

23. No order as to costs.

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**(2024) 7 ILRA 902**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 05.07.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Matters Under Article 227 No. 11249 of 2019

**Abdul Hasan ...Petitioner**
**Versus**
**First A.D.J., Pratapgarh & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Shailesh Kumar Srivastava

**Counsel for the Respondents:**
Sri Akshat Kumar, Sri Ankit Pande, Sri Malkhan Singh, Sri Sanjay Kumar Srivastava

**(A) The Constitution of India, 1950 - Article 227 - Supervisory jurisdiction - The**

**Code of Civil Procedure, 1908 - Order 21 Rule 97 - Resistance or obstruction to possession of immovable property - If a person resists or obstructs the holder or purchaser of a decree for the possession of immovable property, they can apply to the court, and the court will adjudicate the application in accordance with the provisions - Rule 99 - Dispossession by Decree - holder or purchaser, Rule 100 – Order to be passed upon application complaining of dispossession, The Transfer of Property Act 1882 - Section 105 ,111(g). (Para -21)**

Maintainability of the objections preferred by the person who claims to be in possession of the disputed property - Court partially decreed plaintiff's ownership of property - not eviction relief - plaintiff initiated second round of litigation after giving notice to tenants - suit was initially dismissed but appealed - order reached finality - third leg of litigation began with execution case - Petitioner Files Objections under Order 21 Rule 97 CPC - Disputed property used by religious sect - Applicants claim to be managers - Deed obtained by decree holder is collusive and unenforceable . (Para -15, 19)

**HELD:-** Petitioner being an interested party in the suit being in possession of the decreed property, has right to raise his objections under Order 21 Rule 97 CPC before the execution of the decree, which ought to have been duly considered by the trial Court. Matter remitted to trial Court to pass fresh orders on application under Order 21 Rule 97 CPC preferred by petitioner.(Para - 25)

**Petition allowed.** (E-7)

**<u>List of Cases cited</u>:**

Jini Dhanrajgir & anr. Vs Shibu Mathew & anr., 2023 SCC OnLine SC 643

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

1. Heard Sri Shailesh Kumar Srivastava, learned counsel for the petitioner as well as Sri Sanjay Kumar Srivastava, learned counsel appearing for the respondents.

2. The petitioner by means of the present writ petition has challenge order dated 26.02.2019 passed by the 1st Additional District Judge Pratapgarh in Civil Revision No. 60 of 2015 (Abdul Hasan and others versus Shrimati Shobha Rani) as well as the order dated 31/07/2015 passed by the Additional Civil Judge (Junior Division) Pratapgarh in Execution Suit No. 23 of 1980 (Bismilla Begam versus the Ramraj Kunwari)

3. The brief facts of the case are that Raja Jagat Ranvir Bahadur Singh, a Taluqdar of Kaithola Estate, was the owner of the disputed property and had adopted Raja Jagat Ranvir Mahesh Prasad Singh by means of an adoption deed. He further executed will on 27/12/1945 in favour of Raja Jagat Ranvir Mahesh Prasad Singh and gave all his property to him. He executed a deed dated 29-05-1935 in favour of his wife Rani Dharam Raj Kuer respondent No. 9 in respect of this house and some other property. It has been submitted that under this deed Rani Dharam Raj Kuer was granted a heritable but non-transferable lease so far as the house in dispute is concerned and as such under the terms of this grant she could only remain in possession of the house but could not make any temporary or permanent transfer thereof. The Raja died on 09-09-1949. Hence both as an adopted son and as a legatee he was owner of the interest reserved by the Raja in the said house under the deed dated 29-05-1935. Smt. Bimlawati Kumari Devi was the daughter of Raja and had claimed the property through Rani Dharam Raj Kuer by inheritance. The said property was sold by Rani Dharam Raj Kuer by a registered sale

deed in favour of Abdul Rahman 05/01/1960.

4. Raja Jagat Ranvir Mahesh Prasad came to know about the sale deed filed a suit before the civil judge Pratapgarh for cancellation of Sale deed dated 05/01/1960 executed in favour of Abdul Rehman and also for possession after their ejectment. The suit was registered as Regular Suit No. 17 of 1960 where it was stated that Rani Dharam Raj Kuer has been granted only lifetime interest and she has not been given right of transfer by sale of the property in question as such the sale deed is without any authority of law.

5. The suit filed by Raja Jagat Ranvir Mahesh Prasad was decreed by the Munsif Magistrate and an appeal was filed before the District Judge by Abdul Rahman which was allowed and the judgement and decree passed by the Munsif Magistrate was set aside. A second appeal was filed against the judgement of the District Judge before this court being Second Appeal No. 372 of 1963 which was allowed and the order passed by the District Judge was set aside affirming the judgement and decree passed by the Munsiff Magistrate, Pratapgarh on 29/08/1972.

6. The High Court while allowing the Second Appeal recorded the following fin dings after using the documents placed before them:-

a. With regard to the validity of the adoption deed it was held- *Besides being an adopted son of the Raja, the plaintiff is also Ms legatee. From a perusal of this will it is dear that whatever interest had been retained by the Raja under the document dated 29-5-1935 in respect of the house in suit was covered by this will and it had not been excluded therefrom. In fact the Raja tried even to whittle down the extent of the grant made under that document which he could not do. That is not an issue before us. The point worth noticing is that whatever interest was retained by the Raja in the house in suit under the document dated 29-5-1935 was not excluded from the purview of the will in favour of the plaintiff. So the plaintiff on both these grounds is entitled to step into the shoes of the Raja and safeguard his interest, if any, in the house in suit reserved under the deed dated 29-5-1935.*

b. The nature of gift deed made in favour Rani Dharam Raj Kuer it was also really considered and it was held- *In my opinion, not only the document has been specifically classified as a permanent heritable and non-transferable lease but the incidents of the transfer as mentioned in the document also make out a clear case of lease and not an absolute gift. The grantor had reserved a right to receive Rs. 5/- per year from the grantee as Malikana in respect of the house in suit. This periodical payment described as Malikana is nothing but an amount of money to be paid periodically to the transferor by the transferee within the meaning of Section 105 of the Transfer of Property Act. The use of the word 'Malikana' is not conclusive to lead to an inference that it was an absolute transfer of the entire proprietary rights. At one place the grantor had also stated that the object of this grant was to provide maintenance to the grantee who was his own wife. I agree with the courts below that the transaction evidenced by this document dated 29-5-1935 so far as the house in suit is concerned is only a perpetual heritable but a non-transferable lease.*

c. Considering the validity of the lease deed the High Court held- *So, on the*

*facts and circumstances of this case and the close relationship existing between the grantor and the grantee, it cannot be said that the restriction against alienation was only a surplusage or a redundant condition which in the absence of a right of re-entry could not confer any benefit on the lessor in any event. In my opinion, the benefit of this restriction could under certain circumstances be available to the lessor or his own heirs. As such, this condition will be deemed to be valid under Section 10. That being so, the lessee (respondent No. 9) had no authority to make the transfer in favour of the predecessor of respondents Nos. 1 to 8 under the impugned sale deed dated 5-1-1960, and this sale deed shall be deemed to be void against the appellant who is successor-in-interest of the lessor.*

d. With regard to the prayer seeking eviction of the defendant from the suit property it was held- *So long as the lease in favour of respondent No. 9 is not determined by a notice under Section 111(g) of the Transfer of Property Act the plaintiff is not entitled to immediate possession. A lease under this provision can be determined on account of the breach of a condition which provides a right of re-entry for such breach. This condition is not available to the plaintiff-appellant. It also provides that if the lessee renounces his character as lessee and denies the title of the lessor, the lease may be forfeited. Whether or not this condition is available to the plaintiff-appellant, does not arise for our consideration at this stage. All that can be said is that the plaintiff is not in this suit entitled to eject respondent No. 9 so long as her lessee rights are not determined.*

7. The High Court in second appeal held that the adoption deed in favour of Raja Jagat Ranvir Mahesh Prasad Singh was valid, and the gift in favour of the Rani Dharam Raj Kuer was without any right of transfer, and she not having any right of transfer could not have executed a valid sale deed, which accordingly was held to be void. The only issue which was decided against the plaintiff in favour of the defendant against the plaintiff even in favour of the defendant was the aspect of eviction inasmuch as what the aspect of eviction in as much as the Court was of the view that no notice under the court was of the view that no notice under Section 111 (g) of the Transfer of Property Act was not given and accordingly the lease was not determined and accordingly the plaintiff was not entitled to immediate possession.

8. After the judgement of the High Court, notice under Section 111 (g) of the Transfer of Property Act was given to the petitioner and the suit for eviction was filed before the Munsif Magistrate which was registered as regular suit No. 170 of 1973. The said suit was dismissed as time-barred by order dated 21/07/1978. The appeal against the aforesaid judgement was allowed on the basis of compromise on 26/03/1980 and the judgement of the trial Court dated 21/07/1978 was set aside.

9. On the basis of the judgement and decree, Execution Case No. 23 of 1980 was filed before the Additional Civil Judge (Junior division), Pratapgarh the executing Court passed order for execution of the decree on 11/09/2009 where objections were filed by one Rahmat Ulla and Sakina Bano which were rejected. Against the rejection of the rejection they filed a revision before the District Judge Pratapgarh which was also dismissed on 24/10/2009. During the pendency of the execution case Raja Jagat Ranvir Mahesh Prasadh Singh executed a sale deed of the

disputed house in favour of Smt Bismillah Begum and Smt Meherunnisa Bano on 14/03/1980 and subsequently on 16/12/1980 Raja Jagat Ranvir Mahesh Prasadh Singh along with Smt Bismillah Begum and Smt Meherunnisa Bano transferred house No. 105 Gha and the pertinent land through registered sale deed dated 16/12/1980 in favour of Smt Shobha Rani. It was further submitted that in pursuance to the execution of decree the Amin delivered the possession of the maximum part of house No. 105 Gha along with the pertinent land to Smt Bismillah Begum and the same was subsequently delivered to Shobha Rani on the basis of the sale deed.

10. The execution case proceeded for execution of the decree for the remaining part of the disputed property, when fresh objections were filed by the petitioner and 2 other persons including State Government and one Lalji. The objections raised by the petitioner were considered and rejected on 30/04/2015 in his absence and accordingly a recall application was moved on 08/05/2015. The recall application as well as objection of the other persons were disposed of on 29/05/2015.

11. Against the order dated 30/04/2015 and 29/05/2015 the petitioner preferred a revision before the Additional District Judge, Partapgarh which was numbered Revision No. 60 of 2015 and has been rejected by means of order dated 26/02/2019 which has been assailed in the present writ petition along with the order dated 31/07/2015.

12. It had been submitted by counsel for the petitioner that the objections raised by the petitioners in the execution proceedings have been rejected in the most illegal and arbitrary manner and contrary to the provisions laid down under Order 21 Rule 97, 99 and 100 CPC. It was submitted that the objections could have been decided only after permitting the petitioner to lead evidence and by not doing so the exhibiting court has committed grave illegality and consequently the aforesaid order deserves to be set aside.

13. Because of the respondent on the other hand has urged that all the issues in the dispute have been adequately considered and decided. It was stated that this Court in 2nd appeal has already decreed the suit where Raja Jagat Ranvir Mahesh Prasad was held to be the legatee of the original tenure holder by means of a valid will and further that his wife Rani Dharam Raj Kuer did not have any power to alienate the said property which was given on lease to her for her lifetime, and the other opposite parties having purchased the property from Rani Dharam Raj Kuer did not acquire any right or title from her. The objections filed by the petitioner in the execution proceedings were rejected by means of the order dated 30/04/2015 in his absence on the ground that the same did not have any merit. The application for recall of the order dated 30/04/2015 was also rejected on the 29/05/2015 where the reason for non-appearance on 30/04/2015 could not be satisfactorily explained, and the court considered that the matter is 25 years old and its execution is being deliberately delayed and therefore rejected the application of recall as being misconceived and also the ground that no satisfactory explanation have been given for non appearance of the petitioner on 30/05/2015. It was further submitted that in the order passed in revision the revisional court found that the applications of the

petitioner been rejected after due application of mind and there is no error in the same and consequently there was no requirement for interference of the revisional court.

14. I have heard the counsel for the parties and perused the record.

15. In the present dispute Raja Jagat Ranvir Mahesh Prasadh Singh had filed an Original Suit No. 170 of 1973 against Rani Dharam Raj Kuer which was decreed by this Court by means of order dated 29/08/1972 in 2nd Appeal No. 372 of 1963. The rights in favour of the plaintiff crystallized, and the suit was partially decreed to the extent that the plaintiff was declared to be the owner of the disputed property, but the relief with regard to eviction was not allowed as no proper notice as provided for under section 111g of the Transfer of Property Act was not given to the tenant. Accordingly, after giving notice to the occupants of the disputed property the 2nd round of litigation with regard to the eviction of the occupants/tenants commenced. The suit was initially dismissed by the Munsiff Magistrate on 21/07/1978, but the appeal against the said order was allowed on the basis of a compromise on 26/03/1980. The order dated 26/03/1980 attained finality as no appeal or revision was preferred against the same. The 3rd leg of litigation commenced when the execution case No. 23 of 1980 was filed for executing the decree dated 26/03/1980 before the Additional Civil Judge (Junior division), Sadar.

16. Objections were filed by the petitioner under Order 21 Rule 97 CPC stating that the disputed property was being used by a particular religious sect and the said property is a "wakf by user" of which the applicant claimed to be the manager. He stated that the decree obtained by the decree holder was collusive and not enforceable.

17. The said objections were heard on 30/04/2015 on which date the petitioner/applicant was not present, and the court after perusing the objections filed by the petitioner rejected the same is being without any merits. The petitioner subsequently moved an application for recall stating that while coming to the Court he met with an accident and consequently he could not inform. His counsel also did not appear and his objections were rejected ex-parte. Recall application was objected to by the decree holder, who stated that the averments made in the said applications are false and misconceived and the only effort of the applicant is to delay the execution proceedings and even otherwise there is no document to support the alibi made by the applicant.

18. The only ground raised by the petitioner assailing the aforesaid orders is that the trial court should have permitted the petitioner to adduce evidence as provided for under order 21 Rule 97 CPC so that the petitioner could have demonstrated that he has a better title than the decree holder so as to prevent the decree from being executed.

19. In this regard the question regarding maintainability of the objections preferred by the person who claims to be in possession of the disputed property deserves to be considered 1st. Order 21 Rule 97 provides as under:-

***"97. Resistance or obstruction to possession of immovable property**.-*

*(1) Where the holder of a decree for the possession of immovable property*

*or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.*

*(2) Where any application is made under sub-rule (1) the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained."*

20. It is also noticed that there was no application by the decree holder before the executing Court seeking further direction with regard to petitioner who was resisting the execution of the decree. He has straight away moved an application under Order 21 Rule 97 CPC.

21. It has been submitted that according to the provisions of Order 21 Rule 97 CPC, word "any person" would include the third party against whom the decree is sought to be executed and consequently submitted that application was maintainable at the behest of petitioner. It was stated that the rule is merely permissive and not mandatory and there is no limitation that only decree holder or auction purchaser can move appropriate application under Order 21 Rule 97 CPC and the moment the third-party files objections to the execution, the Court should stay the execution till rights claimed by the third party are decided.

22. Learned counsel for the respondent on the other hand has opposed the arguments made by the petitioner. It has been submitted that under Order21 Rule 97 CPC it is only the decree holder who is entitled to make an application in case where execution proceedings are resisted by any person. It was further stated that the petitioner being third party cannot take shelter of provisions of Order 21 Rule 97 CPC and it is only when he is dispossessed, he can approach the Court for restoring his possession as provided under Order 21 Rule 99 CPC.

23. With regard to maintainability of application under Order 21 Rule 97 CPC the issue has been settled by the Hon'ble Apex Court in the case of **Jini Dhanrajgir and Another vs Shibu Mathew and Another, 2023 SCC OnLine SC 643** has held :-.

"16. In our considered view, for more reason than one, relief claimed by the Appellants *ought to be declined.*

*17. Section 47 of the CPC, being one of the most important provisions relating to execution of decrees, mandates that the court executing the decree shall determine all questions arising between the parties to the suit or their representatives in relation to the execution, discharge, or satisfaction of the decree and that such questions may not be adjudicated in a separate suit. What is intended by conferring exclusive jurisdiction on the executing court is to prevent needless and unnecessary litigation and to achieve speedy disposal of the questions arising for discussion in relation to the execution, discharge or satisfaction of the decree. Should there be any resistance offered or obstruction raised impeding due execution of a decree made by a court of competent jurisdiction, the provisions of Rules 97, 101 and 98 of Order XXI enable the executing court to adjudicate the inter se claims of the decree-holder and the third parties in the execution proceedings themselves to avoid prolongation of litigation by driving*

*the parties to institute independent suits. No wonder, the provisions contained in Rules 97 to 106 of Order XXI of the CPC under the sub-heading "Resistance to delivery of possession to decree-holder or purchaser" have been held by this Court to be a complete code in itself in Brahmdeo Chaudhary (supra) as well as in a decision of recent origin in Asgar v. Mohan Verma. In the latter decision, it has been noted that Rules 97 to 103 of Order XXI provide the sole remedy both to parties to a suit as well as to a stranger to the decree put to execution.*

*18. In Bhanwar Lal v. Satyanarain , this Court held that when any person, whether claiming derivative title from the judgment-debtor or sets up his own right, title or interest de hors the judgment debtor, the executing court whilst executing the decree, in addition to the power under Rule 35(3), is empowered to conduct an enquiry whether the obstruction by that person is legal or not.*

*19. This Court in Noorduddin v. Dr. K.L. Anand reiterated that the executing court was bound to adjudicate the claim of an obstructionist and to record a finding allowing or rejecting the claim which was laid before the executing court, the person being neither a party to the earlier proceedings nor the decree being passed against him.*

*20. Yet again, in Babulal v. Raj Kumar, this Court after setting aside the order impugned held that a determination is required to be conducted under Order XXI Rule 98 before removal of the obstruction caused by the objector and a finding is required to be recorded in that regard. It was also held that the executing court was required to determine the question relating to when the appellants had objected to the execution of the decree as against those appellants who were not parties to the decree for specific performance.*

*21. The decision in Brahmdeo Chaudhary (supra) cited by Mr. Chitambaresh, is also to the same effect.*

*22. Considering the scheme of Order XXI Rules 97 to 106, this Court in Silverline Forum Pvt. Ltd. v. Rajiv Trust found it difficult to agree with the High Court that resistance or obstruction made by a third party to the decree put to execution cannot be gone into under Order XXI Rule 97. Referring to Rules 97 to 106, this Court further held that they were intended to deal with every sort of resistance or obstruction raised by any person and that Rule 97(2) made it incumbent on the court to adjudicate upon such complaint in accordance with the procedure laid down. This Court also proceeded to observe:*

*"It is clear that executing court can decide whether the resistor or obstructer is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21, Rule 97(2) of the Code. The adjudication. mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course, the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary".*

23. The long line of precedents notwithstanding, it is indeed true that in

terms of the ordainment of Rule 102 of Order XXI, Rules 98 and 100 thereof would not apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed."

24. The 1st question which arises for determination is with regard to the validity of the order dated 30/04/2015 and 29/05/2015 whereby the application filed by the petitioner was dismissed and further the recall application was also rejected. The petitioner stated that on 30/04/2015 he had met with an accident and consequently could not reach the Court nor inform his counsel and consequently his application under Order 21 Rule 97 was rejected. The trial Court was of the view that the proceedings have been pending for 35 years, and also that he had perused the record where on merits no case for interference was made out and accordingly rejected the application. From perusal of the above order it is clear that the application for recall was rejected without considering the grounds on which it was filed. This court treats the said rejection to be merely on account of want of prosecution as no reasons have been either considered or stated for rejecting the said application on merits. The recall application was filed soon thereafter, which also was rejected affirming the order dated 30/04/2015. Considering the reasons given by the petitioner for his non-appearance on 30/04/2015, and recall application moved immediately thereafter clearly indicates that the non-appearance was not intentional. The Court is satisfied that reasons for non appearance were adequately explained by the petitioner and hence the ex-parte order ought to have been recalled. Though the contesting respondent had opposed the said application as being false and misconceived, but no document or evidence was filed to controvert the facts stated in the application preferred by the petitioner, and accordingly both the orders are therefore, arbitrary and accordingly set aside and the application for recall is allowed.

25. This Court after perusal of the facts of the case concludes that the petitioner being an interested party in the suit being in possession of the decreed property, has right to raise his objections under Order 21 Rule 97 CPC before the execution of the decree, which ought to have been duly considered by the trial Court.

26. Accordingly, the writ petition is **allowed** and the matter is remitted to the trial Court to pass fresh orders on the application under Order 21 Rule 97 CPC preferred by the petitioner. Considering the fact that much time has lapsed due to pendency of the proceedings, the trial Court is directed to consider and decide the application expeditiously, say within maximum period of six weeks from the date of production of certified copy of this order.

27. The parties before this Court undertake to cooperate the proceedings before the trial Court.

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**(2024) 7 ILRA 910**
**REVISIONAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 18.07.2024**

**BEFORE**

**THE HON'BLE ASHUTOSH SRIVASTAVA, J.**

S.C.C. Revision No. 19 of 2024

**Dhanush Vir Singh ...Revisionist**
**Versus**
**Dr. Ila Sharma & Ors. ...Opp. Parties**

**Counsel for the Revisionist:**
Pankaj Saksena

**Counsel for the Opp. Parties:**
Rama Goel Bansal, Shalini Goel

**Code of Civil Procedure, 1908, Section 51:** ***Powers of Court to enforce execution – Section 55: Arrest and detention –*** **Execution Proceeding –** Warrant of Arrest against the Branch Manager/General Manager of the Company who had signed the Tenancy Agreement - **Provincial Small Causes Courts Act, 1887, Section 25** - *Issue*: Whether the Directors/Authorized Representatives of a Limited Company can be arrested and detained in Civil Prison for execution of a Money Decree against the Company, or so to say, whether the Directors/Authorized Representatives of the Company are bound in a representative capacity for the Judgment Debtor Company for the execution of the said Decree - *Held*: *A Money Decree cannot be executed by arresting and detaining in Civil Prison the Directors/Authorized Representatives of the Judgment Debtor Company*, responsible for the conduct of the business of the Company. There is no provision in the CPC that allows execution of a Money Decree against the Judgment Debtor Company by arresting and detaining its Employee, Director, or General Manager. The Executing Court cannot go behind the decree. The Executing Court cannot execute the decree against anyone, other than the Judgment Debtor or from the assets/properties of anyone other than the Judgment Debtor. It was for the Decree Holder to point out the assets of the Judgment Debtor Company against which the Decree can be executed. Such details can be obtained from the Registrar of Companies. Without undertaking any such exercise, the Decree Holder cannot execute the Decree against an individual by seeking his arrest and detention in civil prison. In the case at hand, the Revisionist is not the Judgment Debtor; rather, M/s Bennett Coleman & Co. Ltd. is the Judgment Debtor. **(Para 19, 28)**

**Revision allowed.** (E-5)

**List of Cases cited :-**

1. Case No. C.R.P. No. 5832 of 2006 (V. Dharmavenamma Vs C. Subrahmanyam Mandadi) reported in (2009) 06 AP CK 0018

2. Shyam Singh Vs Collector, District Hamirpur U.P. & ors., reported in 1993 Supp (1) SCC 693

3. M/s G-Tech Stone Ltd. Vs Bfil Finance Ltd. O.S.A. No. 287 of 2019 and C.M.P. Nos. 22998 and 24061 of 2019 Madras High Court

4. V. K. Uppal Vs Akshay International Pvt. Ltd. Manu/DE/0320/2010

5. Anirban Roy & ors. Vs Ram Kishan Gupta & ors. Manu/DE/ 3524/ 2017

6. Liugong India Pvt. Ltd. Vs Yograj Infrastructure Ltd. & ors. Manu/DE/ 1909/2018

7. H.S. Sidona Vs Rajesh Enterprises 1993 (77) P&H 251

8. Tata Engineering and Locomotive Co. Ltd. Vs St. of Bih. AIR 1965 SC 40

9. Delhi Development Authority Vs Skipper Construction Company (P) Ltd. 1996(4) SCC 622

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

1. Heard Sri Pankaj Saksena, learned counsel for the Revisionist and Smt. Rama Goel Bansal, learned counsel for the Plaintiff/Decree Holder/ Opposite Party No.1. The Opposite Party Nos. 2 to 4 have been arrayed as Judgment Debtors/Defendants/Proforma Opposite Parties. No one has put in appearance on their behalf.

2. With the consent of the parties the instant SCC Revision is being decided finally.

3. The instant SCC Revision under Section 25 of the Provincial Small Causes Courts Act, 1887 at the instance of the

Defendant/Judgment Debtor has been filed questioning the judgment and order dated 16.01.2024 passed by the Additional District Judge, Court No. 6, Bareilly , whereby and whereunder allowing the application 57-Kha of the Plaintiff/Decree Holder/Opposite Party No. 1 in Execution Case No. 02 of 2021 arising out of SCC Suit No. 18 of 2016 and issuing the Warrant of Arrest against the Revisionist.

4. The relief claimed by way of the instant SCC Revision is that the Revision be allowed the judgment and order dated 16.01.2024 in Execution Case No. 2 of 2021 (Dr. Ila Sharma Vs. M/s Benett Coleman & Co. Ltd. and others) be set aside with costs.

5. The facts giving rise to the controversy involved between the parties shorn of unnecessary details are that the Revisionist presently working as Vice President of M/s Benett Coleman & Co. Ltd. while working as General Manager and Branch Head was duly authorized to enter into lease agreement with one Ram Dev Bhaguna for the purposes of rent for the period of 9 years w.e.f. 01.06.2013 to 31.05.2022 @ Rs.15,000/- to be enhanced by 15% after 3 years regarding office space at 129, Civil Lines, Balwant Singh Road, Bareilly, having total area 2000 sq. ft. Though the tenancy was for a fixed period of 9 years but the lessee was entitled to terminate the lease by giving 3 months notice during the tenure of the lease. The tenancy was terminated by the Landlord/Lessor vide Notice dated 22.04.2016 and a request was made to the Company to vacate the premises and handover the vacant possession on expiry of 30 days from the service of notice and claimed mesne profits @ Rs.2500/- per day till delivery of actual physical possession. The Company did not vacate the tenanted premises and the Lessor/Landlord instituted a SCC Suit being SCC Suit No. 18 of 2016 (Dr. Illa Sharma and others Vs. M/s Benett Coleman & Co. Ltd. and others) for ejectment and recovery of mesne profits @ Rs.2500/- per day from the date of filing of the Suit till the date of actual possession.

6. The Company is stated to have filed an Application dated 10.09.2018 (Paper No. 37-C) before the Court stating that it is willing to handover the vacant possession of the premises to the Landlord but the Landlord is not coming forward to accept the same and, accordingly, a request was made that the keys of the premises be accepted by the Court and an Amin Commissioner be appointed to ascertain the vacancy and take custody and hand over possession to the Landlord. It is admitted position that vacant possession of the tenanted premises was handed over to the Opposite Party No.1, Dr. Illa Sharma on 01.10.2019, who issued a Letter of Possession on 01.10.2019.

7. The SCC Suit, thereafter proceeded ex-parte and was decreed vide judgment and decree dated 05.08.2021 under which the Company M/s Benett Coleman & Co. Ltd. was directed to pay the mesne profit @ Rs.2500/- per day from the date of filing of the Suit till the date of delivery of possession i.e. 01.10.2019 totaling to a sum of Rs.30,57,500/- to the Plaintiff/Opposite Party No.1 within one month. The judgment and decree dated 05.08.2021 has been assailed by the Company M/s Benett Coleman & Co. Ltd. in SCC Revision (Defective) No. 36 of 2023, in which this Court has issued notice on the Delay

Condonation Application and the Revision is pending consideration. The effect and operation of the judgment and decree dated 05.08.2021 has not been stayed.

8. The Plaintiff/Decree Holder/Opposite Party No.1 filed an execution case registered as Execution Case No. 2 of 2021. The Execution Case was filed against one Sri Vijay Sahi, the then General manager M/s Benett Coleman & Co. Ltd., as Opposite Party No. 3. Subsequently, the Decree Holder/ Opposite Party No.1 impleaded one Sri Vineet Kumar Jain, Managing Director of the Company, as party to the Execution Case, who filed his objections. The Executing Court vide its order dated 23.05.2023 partially allowed the objections holding that the Execution Case cannot proceed against the Managing Director of the Company as he was neither party to the proceedings nor party to the lease agreement signed between the parties. The Executing Court, however, observed that the execution is maintainable against the Branch Manager/General Manager of the Company who had signed the agreement. Accordingly, the Revisionist and the proforma Respondent No. 4 were impleaded in the execution proceedings.

9. The Plaintiff/Decree Holder/Opposite Party No.1 filed an Application (Paper No. 57-Kha) on 04.11.2023 praying for the arrest and detention of the Revisionist as required under Section 55 of the C.P.C. The said Application (Paper No. 57-Kha) was objected to by the Revisionist by stating that the Application is misconceived, as no grounds on which arrest of the Revisionist has been sought, has been disclosed, there is neither any allegation against the Revisionist nor any avernment that he is absconding the decree has not been passed against him in his individual capacity, the compliance of order 21 Rule 41 CPC has not been made and no notice has been issued under Order 21 Rule 37 CPC.

10. The Additional District Judge, Court No. 6, Bareilly, vide the impugned judgment and order dated 16.01.2024 has proceeded to allow the Application (Paper No. 57 Kha) of the Plaintiff/Decree Holder and rejected the objections of the Revisionist and issued the Warrant of Arrest against the Revisionist.

11. Sri Pankaj Saxena, learned counsel for the Revisionist vehemently submits that the instant execution proceedings against the Revisionist is an abuse of the process of law inasmuch as the Revisionist is merely the employee of the Judgment Debtor Company M/s Benett Coleman & Co. Ltd., and no decree has been passed against him personally but has been passed against the Company. The Revisionist has been impleaded in the proceedings in an official capacity and not in his personal capacity and as such, the decree cannot be executed against him by seeking his arrest and detention in civil prison. It is also argued that the Application (Paper No. 57-Kha) was totally misconceived, not maintainable inasmuch as it violated the provisions of Order 21 Rule 11-A, Order 21 Rule 37 and Order 21 Rule 41 CPC. It is, accordingly, prayed that the Application be set aside and the Revision be allowed.

12. Per contra, Smt. Rama Goel Bansal, learned counsel for the Landlord/ Plaintiff/Decree Holder/Opposite Party has filed supplementary counter affidavit stating that the Judgment Debtor Company is avoiding the decree by adopting the

delaying tactics and is harassing the decree holder who is an old lady of 80 years residing in Delhi. Almost 3 years have passed by and the decree dated 05.08.2021 has not been executed. Earlier, an Application on behalf of the judgment debtor was filed to recall the ex-parte decree without complying with the provisions of Section 17 of the Provincial Small Cause Courts Act, 1887. Later on, the said proceedings were withdrawn. The Revisionist has been impleaded under order of the Executing Court dated 23.05.2023, which order has not been put to challenge. The case was also placed before the Lok Adalat at the request of the judgment debtor, however, the judgment debtor did not appear on the date fixed due to non arrangement of the liability to satisfy the decree. It is also averred that as per the knowledge of the decree holder, no property is owned by the judgment debtor in the District Bareilly and in such circumstances, the decree holder has been compelled to execute the decree in mode provided by Section 51 CPC and cannot be compelled to adopt any other mode. It is also vehemently contended that the Revisionist is an authorized representative of the judgment debtor and he cannot avoid his liability to comply with the money decree. It is, accordingly, prayed that the Revision be dismissed at the threshold.

13. Reliance is placed upon the decision of the Andhra Pradesh High Court in ***Case No. C.R.P. No. 5832 of 2006 (V. Dharmavenamma Vs C. Subrahmanyam Mandadi)*** reported in ***(2009) 06 AP CK 0018*** and a decision of the Apex Court in the case of ***Shyam Singh versus Collector, District Hamirpur U.P. and others***, reported in ***1993 Supp (1) SCC 693*** to buttress the point that a decree holder cannot be compelled to adopt a particular mode for executing the decree. Reliance is also placed upon a decision of Madras High Court in the case ***O.S.A. No. 287 of 2019 and C.M.P. Nos. 22998 and 24061 of 2019 (M/s G-Tech Stone Ltd. versus Bfil Finance Ltd.)*** to submit that the corporate veil can be lifted where the Court from the material on record comes to the conclusion that the judgment debtor is trying to defeat the execution of the decree.

14. In the above backdrop this Court has been called upon to rule on the legality, propriety and correctness of the order dated 16.01.2024 passed by the learned Additional District Judge, Court No. 6, Bareilly in Execution Case No. 2 of 2021 whereby the Application (Paper No. 57-Kha) of the decree holder has been allowed and Warrant of Arrest under Order 21 Rule 38 CPC has been issued against the Revisionist who has been impleaded as Opposite Party No. 3 in the execution case.

15. I have heard the learned counsels for the parties at length and have perused the record as also the case laws cited at the bar.

16. The moot question for consideration in this Revision is whether the Directors/Authorized Representatives of a Limited Company be arrested and detained in Civil Prison for execution of a Money Decree against the Company or so to say whether the Directors/Authorized Representatives of the Company are bound in a representative capacity for the Judgment Debtor Company for the execution of the said Decree.

17. Admittedly, the Tenancy Agreement dated 12.06.2013 was executed with M/s Benett Coleman & Co. Ltd., an existing Company within the meaning of

Companies Act, 1956 acting through the Revisionist, who was then working in the capacity of General Manager. In the SCC Suit filed, the Company M/s Benett Coleman & Co. Ltd. was impleaded through its General Manager at Lucknow and Branch Manager at Bareilly. The ex-parte decree dated 05.08.2021 in the SCC Suit No. 18 of 2016 has been passed against M/s Bennett Coleman & Co. Ltd. and as such, the Company is the judgment debtor. The execution of the ex-parte decree is sought to be executed against the Judgment Debtor Company through the Revisionist by filing an Execution Case registered as Execution Case No. 2 of 2021, under Section 51 read with Order 21 Rule 37 CPC for arrest and detention of the Revisionist in civil prison according to law for non payment of the amount of Rs. 30,57,500/- along with 18% interest and execute the decree for recovery of the amount. The Decree Holder/ Opposite Party reserves her right to opt to the mode for execution of the decree through attachment and sale or by sale without attachment of the property of the judgment debtor as also under Section 51 (b) CPC.

18. The Code of Civil Procedures, 1908 is a self contained Code which provides for the elaborate procedure for executing a decree. It would be apposite to refer to some of the provisions of the CPC which deal with execution of a decree and have been relied upon particularly by the learned counsel for the Decree Holder/Respondent.

**Section 51: Powers of Court to enforce execution:-**

51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree-

(a) by delivery of any property specifically decreed;

(b) by attachment and sale or by sale without attachment of any property;

(c) by arrest and detention in prison;

(d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require.

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied-

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment-debtor has, or has had sine the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

**Explanation.**-In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force

of law for the time being in force, is exempt from attachment in execution of the decree.

**State Amendment:-**

**Uttar Pradesh**- In section 51, after clause (b), insert the following clause, namely:- "(bb) by transfer other than sale, by attachment or without attachment of any property"

**Section 55 Arrest and detention:** (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the State Government may appoint for the detention of persons ordered by the Courts of such district to be detained;

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise;

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorised to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found;

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorised to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest;

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The State Government may, by notification in the Official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the State Government in this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he may be discharged, if he has not committed any act of bad faith regarding the subject of the application and if he complies with provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor express his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realised or commit him to the civil prison in execution of the decree.

**Order 21 Rule 10. Application for execution.**

Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

**Order 21 Rule 11. Oral application.**

(1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

(2) **Written application**- Save as otherwise provided by sub-rule(1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely-

(a) the number of the suit;

(b) the names of the parties;

(c) the date of the decree;

(d) whether any appeal has been preferred from the decree;

(e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;

(f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;

(g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;

(h) the amount of the costs (if any) awarded;

(I) the name of the person against whom execution of the decree is sought; and

(j) the mode in which the assistance of the Court is required whether-

(i) by the delivery of any property specifically decreed;

(ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

**Order 21 Rule 11A. Application for arrest to state grounds.**

Where an application is made for the arrest and detention in prison of the judgment-debtor, it shall state, or be accompanied by an affidavit stating, the grounds on which arrest is applied for.

**Order 21 Rule 30. Decree for payment of money.**

Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

**Order 21 Rule 37. Discretionary power to permit judgment-debtor to show cause against detention in prison.—**

(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court 1 [shall], instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

[Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.]

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor."

**Order 21 Rule 38. Warrant for arrest to direct judgment-debtor to be brought up.**

Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

**Order 21 Rule 40. Proceedings on appearance of judgement-debtor in obedience to notice or after arrest.**

(1) When a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.

(2) Pending the conclusion of the inquiry under sub-rule (1) the Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required.

(3) Upon the conclusion of the inquiry under sub-rule (1) the Court may, subject to the provisions of section 51 and to the other provisions of the Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

**Provided** that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) When the Court does not make an order of detention under sub-rule (3), it shall disallow the application and, if the judgment-debtor is under arrest, direct his release.

**Order 21 Rule 41. Examination of judgment-debtor as to his property.**

(1) Where a decree is for the payment of money the decree-holder may apply to the Court for an order that-

(a) The judgment-debtor, or

(b) where the judgment-debtor is a corporation, any officer thereof, or

(c) any other person, be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

(2) Where a decree for the payment of money has remained unsatisfied for a period of thirty days, the Court may, on the application of the decree-holder and without prejudice to its power under sub-rule (1), by order require the judgment-debtor or where the judgment-debtor is a corporation, any officer thereof, to make an affidavit stating the particulars of the assets of the judgment-debtor.

(3) In case of disobedience of any order made under sub-rule (2), the Court making the order, or any Court to which the proceeding is transferred, may direct that the person disobeying the order be detained in the civil prison for a term not exceeding three months unless before the expiry of such term the Court directs his release.

**Order 21 Rule 50. Execution of decree against firm.**

(1) Where a decree has been passed against a firm, execution may be granted-

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) against any person who has been individually served as a partner with a summons and has failed to appear:

**Provided** that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 30 of the Indian Partnership Act, 1932 (9 of 1932).

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2) the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not lease, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

(5) Nothing in this rule shall apply to a decree passed against a Hindu Undivided Family by virtue of the provision of rule 10 of Order XXX.

19. A perusal of the above provisions shows that the same apply to a judgment debtor alone who has suffered the decree. In the case at hand the Revisionist is not the judgment debtor rather it is M/s Bennett Coleman & Co. Ltd. which is the judgment debtor. There is no provision in the CPC which provides for execution of a money

decree against the Judgment Debtor Company by effecting arrest and detention of its Employee, Director or General Manager. Order 21 Rule 50 does provide for execution of a money decree against a firm from the assets of the partners of the said firm mentioned in the Rule but there is no provision with respect to the Employee/Representative/Director of a Company. The Executing Court cannot go behind the decree and can execute the same as per the form only. The decree admittedly is against the Company. The Executing Court cannot execute the decree against anyone including the Revisionist herein other than the judgment debtor or against from the assets/properties of anyone other than the judgment debtor.

20. Sub Rule (1)(b) of Order 21 Rule 41 provides that where a money decree is against the judgment-debtor which is a Corporation, the decree holder may apply to the Court for an Officer of the said Corporation to be orally examined to determine the quantum of debts that are owned by the judgment-debtor and whether the judgment-debtor has the means of satisfying the decree. Order 21 Rule 41(2) provides that on an Application of a decree-holder the Court has the power to require the judgment-debtor or where the judgment-debtor is a Corporation, any Officer to file an affidavit stating the particulars of he assets of the judgment-debtor. Order 21 Rule 41(3) provides that in case of disobedience of any order made under Order 21 Rule 41(2), the Court may direct civil imprisonment of the person disobeying the said order.

21. The Delhi High Court in the Case of ***V. K. Uppal Vs. Akshay International Pvt. Ltd.*** reported in ***Manu/DE/0320/2010*** wherein an execution of an Award under the Arbitration Act, 1996 against the Judgment debtor Company was sought to be enforced against the Director the Court rejecting the Application observed as under:

*"6. The admitted position is that the arbitration award having force of the decree is against the judgment debtor company only and not against its Directors. The question which arises is whether a money decree against a Private Limited Co. can be executed against its Directors. There is no provision therefor in the CPC. Order 21 Rule 50 does provide for execution of a money decree against a firm from the assets of the partners of the said firm mentioned in the said rule but there is no provision with respect to the Directors of a company. The executing court, as this Court is cannot go behind the decree and can execute the same as per its form only. The decree is against the company. This Court as the executing court cannot execute the decree against anyone other than the judgment debtor or against from the assets/properties of anyone other than the judgment debtor. The identity of a Director or a shareholder of a company is distinct from that of the company. That is the very genesis of a company or a corporate identity or a juristic person. The classic exposition of law in this regard is contained in Solomon Vs. Solomon & Co. Ltd. 1897 AC 22 where the House of Lords had held that in law a company is a person all together different from its shareholders and Directors and the shareholders and Directors of the company are not liable for the debts of the company except to the extent permissible by law."*

22. Then again, the Delhi High Court in the case of ***Anirban Roy and Others Vs. Ram Kishan Gupta and others*** reported in

***Manu/DE/ 3524/ 2017*** while considering a Petition under Article 227 of the Constitution of India impugning orders passed in execution proceedings exercising powers under Order 21 Rule 41 CPC directing the Directors of the Judgment Debtor Company to disclose their personal assets movable and immovable and issuing bailable warrants, while allowing the petition observed as under:-

*"I have in V.K. Uppal Vs. Akshay International Pvt. Ltd. 2010 SCC online Delhi 538 held; (i) that there is no provision in the CPC for execution of a money decree against a Pvt. Ltd company, against its directors; (ii) that though Order XXI Rule 50 of the CPC does provide for execution of a money decree against a firm, from the assets of the partners of the said firm mentioned in the said Rule but there is no provision with respect to directors of a company; (iii) that the Executing Court cannot go behind the decree and can execute the same as per its form only; (iv) that if the decree is against the company, the executing Court cannot execute the decree against anyone other than the judgment-debtor company or against the assets and properties of anyone other than the judgment-debtor company; (v) that the identity of a director or a shareholder of a company is distinct from that of the company--that is the very genesis of a company or a corporate identity or a juristic person;(vi) the classic exposition of law in this regard is contained in Solomon Vs. Solomon & Co. Ltd. 1897 AC 22 where the House of Lords held that in law, a company is a person all together different from its shareholders and directors and the shareholders and Directors of the company are not liable for the debts of the company except to the extent permissible; (vii) that though a Single Judge of this Court in Jawahar Lal Nehru Hockey Tournament Vs. Radiant Sports Management 149(2008) DLT 749 observed that there could be a case where the Court even in a execution proceeding lifts the veil of a closely held company, particularly a Pvt. Ltd company and in order to satisfy a decree, proceed against the personal assets of its directors and shareholders but the said judgment was over ruled by the Division Bench EFA(OS) No.17/2008 decided on 7th November, 2008 and reported as MANU/DE/1756/2008, finding that the director of the company had agreed to be personally liable to satisfy the decree and for this reason holding him liable; however the Division Bench refrained from commenting authoritatively on the aspect of lifting of the corporate veil in execution; (viii) that though Section 53 of the Transfer of the Property Act, 1882 allows the creditors to have a transfer of property made with an intent to defeat the creditors set aside but a case therefor has to be pleaded; (ix) that it cannot be laid as a general proposition that whenever the decree is against a company, its Directors/ shareholders would also be liable-to hold so would be contrary to the very concept of limited liability and obliterate the distinction between a partnership and a company; (x) that though the Courts have watered down the principle in Solomon supra to cover the cases of a fraud, improper conduct, etc. as laid down in Singer India Ltd. Vs. Chander Mohan Chadha (2004) SCC 1 but a case therefor has to be made out; (xi) that the decree holders in that case had not made out any case therefor; the directors were not parties to the proceedings in which decree was passed and were not impleaded in the execution petition also and there were no averments in the execution petition of fraud or improper conduct or of incorporation of*

*the company to evade obligations imposed by law and in which situations Supreme Court in Singer India Ltd. supra has held that the corporate veil must be disregarded."*

23. Yet again the Delhi High Court in the case of ***(Liugong India Pvt. Ltd. Vs. Yograj Infrastructure Ltd. And others)*** reported in ***Manu/DE/ 1909/2018*** observed as under.

*12. A company, being a juristic entity, has to necessarily act through natural persons and we are still far from the day when such juristic entities, with the assistance of Artificial Intelligence will enter into contracts without acting through natural persons. Thus, merely because a natural CS(OS) 3318/2012 person has acted on behalf of a juristic entity like a company will not make such natural person personally liable for the debts of such juristic entity. Reference if any required in this context can be made to V.K. Uppal Vs. Akshay International Pvt. Ltd. 2010 SCC OnLine Del 538 and Anirban Roy Vs. Ram Kishan Gupta MANU/DE/3524/2017.*

24. The Punjab and Haryana High Court in the case of ***H.S. Sidona vs. Rajesh Enterprises*** reported in ***1993 (77) P&H 251*** has held that where there was a decree for recovery of sums due to a Bank from a Company in a suit against the Company and its Managing Director, the liability to discharge the decreetal amount was that of the Company and not of its Managing Director. The Executing Court could proceed against the Managing Director of the Judgment Debtor Company only if it came to be conclusion that the managing Director was personally liable to discharge the decreetal amount.

25. The Bombay High Court at Goa while considering a Civil Revision Petition at the instance of the Proprietor of the Judgment Debtor Company incorporated under the Companies Act assailing an order refusing to discharge him in execution proceedings where the assistance of the Court for executing the decree inter-alia was sought by detention in civil prison the Sole Proprietor/Authorized Signatory/ Partner/Director of the Judgment Debtor in civil prison allowed the Revision, set aside the impugned order observing as under:-

*"10. It is apparent that as per the case made out in the plaint Harshada Trading Company is a Company, incorporated under the Companies Act and the decree is also passed against the original defendant-Harshada Trading Company alone. It is now well settled that where the decree is against the Company, which is an independent entity, the decree cannot be executed against any individual, being a Director or a person responsible for the conduct of the business of the Company. It was for the respondent to point out as to what are the assets of the Company, against which the decree can be executed. Such details can be obtained by the decree holder from the office of the Registrar of Companies (RoC). Without doing any such exercise, the respondent is trying to execute the decree against an individual and that too, without showing that the petitioner is in anyway related to the Company-Harshada Trading Company."*

26. Much emphasis has been laid by Smt. Rama Goel Bansal, learned counsel for the Decree Holder/Respondent No.1 that the Judgment-Debtor Company has no intention to honour the Decree passed in the SCC Suit dated 05.08.2021 which is for

a sum of Rs.30,57,500/- and about 3 years have passed by and the Decree Holder/Respondent No.1 has not been able to enjoy the fruits of the Decree. She submits that this case is a fit case in which this Court should lift the Corporate Veil to see that the Revisionist being the Vice President of the Judgment Debtor Company is in the helm of the affairs of the Judgment Debtor Company and no indulgence is required to be granted to the Revisionist and rather he must be directed to ensure the satisfaction of the Decree.

27. I have given my anxious consideration to the above submission of the learned counsel for the Decree Holder/Respondent No.1 and am not impressed. No ground for invoking the above principle is made out in the present case. The question of lifting the Corporate Veil was examined by the Constitutional Bench in the case of ***Tata Engineering and Locomotive Co. Ltd. Vs. State of Bihar,*** reported in ***AIR 1965 SC 40***. In the said case the Apex Court observed that the doctrine of lifting of the veil postulate the existence of dualism between the Company on one hand and its members or shareholders on the other. The question was again considered in the case of ***Delhi Development Authority Vs. Skipper Construction Company (P) Ltd.*** reported in ***1996(4) SCC 622***. In Para Nos. 24 to 28 the Apex Court observed as under:-

*24. In Aron Salomon v. Salomon & Company Limited (1897 Appeal Cases 22), the House of Lords had observed,*

*"the company is at law a different person altogether from the subscriber...; and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands received the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, on any shape or form, except to the extent and in the manner provided by that Act".*

*Since then, however, the Courts have come to recognize several exceptions to the said rule. While it is not necessary to refer to all of them, the one relevant to us is "when the corporate personality is being blatantly used as a cloak for fraud or improper conduct". [Gower: Modern Company Law - 4th Edn. (1979) at P. 137]. Pennington [Company Law - 5th Edn. 1985 at P.53] also states that "here the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by the law", the court will disregard the corporate veil. A Professor of Law, S. Ottolenghi in his article "From Peeping Behind the Corporate Veil, to Ignoring it Completely" says*

*"the concept of 'piercing the veil' in the United States is much More developed than in the UK. The motto, which was laid down by Sanborn,J. and cited since then as the law, is that 'when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. The same can be seen in various European jurisdictions".*

*[(1990) 53 Modern Law Review 338].*

*Indeed, as far back 1912, another American Professor L. Maurice Wormser examined the American decisions on the subject in a brilliantly written article "Piercing the veil of corporate entity" [published in (1912) XII Columbia Las Review 496] and summarized their central holding in the following words:*

*"The various classes of cases where the concept of corporate entity should We ignored and the veil drawn aside have vow been briefly reviewed. What general rule, if any, can be laid down? The nearest approximation to generalization which the present state of the authorities would warrant is this: When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons."*

*25. In Palmer's Company law, this topic discussed in Part- II of Vol-I. Several situations where the court will disregard the corporate veil are set out. It would be sufficient for our purposes to quote the eighth exception. It runs:*

*"The courts have further shown themselves willing to 'lifting the veil' where the device of incorporation is used for some illegal or improper purpose....Where a vendor of land sought to avoid the action for specific performance by transferring the land in breach of contract to a company he had formed for the purpose, the court treated the company as a mere 'sham' and made an order for specific performance against both the vendor and the company".*

*Similar views have been expressed by all the commentators on the Company Law which we do not think it necessary to refer to.*

*26. The law as stated by Palmer and Gower has been approved by this Court in Tata Engineering and Locomotive Company Limited v. State of Bihar [1964 (6) S.C.R. 885 ]. The following passage form the decision is apposite:*

*"Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But, it would not be possible to evolve a rational consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly, where fraud is intended to be prevented, or trading with enemy is sought to be defeated, the veil of corporation is lifted by judicial decisions and the shareholders are held to be 'persons who actually work for the corporation."*

*27. In DHN Food Distributors Ltd. & Ors. v. London Borough of Tower Hamlets [ 1976 (3) All.E.R. 462 ], the Court of Appeal dealt with a group of companies. Lord Denning quoted with approval the statement in Gower's Company Law that*

*"there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group".*

*The learned Master of Rolls observed that "this group is virtually the same as a partnership in which all the three companies are partners". He called it a case of "three-in-one" - and, alternatively, as "one-in-three".*

*28. The concept of corporate entity was evolved to encourage and promote trade and commerce : but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created several*

*corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family and that the device of incorporation was really a Ploy adopted for committing illegalities and/or to defraud people."*

28. This Court is of the firm view that the Money Decree dated 05.08.2021 for the sum of Rs.30,57,500/- cannot be executed against the Revisionist being the Vice President of the Judgment Debtor Company M/s Benett Coleman Co. Ltd. responsible for the conduct of the business of the Company. It was for the Respondent/Decree Holder to point out as to what are the assets of the Judgment Debtor Company against which the Decree can be executed. Such details can very well be obtained from the Registrar of the Companies without undertaking any such exercise, the Decree Holder/ Respondent is trying to execute the Decree against an individual/ Revisionist by seeking his arrest and detention in civil prison.

29. In view of the above, this Court comes to the irresistible conclusion that the application 57-Kha moved by the Decree Holder/Opposite Party seeking the arrest and detention of the Revisionist who admittedly is not the judgment debtor and only the Vice President of the Judgment Debtor Company is misconceived and was not liable to be entertained. The learned Additional District Judge, Court No. 6, Bareilly, committed manifest error of law in allowing the Application and issuing Warrant of Arrest under Order 21 Rule 38 against the Revisionist under the impugned order dated 16.01.2024. The order dated 16.01.2024 impugned in the instant SCC Revision is set aside. The SCC Revision is **allowed**. However, this Court is conscious of the fact that a Money Decree has been passed against the Judgment Debtor Company, which is liable to be enforced against the Judgment Debtor Company. The Decree Holder/Respondent may take recourse to the specific provisions of Order 21 Rule 41 CPC to enforce the Decree passed in the SCC Suit No. 18 of 2016 and suitably amend the Execution Application No. 2 of 2021.

30. Learned counsel for the decree-holder may file an appropriate application at the earliest and in the eventuality of such an application being filed, it is expected that the Executing Court shall taken cognizance of the said application and pass appropriate orders expeditiously preferably within two months from the date of service of a certified copy of the order of this Court.

31. No order as to costs.

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**(2024) 7 ILRA 925**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 16.07.2024**

**BEFORE**

**THE HON'BLE SALIL KUMAR RAI, J.**

Civil Misc. Writ Petition No. 42499 of 2023
And
Writ - C No. 12426 of 2022

**The C/M Nawab Singh Chauhan Gramoday Inter College, District Aligarh & Anr.** **...Petitioners**

**Versus**

**The State of U.P. & Ors.** **...Respondents**

**Counsel for the Petitioners:**

Sri Shivendu Ojha, Sneh Pandey, Sr. Advocate

**Counsel for the Respondents:**
Sri Bachchu Lal Yadav, C.S.C.

**Civil Law - Societies Registration Act, 1860 – Section 4-B - U.P. Intermediate Education Act, 1921 – Section 16-A to Section 16-D - Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 - Section 5 - Gram Shiksha Samiti, a society registered under Societies Registration Act, runs Nawab Singh Chauhan Gramodaya Inter College – Disputes arose regarding validity of elections for Committee of Management, with rival claims from different parties - The District Inspector of Schools referred matter to Regional Level Committee, rejected on the ground that both the elections were held on a list which was not registered under Section 4-B of Societies Registration Act - Impugned Order - Validity of Elections - Held, the Scheme of Administration of College provides for general body of College different from general body of Society - No provision either in Scheme or in bye-laws of Society providing that members of general body of Society shall be members of general body of College or general body of Society shall be general body of College – Scheme doesn't stipulate participation of general body of Society in elections of Committee of Management or its office-bearers – Elections held by petitioners were valid and orders rejecting these elections were contrary to law – Impugned orders quashed, matter is remanded back – Directions accordingly (Para 2, 5, 23, 26, 27, 28)**

**Writ petition allowed.** (E-13)

**<u>List of Cases cited</u>:**

Committee of Management Hindu Inter College & ors.Vs Regional Deputy D E & ors.1988 (14) AIILR 376

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. The above two writ petitions were connected by order of this Court and had, therefore, been heard together and are being decided by a common judgment. One Ravindra Singh Chauhan has been impleaded as respondent no. 4 in Writ – C No. 42499 of 2023 and as respondent no. 5 in Writ – C No. 12426 of 2022. Ravindra Singh Chauhan shall be referred as respondent no. 4 in the present judgment.

2. The facts of the case are that Gram Shiksha Samiti, Kasimpur Power House, District Aligarh (hereinafter referred to as, 'Society') is a society registered under the Societies Registration Act, 1860 (hereinafter referred to as, 'Act, 1860') and its registration stands renewed for a period of five years w.e.f. 17.12.2020. The Society runs an educational institution named as Nawab Singh Chauhan Gramodaya Inter College, Kasimpur Power House, Aligarh (hereinafter referred to as, 'College'). The College is a recognized institution as defined in U.P. Intermediate Education Act, 1921 (hereinafter referred to as, 'Act, 1921') and is governed by the Act, 1921 and the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 (hereinafter referred to as, 'Act, 1971').

3. The bye-laws of the Society describe the different categories of members of the general body of the Society and prescribe the qualifications for being enrolled as member of the Society and the manner in which the governing body of the Society shall be elected and constituted. The bye-laws of the Society do not provide that the members of the general body of the Society or the elected office-bearers of the

governing body of the Society shall also be the members of the general body of the College and members of the Committee of Management of the College.

4. The Scheme of Administration of the College stipulates, in Clause - 3, a general body of the College different from the general body of the Society. The Scheme of Administration specifies the different types of members of the general body of the College and classifies them as patron members, life members, ordinary members and as special / distinguished members. The Scheme of Administration does not provide that the members of the general body of the Society shall also automatically be members of the general body of the College. The Scheme of Administration further provides the qualification required to be a member of the general body of the College, the procedure for enrolling the members and also provides that the College shall be managed by a Committee of Management elected in accordance with the Scheme of Administration. Clause - 8 of the Scheme of Administration prescribes that the Committee of Management shall consist of fifteen members out of which three members shall be ex-officio members and twelve members shall be elected by the general body of the College from amongst the members of the general body of the College itself and in the manner provided in the Scheme of Administration. The term of the Committee of Management is five years. Clause - 11(3) of the Scheme of Administration provides that the list of members of the general body of the College shall be declared three months before the five year term of the Committee of Management expires and the list shall be communicated to the members of the general body of the College. Clause - 26 specifically notes that the College shall be managed in accordance with the provisions of the Scheme of Administration and any rule or order issued by the Registrar - Firms, Societies and Chits shall not be applicable on the general body of the College or on its executive committee.

5. The last election of the Committee of Management of the College was held on 1.1.2017 in which one Shri Vipin Kumar Chauhan was elected as Manager and his signatures were attested vide order dated 18.1.2017 passed by the District Inspector of Schools, Aligarh (hereinafter referred to as, 'DIOS'). The petitioner in Writ – C No. 12426 of 2022 claims that subsequently another election was held on 5.12.2021 in which Smt. Niharika Chauhan, the petitioner no. 2, was elected as Manager and the requisite documents to attest her signatures as Manager were sent to the DIOS. Respondent no. 4 also set up a rival election allegedly held on 28.11.2021 claiming to be elected as Manager. As rival claims regarding the elections were set up by different parties, the DIOS vide his letter dated 15.12.2021 referred the matter to the Regional Level Committee and also by his order dated 26.3.2022 passed under Section 5 of the Act, 1971 directed that the accounts of the College would be operated by the Finance and Accounts Officer (Secondary Education), Aligarh and the Principal of the College.

6. The Regional Level Committee vide its decision dated 29.3.2022 rejected the rival elections set up by the parties on the ground that both the elections were held on a list which was not registered under Section 4-B of the Act, 1860 (as amended in 2013). Consequently, by order dated 30.3.2022, the Joint Director of Education, Aligarh Division, Aligarh appointed an

Authorized Controller in the College and directed that elections to elect the Committee of Management of the College be held on the list of members of the general body of the Society registered under Section 4-B of the Act, 1860.

7. The orders dated 26.3.2022 passed by the DIOS, the order dated 29.3.2022 passed by the Regional Level Committee and 30.3.2022 passed by the Joint Director of Education, Aligarh Division, Aligarh have been challenged in Writ – C No. 12426 of 2022 in which a further prayer has been made that the Regional Level Committee be directed to pass fresh orders on the reference made to it by the DIOS through his letter dated 15.12.2021. A counter affidavit has been filed by respondent no. 4 opposing the claim raised in Writ – C No. 12426 of 2022. The stand of the respondent no. 4 as taken in his counter affidavit to challenge the claim of the petitioners shall be referred while narrating the arguments of the counsel for the respondents.

8. While Writ - C No. 12426 of 2022 was pending in this Court, the petitioners again held elections to elect the Committee of Management and its office bearers. The elections were held on 10.9.2023 in which petitioner no. 2 was elected as Manager. The requisite documents were sent to the DIOS for attesting the signatures of petitioner no. 2 as Manager. It also appears that respondent no. 4 also set up a rival election dated 3.9.2023 claiming to have been elected as Manager. The petitioners as well as respondent no. 4 both claimed that their elections were held on the basis of lists registered under Section 4-B of the Act, 1860. Another election dated 10.9.2023 was held by the Authorized Controller on a list of members registered under Section 4-B of the Act, 1860 and in the said election, the respondent no. 4 is shown to have been elected as Manager. The requisite documents were also sent by the Authorized Controller to the DIOS for appropriate decision. The DIOS vide his order dated 14.9.2023 rejected the elections set up by the petitioners and respondent no. 4 but recognized the election held by the Authorized Controller on 10.9.2023 on the ground that in view of the order dated 30.3.2022 of the Joint Director only the Authorized Controller had the power to hold the elections of the Committee of Management and its officer bearers. Consequently, the DIOS vide his order dated 14.9.2023 attested the signatures of respondent no. 4, as the Manager of the Committee of Management of the College. The order dated 14.9.2023 has been challenged in Writ – C No. 42499 of 2023.

9. It was argued by the counsel for the petitioners that the general body of the College is different and separate from the general body of the Society and the members of the general body of the College are enrolled in accordance with the provisions of the Scheme of Administration approved by the Director of Education and not in accordance with the bye-laws of the Society. The members of the general body of the Society are not automatically members of the general body of the College and they have to be separately enrolled as members of the general body of the College in the manner prescribed in the Scheme of Administration. It was argued that members of the general body of the Society have no right to participate in the elections of the Committee of Management of the College or in the meetings of the general body of the College if they have not been separately enrolled as members of the general body of the College. It was argued

that Section 4-B of the Act, 1860 applies only to the list of members of a society registered under the Act, 1860 and the list of members of an institution governed by the Act, 1921 is not required to, and can not be, registered under the Act, 1860. It was argued that the composition and constitution of the Committee of Management of an institution is to be in accordance with the provisions of Act, 1921 and the Scheme of Administration approved by the Director and not by Act, 1860. It was argued that the elections to elect the Committee of Management had to be held in accordance with the Scheme of Administration, therefore, the Committee of Management and its office-bearers had to be elected by members of the general body of the College and not by members of the general body of the Society. It was argued that the order dated 29.3.2022 passed by the Regional Level Committee rejecting the elections set up by the petitioners only on the ground that the said elections were held on a list which had not been registered under Section 4-B of the Act, 1860 and also so far as it directs that the elections to elect the Committee of Management be held on a list registered under Section 4-B of the Act, 1860 ignores the aforesaid aspect and for the aforesaid reasons, the order dated 29.3.2022 passed by the Regional Level Committee and the consequential order dated 30.3.2022 passed by the Joint Director of Education appointing an Authorized Controller to manage the College are contrary to law. It was further argued that as the elections dated 10.9.2023 recognized by the DIOS vide his order dated 14.9.2023, have been held by the members of the general body of the Society and not by the members of the general body of the College, therefore, the order dated 14.9.2023 passed by the DIOS is also contrary to law. It was further argued that the validity of the order dated 14.9.2023 is dependent on the legality of the order dated 29.3.2022 passed by the Regional Level Committee and the consequential order dated 30.3.2022 passed by the Joint Director of Education which are bad in law and for the said reason, the order dated 14.9.2023 passed by the DIOS, Aligarh is also contrary to law. It was argued that for the aforesaid reasons, the order dated 29.3.2022 passed by the Regional Level Committee, the order dated 30.3.2022 passed by the Joint Director of Education and the order dated 14.9.2023 passed by the DIOS are liable to be quashed.

10. Rebutting the arguments of the counsel for the petitioners, the Standing Counsel representing the State respondents and the counsel for respondent no. 4 have argued that the orders challenged in the present petition are based on the Government Order dated 21.11.2008 which directs that in the Scheme of Administration of an institution governed by the Act, 1921, there shall be a clause providing that the members of the general body of the parent society, i.e., the Society which manages the Institution, shall elect the Committee of Management of the Institution. It was argued that for the aforesaid reasons, the election set-up by the petitioners were not in accordance with law in as much as admittedly, the elections were held by the general body of the College and the office-bearers were elected by an electoral College which consisted of persons who were not members of the general body of the Society. It was argued that vide order dated 30.3.2022, an Authorized Controller was appointed in the Institution who was authorized to hold the elections of the Committee of Management of the College and its office-bearers on a

list of members of the Society registered under Section 4-B of the Act, 1860. The elections were held on 10.9.2023 electing the respondent no. 4 as Manager. It was argued that the DIOS, vide his order dated 14.9.2023, has rightly recognized the elections held on 10.9.2023 because as a consequence of the order dated 30.3.2022, only the Authorized Controller had the jurisdiction to hold the elections of the Committee of Management and its office bearers. It was argued that for the aforesaid reasons, there is no illegality in the order dated 29.3.2022 passed by the Regional Level Committee, the order dated 30.3.2022 passed by the Joint Director of Education and the order dated 14.9.2023 passed by the DIOS and the petitions are liable to be dismissed.

11. I have considered the submissions of the counsel for the parties.

12. Before proceeding further, it would be apt to consider the provisions of the Act, 1921 pertaining to the Scheme of Administration of an institution governed by the Act, 1921.

13. Section 16-A of the Act, 1921 starts with a non-obstante clause and provides that notwithstanding anything in any law, document, or decree or order of a Court or other instrument, there shall be a Scheme of Administration for every institution which, amongst other matters, shall provide for the constitution of a Committee of Management vested with the authority to manage and conduct the affairs of the institution. Section 16-A(5) of the Act, 1921 provides that the Scheme of Administration of every institution shall be subject to the approval of the Director and no amendment to or change in the Scheme of Administration shall be made without the prior approval of the Director. The proviso to Section 16-A(5) states that where the Director refuses to approve an amendment or change in the Scheme of Administration, the State Government may, if it is satisfied that the proposed amendment or change is in the interest of the institution, order the Director to approve the same and thereupon the Director shall act accordingly. Section 16-A(6) provides that every recognized institution shall be managed in accordance with the Scheme of Administration framed under and in accordance with sub-section (1) to (5) and Sections 16-B and 16-C of the Act, 1921. Section 16-C of the Act, 1921 provides that when a Scheme of Administration is submitted to the Director for approval, the Director shall, within the time prescribed, either approve the draft Scheme of Administration or suggest any alteration or modification therein and in case, the Director suggests any alteration or modification in the Scheme of Administration, he shall intimate the reasons therefor to the institution and shall afford an opportunity to the institution to make a representation within the prescribed time. Section 16-C further specifies that if the Director does not suggest any alteration or modification in the draft Scheme of Administration within the time prescribed by regulations, the draft Scheme of Administration shall be deemed to have been approved. Section 16-C(2) provides that the Director may either approve the Scheme of Administration as submitted before him in its original form or subject to the alteration or modification suggested or with any other changes as may appear to him to be just and proper. Section 16-CCC of the Act, 1921 provides that where any Scheme of Administration has been approved under Sections 16-A, 16-B or 16-C at any time before the commencement of

the Act, 1980 (which incorporated certain amendments in Act, 1921) and such Scheme of Administration is inconsistent with the provisions of the Act, 1921, the Director shall send, within a period of three years from such commencement, a notice to the institution suggesting any alteration or modification in the Scheme of Administration and requiring the institution to submit a fresh Scheme of Administration or to amend or alter the existing Scheme. While suggesting the alterations, the Director shall give his reasons therefor and shall also afford an opportunity to the institution to make a representation against the alteration or amendment and may approve the Scheme of Administration either in its original form or subject to any alteration or modification suggested by him or with any other changes as may appear to him to be just and proper.

14. The Third Schedule of the Act, 1921 enumerates the principles on which a Scheme of Administration shall be approved. The principles, in short, are that every Scheme of Administration shall provide for proper and effective functioning of the Committee of Management, the constitution of the Committee of Management by periodical elections, the qualifications of the members and office- bearers of the Committee of Management and the term of their offices, the procedure for calling meetings and the conduct of business at such meetings and the Scheme of Administration shall also provide that all decisions shall be taken by the Committee of Management. The Scheme of Administration shall clearly define the powers and duties of the Committee of Management and its office-bearers. The Scheme of Administration shall also include provisions for maintenance and security of property belonging to the institution and also for the utilization of its funds as well as for the regular checking and auditing of accounts. Regulation 14 in Chapter I of the Regulations framed under the Act, 1921 also relate to the framing of Scheme of Administration which reiterate the principles of the Third Schedule and the provisions from 16-A to 16-CCC of the Act, 1921.

15. A reading of Section 16-D shows that the affairs of an institution have to be managed strictly in accordance with the provisions of the Scheme of Administration. Sub-clause (vi) and (vii) of Section 16-D provide that where the draft Scheme of Administration of an institution has not been submitted within the time allowed therefor under Section 16-B or that the management of the institution is being conducted otherwise than in accordance with the Scheme of Administration or the affairs of the institution are being otherwise mismanaged or the Scheme of Administration in relation to an institution, approved before the commencement of the Intermediate Education Amendment Act, 1980 is inconsistent with the provisions of the Act, 1921 and the management of the institution has failed to alter or modify it within a reasonable time despite notice under Section 16-CCC, the Director may refer the case to the Board of Education for withdrawal of recognition of such institution or issue notice to the Committee of Management to show cause within thirty days from the date of receipt of such notice why an order under sub-section (4) should not be made. Clause - 4 of Section 16-D provides that where the Committee of Management of the institution fails to show cause or where the Director is, after considering the cause shown by the Committee of Management, satisfied that

any of the grounds mentioned in sub-section (3) exist, i.e., where the management of the institution is being conducted otherwise than in accordance with the Scheme of Administration or the provisions of the Scheme of Administration are inconsistent with the provisions of Act, 1921 and despite notice the management fails to alter or modify the Scheme of Administration within reasonable time, the Director may recommend to the State Government to appoint an Authorized Controller for that institution and thereupon the State Government may authorize the Authorized Controller to take over the management of such institution and its properties.

16. A reading of Section 16-D clearly indicates that the management of an institution has to be conducted strictly in accordance with the provisions of the approved Scheme of Administration and any transgression from the provisions of the Scheme of Administration would invite action under Section 16-D(4) of the Act, 1921 putting the existing Committee of Management under suspension and appointment of an Authorized Controller in the institution.

17. It is also apparent from a reading of Section 16-A to Section 16-D that it is only an approved Scheme of Administration which is to govern the management of the institution.

18. The Act, 1921 does not require that the list of members of the general body of an institution should be registered under the Act, 1860 or under any other legislative enactments. An institution governed by Act, 1921, merely because it is run by a Society registered under the Act, 1860, is not itself a Society registered under the Act, 1860, therefore, the list of members of the general body of such an institution is not required to be registered under Section 4-B of the Act, 1860. Under Section 4-B of the Act, 1860, the Registrar has the jurisdiction to register only the list of members of the general body of a Society which is registered under the Act, 1860. The Act, 1860 and Act, 1921 operate in distinct fields and in case of any conflict between the two, Section 16-A shall prevail because of the non-obstante clause in the provision. The Act, 1921 does not provide that the general body of the parent society, i.e., the Society which runs the institution, would necessarily be the electoral College for the elections of the Committee of Management of the institution or its office bearers. There is no provision in the Act, 1921 prohibiting constitution of a general body of an institution different and separate from the general body of the parent society which runs the institution. Any provision in the Scheme of Administration providing for a general body of the institution separate and different from the general body of the parent society would not be invalid.

19. It was held by the Division Bench of this Court in ***Committee of Management Hindu Inter College and Ors. vs. Regional Deputy D E and Ors. 1988 (14) AIILR 376*** that Section 16-A of the Act, 1921 is a complete code by itself so far as the constitution of Committee of Management of recognized institutions is concerned and the Act, 1921 and Act, 1860 operate in distinct fields. The observations of the Division Bench are reproduced below : -

*"[3] The submission is misconceived and must be rejected.* ***Section 16A of the Intermediate Education Act is a complete Code by itself in so far as the***

***constitution of the Committee of Management of recognised institutions and the disputes pertaining to the management of institution are concerned.*** *It begins with a non-obstante clause and says:--*

*Notwithstanding anything in any law, document or decree or order of a Court or other instrument,.....*

*It provides that there shall be a Scheme of Administration for every institution which shall provide, amongst other matters, for the constitution of a Committee of Management vested with authority to manage and conduct of the affairs of the institution. The Scheme of Administration has to be approved by the Director of Education.* ***The provision obligates that every recognised institution shall manage its affairs in accordance with that Scheme****. Then follows the all-important sub-section 7 of Section 16A which says:-*

*Whenever there is dispute with respect to the management of an institution, persons found by the Regional Deputy Director of Education upon such enquiry as it deemed fit to be in actual control of its affairs may, for purposes of this Act, be recognized to constitute the Committee of Management of such institution until a court of competent jurisdiction directs otherwise:*

*Provided that the Regional Deputy Director of Education shall before making an order under this sub-section, afford reasonable opportunity to the rival claimants to make representations in writing.*

*[4] ...*

*[5]* ***The Societies Registration Act, on the other hand, deals, inter alia with the resolution of disputes with respect to the election of the office bearers of a registered society****. The power of the Registrar or the prescribed authority to determine disputes in respect of the election of the office bearers of the society, as distinct from the managing committee of the institution run by that society, operates in an altogether different field from that with which the Regional Dy. Director is concerned.* ***The two enactments, namely, the Intermediate Education Act and the Societies Registration Act, to our mind, operate in distinct fields.*** *There is no overlapping between the two. Even if there is, insofar as disputes pertaining to the management of a recognized institution or the constitution of the Committee of Management are concerned, the Dy. Director of Education enjoys, in view of the scheme of the Act and the non-obstante clause used in Section 16A(1) and the clear provisions of Section 16A(1) exclusive powers save to the extent that the decision of the Dy. Director of Education under sub-section (7) shall operate only till a court of competent jurisdiction directs otherwise."* (emphasis supplied)

20. The Government Order dated 21.11.2008 could not have overriden the statutory provisions. The Government Order itself does not amend and could not have amended any existing Scheme of Administration. In light of the Government Order dated 21.11.2008, the Director could have proposed to any institution to amend the Scheme of Administration after giving the existing Committee of Management an opportunity to represent against the proposed amendments and then further, the Director or any other competent authority could have approved the existing Scheme of Administration either in its unamended form or with the proposed amendments (in this case, the amendments proposed in the Government Order dated 21.11.2008) but till the Scheme of Administration is so

amended, the provisions of the Government Order dated 21.11.2008 could not have been implemented in the institutions where the Scheme of Administration has not been amended incorporating the clause provided in the Government Order.

21. The outcome of the aforesaid discussion is that elections to a Committee of Management of an institution and its office- bearers are to be held in accordance with the Scheme of Administration. Any transgression from the scheme prescribed in the Scheme of Administration would invalidate the elections and any elections held according to the provisions of the Scheme of Administration cannot be rejected by the DIOS or the Regional Level Committee on the ground that the elections were not in accordance with the Government Order dated 21.11.2008. Under Section 16-A(7) of the Act, 1921, the educational authorities – the District Inspector of Schools, the Regional Level Committee, the Joint Director or any other authority – can only look into the question as to whether the elections set up by the concerned party was in accordance with the Scheme of Administration. The educational authorities while deciding any dispute regarding rival claims set up by the parties under Section 16-A(7) cannot go beyond the provisions of the Scheme of Administration. Resultantly, where the Scheme of Administration of the institution stipulates a general body of the institution separate and different from the general body of the parent society, i.e., the society which runs the institution, and the general body of the society is not the electoral College for electing the Committee of Management and the office bearers of the institution, the elections cannot be invalidated on the ground that the elections were held on a list which was not registered under Section 4-B of the Act, 1860.

22. In the present case, the Scheme of Administration of the College was approved by the Regional Joint Director of Education, Agra. It is not the case of the respondents that any action was taken or any notice was issued to the College by the Director under Section 16-B or Section 16-CCC to include in the Scheme of Administration of the College the provisions of the Government Order dated 21.11.2008. The provisions stipulated in the Government Order dated 21.11.2008 were not incorporated in the Scheme of Administration of the College. There is nothing on record in the present case to show that any proposal was made by the Director or any other authority asking the College to amend its Scheme of Administration in accordance with the provisions stipulated in the Government Order dated 21.11.2008.

23. The Scheme of Administration of the College provides for a general body of the College separate and different from the general body of the Society. There is no provision either in the Scheme of Administration of the College or in the bye-laws of the Society providing that members of the general body of the Society shall automatically also be members of the general body of the College or that the general body of the Society shall also be the general body of the College. The Scheme of Administration of the College provides that any person desirous of being member of the general body of the College shall deposit the requisite fees, either by cheque or bank draft issued in the name of the College, along with an application recommended by any member of the general body of the College and submit the

application before the Treasurer of the College. The application shall be placed before the Manager who shall in turn place the same before the Committee of Management and in case, the Committee of Management refuses to enroll the said person as member of the College, the matter shall be placed before the general body of the College. Clause - 5 of the Scheme of Administration provides that if the general body of the College agrees to admit the applicant as member, the applicant shall be admitted as member with effect from the date the cheque or the bank draft was submitted by him. A reading of Clause - 5 of the Scheme of Administration shows that it is the general body of the College which has the authority to decide on the admission of any applicant as a member of the general body of the College and the society – its general body or its governing body – has no role in the matter. The Scheme of Administration of the College also provides that the Executive Committee of the College shall be constituted by elections from amongst members of the general body of the College and the elections shall be held by the general body of the College. The Scheme does not stipulate participation of the general body of the Society in the elections of the Committee of Management or its office-bearers. Clause - 26 of the Scheme of Administration also provides that any order passed by the Registrar, Firms, Societies and Chits shall not be applicable either on the general body of the College or on the Executive Committee of the College. In short, the general body of the Society is not the electoral College which elects the Committee of Management and the office bearers of the College. Thus, the elections of the Committee of Management and the office bearers of the College cannot be rejected on the ground that the elections were held, on a list of members which was not registered under Section 4-B of the Act, 1860. Any order rejecting the elections on the ground that the election was held on a list not registered under Section 4-B of the Act, 1860 would be vitiated because of consideration of irrelevant material. As a corollary, any election held on a list registered under Section 4-B of the Act, 1860 and excludes members of the general body of the College who were not members of the general body of the Society would be contrary to the Scheme of Administration and invalid.

24. In view of the aforesaid, the elections of the Committee of Management of the College set up by the petitioners and by respondent no. 4 and referred to the Regional Level Committee by the DIOS vide his order dated 15.12.2021 could not have been rejected on the ground that the elections were held on a list of members which had not been registered under Section 4-B of the Act, 1860. The decision / order dated 29.3.2022 passed by the Regional Level Committee rejecting the elections set up by the petitioners as well as the respondent no. 4 on the aforesaid ground is contrary to law. The consequential order dated 30.3.2022 passed by the Joint Director of Education appointing an Authorized Controller in the College is, for the same reason also contrary to law. The appointment of Authorized Controller in the College has been declared illegal. It has also been held that the elections of the Committee of Management and the office bearers of the College could not have been held on a list registered under Section 4-B of the Act, 1860 and such an election would be invalid because it would be

contrary to the Scheme of Administration. For the said reasons, the elections dated 10.9.2023 were invalid and contrary to law.

25. Thus, the order dated 14.9.2023 passed by the District Inspector of Schools, Aligarh recognizing the elections dated 10.9.2023 electing the respondent no. 4 as Manager of the Committee of Management of the Institution is also contrary to law.

26. For the aforesaid reasons, the orders dated 29.3.2022, 30.3.2022 and 14.9.2023 are contrary to law and are, hereby, quashed.

27. The matter is remanded back to the Regional Level Committee, Aligarh Region, Aligarh, i.e., respondent no. 2 to decide the dispute regarding the rival elections set up by the petitioners and respondent no. 4 and referred to it by the District Inspector of Schools, Aligarh by his letter dated 15.12.2021 afresh in accordance with the observations made above. Appropriate orders shall be passed by the Regional Level Committee and by the District Inspector of Schools, Aligarh within a period of two months from today and the Regional Joint Director of Education, Aligarh Region, Aligarh shall ensure that appropriate orders are passed by the Regional Level Committee and the District Inspector of Schools within the time prescribed by this Court.

28. Till the decision of the Regional Level Committee, the College shall be managed by an Authorized Controller appointed by the Joint Director of Education, Aligarh Region, Aligarh.

29. With the aforesaid directions and observations, the writ petitions are ***allowed***.

30. A copy of this order shall be sent to the Joint Director of Education, Aligarh Region, Aligarh by the Registrar (Compliance) within ten days for necessary compliance.

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**(2024) 7 ILRA 936**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 22.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Crl. Misc. Application U/S 482 No. 1213 of 2020
With
Application U/S 482 No. 18760 of 2022

**Tanmay Pandey ...Applicant**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Applicant:**
Sri Rahul Mishra

**Counsel for the Respondents:**
G.A., Sri Himanshu Shekhar

**Criminal Law - Criminal Procedure Code, 1973 - Section - 482 - Applications u/s 482** – FIR – alleging that all accused have formed an unlawful assembly and in furtherance of their common intention to demolish house of complainant with a JCB machine and they were threats and abused to the complainant also - investigation – chargesheet was filed followed by another charge-sheet – plea taken that – all the applicants are government employees and they are not concerned with alleged crime as well as civil litigations which are pending between rival parties before the revenue court – court finds that, there is no denial on behalf of the applicants that a demolition took place on date of incident with the help of JCB which was confiscated also – witnesses in their St.ment have named respectively the names of applicants to be a part of unlawful assembly – as well as there is no denial that police came on call on dial 100 and a JCB was confiscated -

presence of applicants and other accused persons are prima facie established – it is not a case where a civil dispute is being given a criminal colour since accused are not parties in civil dispute - hence, there is a prima facie case against them – consequently, applicant is rejected and interim order passed therein are vacated – trial court directed to proceed further in accordance with law. (Para – 17, 18, 19, 22, 23)

**Applications u/section - 482 is Dismissed.** (E-11)

**List of Cases cited**:

Central Bureau of Investigation Vs Aryan Singh & ors.2023 SCC online 379.

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Above referred both applications are arising out of same charge sheet, therefore, with consent of learned counsel for parties, are being decided by a common judgment.

2. Applicant Tanmay Pandey (Application No. 1213 of 2020) has declared himself to be an employee of Collectorate, Azamgarh, however, name of post and designation has not been disclosed in application or in any other material. Surprisingly, the affidavit sworn in support of application is of one Shiv Shankar declaring himself to be a family friend without disclosing that as to why applicant himself has not sworn the affidavit. The declaration made in last paragraph of affidavit declares that contents of paragraph of application were either true to personal knowledge of deponent or on basis of record or as informed by deponent. There is no declaration that source of information of deponent was the applicant. Therefore, on face of it, affidavit is legally not duly sworn and present application could be rejected for said legal error, however, still considering that present application is pending for last 4 years and applicant is enjoying interim order as well as learned Advocates for parties have placed submission on fact and legal issues, therefore, Court proceeds to decide the same on merit.

3. Applicants Rajesh Kumar Maurya and Shailesh Upadhyay (Application No. 18760 of 2022) have also declared themselves to be government employees, however, their designation or posts have also not been disclosed either in the application or in any other document. For reference, relevant part of paragraph 28, 29 and 30 of affidavit are being quoted below :-

"28. That the applicants till date have failed to cull out exact reasons and motive of informant in falsely implicating him however he feels and has a guess that since the parties were undergoing litigation before the revenue Court in Collectorate, Azamgarh and **whereas the applicants are an employee in Collectorate, Azamgarh,** it appears that the informant has falsely implicated the applicants as accused in the F.I.R. that has led to the impugned charge sheet on his misplaced apprehension and understanding that the applicants are conniving with parties at litigation with him and is helping them in the revenue proceedings before the Revenue Court, Azamgarh.

29. That at the cost of repetition it is stated that the applicants have absolutely got no concern with Gata No.196 or structure standing thereon or with the litigations in Revenue as well as Civil Court in respect of the said property and therefore **the applicants who is a Government Employee** have been

unnecessarily tagged in as accused by the informant and have been thus subjected to undue harassment and victimization.

30. That therefore any coercive proceeding in view of impugned charge sheet and consequent proceedings of the court below sourced in F.I.R. which proceeds on malice shall ruin the future of applicants, particularly in view of the fact that **he is a Government Employee.**"

4. Above declaration on face of it, appears to be false being not supported by any document, therefore, this application could be rejected only on above referred legal error, however, since this application is pending for last 2 years, and applicants are enjoying interim order as well as rival submissions have been placed, therefore, Court proceeds to decide it also on merit.

5. These cases are arising out of an FIR lodged by complainant Badri Prasad Gupta against 8 named accused including present applicants on 23.12.2016 at 20.25 Hours alleging that all accused have formed an unlawful assembly and in furtherance of their common intention to demolish house of complainant, came at place of occurrence at about 7.30 Hours and demolished the house with help of a JCB machine and when complainant and others came, accused persons extended threats and abused also. It was further alleged that a call was made on Dial 100 and it was responded also and only thereafter, the accused persons ran away without taking the JCB, which was later on confiscated by the police. During investigation, statments of complainant and others were recorded and finally a charge sheet being No. 01 was filed on 14.08.2017 against 5 named accused including these applicants. Another charge sheet was filed against other accused viz., Ashutosh also. Involvement of two other named accused was found false.

6. The crux of argument of S/Sri Rahul Mishra and Chandra Kumar Rai, learned Advocates for applicants was that applicant Tanmay Pandey who has declared himself to be a government employee at Collectorate, Azamgarh as well as other two applicants Rajesh Kumar Maurya and Shailesh Upadhyay, who have also declared themselves to be government employees are not concerend with alleged crime as well as civil litigations between rival parties are also pending before Revenue Court.

7. Learned Advocates have submitted that reason for their false implication appears to be that some civil dispute was pending before Revenue Court also, therefore, in order to put pressure on applicants and to provide favour.

8. Learned Advocates have also submitted that involvement of some of named accused were found false, therefore, it appears that FIR was lodged with exaggerated facts.

9. Learned Advocates have referred contents of civil dispute pending between complainant and other party for injunction in regard to plot in question, however, no injunction was granted.

10. Learned Advocates have also referred that an application was moved by one of named accused to recover the CCTV footage installed around place of occurrence, however, no finding was recorded of the footage. CCTV footage are also not on record. The I.O. has not taken photographs of debris or demolished structure. Statement of police officers who

came at the place of occurrence in response to Dial 100 have also not been recorded though some police officers are proposed witnesses in the charge sheet. This Court has earlier directed to place CCTV footage on record, however, it was not complied with.

11. Per contra, learned A.G.A. as well as Sri Himanshu Shekhar, learned counsel for opposite party no.2 have supported the outcome of investigation, that it was based on statement of complainant and other witnesses. They have also submitted that it was a fair investigation since involvement of some named accused was not found to be true.

12. Heard learned counsel for parties and perused the record.

13. In order to appreciate rival submissions, contents of FIR, Majid Bayan, statement of complainant, statement of Smt. Shipra Baranawal, wife of complainant and statement of Ambrish Kumar who are cited as proposed witness in charge sheet are reproduced below :-

"24.12.2016/ ब्यान वादी- श्री बद्री प्रसाद गुप्ता पुत्र जुगुल किशोर नि० आसिकगंज पीएस कोतवाली आजमगढ़ बदरियाफत प्रथम सूचना रिपोर्ट का पूर्ण समर्थन व ताईद करते हुए बता रहे है कि साहब दिनांक 23.12.16 को सुबह समय 7.30 ए एम बजे राजेश कुमार मौर्य सा० हाफिजपुर, आशुतोष कुमार द्विवेदी मिशन कम्पाउन्ड नरौली राकेश राम उर्फ बबलू प्राइमरी अध्यापक सा० मातबरगंज संजीव सिंह पुत्र दशरथ सिंह साद कुर्मी टोला रामकृष्ण मिश्रा सा० ठण्डी सडक रवि मिश्रा पुत्र जितेन्द्र मिश्रा सा० बडादेव तन्मय पाण्डेय (कर्मचारी कलेक्ट्रेट) शैलेष उपाध्याय सा० हाफिजपुर ने नाजायज मजमा बनाकर लाठी लिए हुए मेरे मकान को जे०सी०बी० मशीन से गिराने लगे कि मौके पर आलोक कुमार व अन्य लोगो से सूचना दिया तो प्रार्थी मौके पर गया तो मना किया तो माँ बहिन को गाली देते हुए जान से मारने की धमकी देते हुए मारने को दौडाया प्रार्थी और आलोक पीछे हटकर अपनी जान बचायी प्रार्थी ने पुलिस नं० 100 पर सूचना दिया पुलिस मौके पर आयी तब तक मुल्जिमान उपरोक्त पुलिस को देखकर भाग गये मैने मकान के पीछे स्थित दो कमरे बरामदा बाउन्ड्री चबुतरा दीवाल जे०सी०बी० से तोडकर उपरोक्त मुल्जिमान गिरा दिया गया था मुल्जिमान उपरोक्त के कृत्य से काफी आतंक का माहौल बना हुआ है पुलिस जे०सी०बी० मशीन को थाना कोतवाली ले गयी मै और अगल बगल लोग प्रयासरत है मेरा करीब तीन लाख से उपर का नुकसान हो गया अंत में इस घटना से ग्रस्त होकर मैने थाना कोतवाली पर जाकर उक्त मुल्जिमान के विरूद्ध प्राथमिकी दर्ज करायी इस प्रकार बयान अंकित कराये।

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14.09.17/ मजीद बयान वादी- श्री बद्री प्रसाद गुप्ता पुत्र जुगुल किशोर नि० कासिमगंज पीएस कोतवाली जिला आजमगढ़ बदरियाफत बता रहे है कि जो एफआईआर मैने लिखायी थी तथा जो बयान मैने दिया था वही बयान मेरा है अभियुक्त आशुतोष कुमार द्विवेदी पुत्र रविन्द्र कुमार द्ववेदी नि० मिशन कम्पाउन्ड पीएस सिघारी जि० आजमगढ़ तथा राम कृष्ण मिश्रा पुत्र ए०एम० मिश्रा नि० डण्डी सडक पीएस कोतवाली जिला आजमगढ़ का पूरा पता यही है राकेश कुमार उर्फ बबलू का पूरा नाम पता अभी मालूम नहीं हो पाया है मेरे मुकदमें मे घटना के चश्मदीद गवाह मेरी पत्नी शिप्रा बरनवाल पत्नी बदरी प्रसाद गुप्ता तथा मेरा भाई अम्बरीश कुमार बरनवाल भी है जो मौके पर पहुचे थे। अगर आप चाहे तो इन लोगो का भी बयान ले सकते है आलोक कुमार अब पुनः बयान देने को मना कर रहे है। यही मेरा बयान है।

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15.10.17/ बयान गवाह- श्रीमती शिप्रा बरनवाल पत्नी श्री बद्री प्रसाद गुप्ता नि० आसिकगंज पीएस कोतवाली जि० आजमगढ़ बदरियाफत बता रही है कि दि० **23.12.16** को सुबह घर पर थी कि तभी सूचना मिली की मेरे रोडवेज वाले मकान पर कुछ बवाल हो रहा है मै तथा अम्बरीश तुरन्त मौके पर पहुचे तो राजेश कुमार मौर्य आशुतोष द्विवेदी राकेस उर्फ बबलू संजीव सिंह रवि मिश्रा तन्मय पाण्डेय शैलेश उपाध्याय प्रार्थिनी का मकान जे०सी०बी० से गिरा रहे थे हम लोगो के द्वारा मना किया गया तो बहिन की भद्दी-2 गाली दिये तथा जान से मारने की धमकी दिये तथा मारने के लिए दौडाये किसी तरह हम लोग जान बचाकर भागे। यही मेरा बयान है।

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बयान गवाह- श्री अम्बरीश कुमार पुत्र स्व० गुगुल किशोर गुप्ता नि० आसिफगंज पीएस कोतवाली जि० आजमगढ बदरियाफत बता रहे है कि दि० **23.12.16** को समय **7.30** एएम पर मै घर पर था कि तभी सूचना मिली की रोडवेज वाले मकान पर कुछ लोग बवाल कर रहे है तो मै अपने भाई की पत्नी को साथ लेकर तुरन्त मौके पर पहुचा तो राजेश आशुतोष राकेश उर्फ बबलू संजीव सिंह रवि मिश्रा तन्मय पाण्डेय शैलेष उपाध्याय हम लोगो का मकान जेसीबी से गिरा रहे थे तथा मना करने पर गन्दी

गन्दी गाली दिये तथा जान से मारने की धमकी दिये तथा मारने के लिए दौडाए तो हम लोग किसी तरह जान बचाकर भागे।"

14. As referred above, contents of FIR and statement of witneses are appeared to have stated similar version of alleged occurrence. Alleged occurrence took place in public view and statement of some independent witnesses were also recorded, however, they have not named all accused persons though have submitted that demolition took place.

15. In order to quash any criminal proceeding or charge sheet, Court has to invoke inherent powers of Section 482 Cr.P.C. and to consider that whether on basis of material collected during investigation, either no case is made out or on basis of material available, it could be a case of absolutely false implication i.e. criminal proceeding was initiated to wrecking vengeance.

16. Learned Advocates for applicants have assigned reasons for false implication of applicants that they are government employees and some ligitation are pending in Revenue Court, therefore, they have been falsely implicated in criminal case. However, except details of one case i.e. civil dispute, no other detail of case pending before Revenue Court is placed on record, except some reports, however, they could not support the plea of false implication. There is no valid reason for their false implication, therefore, argument of false implication is hereby rejected.

17. Now the Court proceeds to consider whether on basis of evidence collected during investigation, a prima facie case is found against applicants or not. It is consistent case of complainant that a demolition took place on date of occurrence with help of JCB machine which was confiscated also. There is no denial of it on behalf of applicants. Witnesses in their respective statements have named applicants to be a part of unlawful assembly. Even independent witnesses though not named the accused persons but have corroborated so much as that demolition took place. Presence of applicants and other accused are prima facie established.

18. At the stage of cognizance of an offence and to summon accused and others, trial Court is not bound to look whether there was any motive with applicants or accused persons to commit offence. The Court has to consider whether on basis of evidence collected during investigation, there is a prima facie case against applicants or not and as referred above, on basis of evidence collected during investigation, there is a prima facie case against them.

19. So far as collection of CCTV footage is concerned, it may be a lacunae on behalf of Investigating Officer but it would not be sufficient to hold that no occurrence took place or applicants were not present since there is no denial that police came on call on Dial 100 and a JCB machine was confiscated from place of occurrence. The Court has already rejected submission of false implication in earlier paragraphs. It is not a case where a civil dispute is being given a criminal colour since accused are not parties in civil dispute. Complainant could not get any benefit for making false implication of applicants and others.

20. There is merit in argument of learned AGA and learned counsel for opposite party that a fair investigation was

conducted and involvement of some of named accused in FIR were found false. At this stage, to cause interference with a legally initiated criminal proceedings would amount to cause it a sudden death as well as at this stage, the Court cannot conduct a mini trial.

21. Aforesaid observations would have support from a judgment of Supreme Court in **Central Bureau of Investigation vs. Aryan Singh and others, 2023 SCC Online SC 379** and its relevant paragraphs are quoted below :-

"10. From the impugned common judgment and order passed by the High Court, it appears that the High Court has dealt with the proceedings before it, as if, the High Court was conducting a mini trial and/or the High Court was considering the applications against the judgment and order passed by the learned Trial Court on conclusion of trial. **As per the cardinal principle of law, at the stage of discharge and/or quashing of the criminal proceedings, while exercising the powers under Section 482 Cr. P.C., the Court is not required to conduct the mini trial.** The High Court in the common impugned judgment and order has observed that the charges against the accused are not proved. 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. Therefore, the High Court has materially erred in going in detail in the allegations and the material collected during the course of the investigation against the accused, at this stage. **At the stage of discharge and/or while exercising the powers under Section 482 Cr. 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".**

11. One another reason pointed by the High Court is that the initiation of the criminal proceedings/proceedings is malicious. At this stage, it is required to be noted that the investigation was handed over to the CBI pursuant to the directions issued by the High Court. That thereafter, on conclusion of the investigation, the accused persons have been chargesheeted. Therefore, the High Court has erred in observing at this stage that the initiation of the criminal proceedings/proceedings is malicious. **Whether the criminal proceedings was/were malicious or not, is not required to be considered at this stage. The same is required to be considered at the conclusion of the trial. In any case, at this stage, what is required to be considered is a prima facie case and the material collected during the course of the investigation, which warranted the accused to be tried.**

12. In view of the above and for the reasons stated above, when the High Court has exceeded in its jurisdiction in quashing the entire criminal proceedings and applying the law laid down by this Court in catena of decisions on exercise of the powers at the stage of discharge and/or quashing the criminal proceedings, the impugned common judgment and order passed by the High Court quashing the criminal proceedings against the accused is unsustainable and the same deserves to be quashed and set aside."

22. In aforesaid circumstances, this Court does not find any ground to interfere with charge sheet dated 14.08.2017, cognizance order dated 16.01.2019 as well

as summoning order dated 18.11.2019, therefore, these applications are **rejected** and interim orders passed therein are vacated.

23. Trial Court is directed to proceed further in Case No. 843 of 2019 (State vs. Rajesh Kumar Maurya and others) pending before Court of Chief Judicial Magistrate, Azamgarh in accordance with law.

24. Registrar (Compliance) to take steps.

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**(2024) 7 ILRA 942**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 18.07.2024**

**BEFORE**

**THE HON'BLE SAURABH LAVANIA, J.**

Application U/s 482 No. 6293 of 2024

**Complainant of Case Crime 1479/2017** **...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Niyaj Ahmad

**Counsel for the Respondent:**
G.A.

**Criminal Law-The Code of Criminal Procedure, 1973-Section 53-A)-** Efforts should be made to find out the truth- Right to privacy is a part of the right to life and personal liberty under Article 21 and that Article 20(3) provides that nobody should be compelled to give evidence against himself, however that the said would not over-ride the search for the truth, as the offence of rape is an offence against the society at large and as the objective of a Court proceeding is to find out the "truth". **(Para 8, 9 & 11)**

**Application dismissed**. (E-15)

**List of the Cases cited:-**

1.K.K. Malik Vs St. of Har., 2011 SCC (3) (Criminal) 61

2.Case No. Crl.A./73/2023 (Sudip Biswas @ Bura vs. The State of Assam and another)

3.Meera Devi & ors. Vs Jitender & ors. 2016 SCC OnLine Del 4322

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the applicant, learned AGA for the State of U.P. and Sri Manoj Kumar Singh, , Advocate, who has filed Vakalatnama on behalf of respondent No. 2 in the Court today, which is taken on record.

2. By means of this application, the applicant has sought the following main relief:-

> *"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash the impugned order dated 12.2.2024, passed by the learned Additional Sessions Judge/ Special Judge, POCSO Act, Bahraich, in Special Criminal Case No.90 of 2018; State Versus Waliuddin, arising out of Case Crime No.1479 of 2017, under sections-363, 366,376 (D) I.P.C. and Sections 3/4 of POCSO Act, relating to Police Station- Hardi, District- Bahraich, as contained in Annexure no.2 to this petition, in the interest of law and justice."*

3. The facts, which are relevant for disposal of this case, are to the effect that an FIR was lodged against Ateek, Kalimuddin and Khaisal Nisha on

03.10.2017 registered as Case Crime No. 1479 of 2017, under Sections 363, 366 IPC, Police Station- Hardi, District- Bahraich and during investigation, Section 376-D IPC and Section 3/4 POCSO Act were added and thereafter, the charges sheet was submitted before the trial court.

4. It would be apt to indicate here that in the present application, it has not been indicated that when the charges were framed and what is the status of trial, though, it is required for giving overall picture of the pending case. Learned counsel for the applicant while drafting the application, for the reasons best known to him, has not indicated the relevant facts of the case. Accordingly, this Court is not in a position to indicate all facts of the present trial. The facts, which appear from the record, are as under.

> (i) As per the case of the prosecution, on 27.09.2017, accused Ateeq abducted minor daughter of the applicant and thereafter accused Ateeq, Waliuddin (respondent No. 2), Akram and Intesar committed gang rape with her. After this incident, the victim gave birth to a male child in the month of September, 2018.
>
> (ii) After recording the statements of witnesses of prosecution including the victim (PW-3) in the trial i.e. Session Trial No. 90/18 (State vs. Waliuddin) arising out of Case Crime No.1479 of 2017, under sections-363, 366,376 (D) I.P.C. and Sections 3/4 of POCSO Act, Police Station- Hardi, District- Bahraich, an application No. 34-B/1 to 34-B/2 was preferred by the defence/accused namely Waliuddin praying therein for holding DNA test.

5. Before the trial court as also before this Court, the applicant has stated that the application aforesaid was moved with ulterior motive i.e. to delay the conclusion of trial.

6. The trial court, as appears from the impugned order dated 12.02.2024, after considering Section 53(A) Cr.P.C. and observations made by the Hon'ble Apex Court in the judgment passed in the case of ***K.K. Malik vs. State of Haryana, 2011 SCC (3) (Criminal) 61*** and also taking note of oral statement made by the victim before the this Court for getting DNA test in the Government Medical College or Hospital, the trial court allowed the application vide impugned order dated 12.02.2024, relevant portion of which reads as under:-

> "मामला अवयस्क पीडिता उम्र लगभग 14 वर्ष के साथ जबरदस्ती बलात्कार करके प्रवेशन लिंग हमला करने, जिसके फलस्वरूप पीड़िता का गर्भवती हो जाने से सम्बन्धित है। माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधि व्यवस्था K.K. Malik Vs State of Haryana 2011 SCC (3) (Criminal) 61 में अवधारित किया गया कि दण्ड प्रक्रिया संहिता में धारा 53(A) शामिल किये जाने के पश्चात् बलात्कार से सम्बन्धित सभी मामलों में डी०एन०ए० परीक्षण कराया जाना आवश्यक है, जिससे अभियुक्त की पहचान की जा सके और उसके विरुद्ध लगाये गये आरोप को समुचित ढंग से साबित कराया जा सके। प्रस्तुत प्रकरण में प्रथम सूचिका द्वारा उपरोक्त अभियुक्त की ओर से प्रस्तुत प्रार्थना-पत्र वास्ते कराये जाने डी०एन०ए० परीक्षण के विरुद्ध आपत्ति दाखिल की गई है और मौखिक रूप से उपरोक्त अभियुक्त, पीड़िता व पीड़िता से जन्मे बच्चे का डी०एन०ए० परीक्षण किसी सरकारी मेडिकल कालेज अथवा अस्पताल में किये जाने हेतु प्रार्थना की गई है।

प्रस्तुत मामले में अभियुक्त उपरोक्त की पहचान किया जाना मुख्य साक्ष्य बिन्दु होने के कारण डी०एन०ए० परीक्षण कराया जाना आवश्यक है। अतः अभियुक्त वलीउद्दीन द्वारा प्रस्तुत उपरोक्त प्रार्थना पत्र स्वीकार किया जाता है और मुख्य चिकित्साधिकारी बहराइच को निर्देशित किया जाता है कि एक सप्ताह के अन्दर नियमानुसार अभियुक्त वलीउद्दीन पुत्र समीम, निवासी- सरजूपुरवा, दा० मासाडीह, थाना हरदी, जनपद बहराइच तथा मामले से सम्बन्धित पीड़िता व दौरान मुकदमा पीड़िता से जन्मे बच्चे का डी०एन०ए० सैम्पल लेकर के०जी०एम०यू० लखनऊ में परीक्षण कराये जाने हेतु सम्पूर्ण प्रक्रिया पूर्ण कराया जाना सुनिश्चित करें। उभय पक्ष मुख्य चिकित्साधिकारी बहराइच के समक्ष उक्त अवधि में उपस्थित हों। इस आदेश की एक-एक प्रति मुख्य चिकित्साधिकारी बहराइच एवं उभयपक्ष के विद्वान अधिवक्तागण को आवश्यक कार्यवाही हेतु प्राप्त करायी जाये। प्रथम सूचिका की ओर से दाखिल आपत्ति, तद्नुसार निस्तारित की जाती है।"

7. To impeach the findings recorded by the trail court in the order impugned dated 12.02.2024, nothing has been brought to the notice of the Court particularly with regard to the oral statement from the side of prosecution, according to which, it has been requested/prayed that DNA test of accused/applicant namely Waliuddin, victim and minor be conducted at Government Medical College or Government Hospital.

8. On the subject matter of this case, this Court feels it appropriate to refer the relevant portion of the order dated 13.10.2023 passed by the Division Bench of the Gauhati High Court while dealing with Criminal Appeal filed against the judgment of conviction i.e. ***Case No. Crl.A./73/2023 (Sudip Biswas @ Bura vs. The State of Assam and another)*** and the judgment of the Delhi High Court passed in the case of ***Meera Devi and others vs. Jitender and others reported in 2016 SCC OnLine Del 4322***. According to which, in nutshell, efforts should be made to find out the truth.

9. The relevant paragraphs of the order dated 13.10.2023 passed in the case of ***Sudip Biswas @ Bura (supra)*** are as under:-

> "6. The question that arose was whether this Court could direct the appellant to undergo a DNA test, to prove whether he was the father of the child born to the victim and which in turn would prove as to whether he was the rapist of the victim.
>
> 7. The learned Senior Counsel for the appellant submits that this Court cannot compel the appellant to undergo a DNA test without his consent. In this regard the learned Senior Counsel submits that in terms of the judgment of the Supreme Court in the case of ***Goutam Kundu Vs. State of West Bengal & Others***, reported in ***1993 3 SCC 418***, Courts in India cannot order a blood test as a matter of course. He submits that the Apex Court has held that the Courts have to carefully examine the consequence of ordering a blood test and no one can be compelled to give his/her sample of blood for analysis.
>
> 8. The learned Senior Counsel submits that the evidence adduced by the prosecution does not prove that the appellant was the rapist of the victim or that the appellant was the father of the victim's child. In this respect, he has referred to the evidence given by the prosecution witnesses,

especially the evidence given by the victim in her cross-examination, wherein she has stated that she came to know the name of the appellant only when the case was filed and that she had not seen the face of the person who raped her on the relevant night, due to darkness. He also submits that as the FIR had been filed after 6/7 months after the alleged rape had been committed, the same cast a doubt on the authenticity of the contents of the FIR.

9. On the other hand, the Additional Public Prosecutor submits that the victim was mentally ill and unable to recall previous incidents, as given in the testimony of PW-1. She also submits that the victim was 48 years of age and the appellant was 24 years of age. Further, though a bichar (village meeting under the aegis of the elder of the village) had been held in the village on 2 (two) occasions, due to the alleged illegal act of the appellant, the appellant did not turn up in the bichar held on the 2 (two) occasions. She submits that though the evidence of the prosecution witnesses proved the guilt of the appellant, the appellant should be subjected to a DNA test to conclusively prove the said fact.

10. We have heard the learned counsels for the parties.

11. The question to be decided is as to whether the appellant had raped the victim and whether the child born to the victim had been fathered by the appellant, as it has been alleged that the child was the result of the rape. As stated earlier, an issue has cropped up as to whether a DNA test could/should be done on the appellant and the child, so as to determine whether the appellant had fathered the child, besides considering the evidence that has already been recorded by the learned Trial Court.

12. In the case of ***Goutam Kundu (supra)***, the Supreme Court was seized of an issue, wherein the paternity of a child between a married couple was disputed. The alleged father (husband) of the child prayed for a Blood Group test of the child and himself to prove that he was not the father of the child. The application was dismissed on the ground that there were other methods in the Evidence Act to prove the paternity of the child and that the Blood Group test could not conclusively prove the paternity of a child. The Supreme Court in the above case held that though a Blood Group test was a useful test to determine the question of disputed paternity, it could be relied upon by the Courts as a circumstantial evidence, which ultimately excluded a certain individual as a father of the child. The Supreme Court further held that in terms of Section 112 of the Evidence Act, the presumption of legitimacy of a child, with regard to the father is that a child born of a married woman is deemed to be the legitimate child of a husband and would remain so, even if the child was born within 280 days after dissolution of a marriage and the mother remain unmarried, unless it could be shown that the parties to the marriage had no access to each

other at any time, when the child could have been begotten. It was in the above context that the Supreme Court in ***Goutam Kundu (supra)*** held that the Courts in India cannot order a blood test as a matter of course. It thus held as follows:-

*"(1) That courts in India cannot order blood test as a matter of course;(2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.*

*(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.*

*(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.*

*(5) No one can be compelled to give sample of blood for analysis."*

13. The paternity test that was sought to be done by the alleged father in ***Goutam Kundu (supra)*** was a Blood Group test and not a DNA profiling/test, wherein DNA rich cells are extracted. On the other hand, Blood Group test examines the Blood type of a person. As per the medical literature existing today with regard to DNA test and Blood test, perhaps the greatest difference between a Blood Group test and a DNA test is that a Blood Group test cannot be used as conclusive proof of fatherhood. It can only be used to disprove parentage and not to prove that the individual is the father of the child. The DNA test on the other hand, is a very reliable test, which is based on different parameters than a Blood Group test.

14. With the incorporation of Section 53A Cr.PC w.e.f. 23.06.2006, DNA test can be done to facilitate the prosecution, in proving it's case against an accused. Though it may be argued that right to privacy is a part of the right to life and personal liberty under Article 21 and that Article 20(3) provides that nobody should be compelled to give evidence against himself, we are of the view that the said would not over-ride the search for the truth, as the offence of rape is an offence against the society at large and as the objective of a Court proceeding is to find out the "truth". We are accordingly of the view that the appellant's right under Articles 20(3) & 21 would have to give way to public interest, so that the truth is laid bare for all to see.

15. In the case of ***Harishchandra Sitaram Khanorkar Vs. State of Maharashtra, reported in 2023 (1) ABR (CRI) 259***, the Division Bench of the Bombay High Court has held that there can be no doubt that there have been remarkable technological advancement in forensic science and in scientific investigations. The DNA testing has an unparalleled ability both to exonerate the wrongly convicted person and to identify the guilty. It

has the potential to significantly improve both the criminal justice system and police investigative practices. Modern DNA testing can provide powerful new evidence unlike anything known before DNA technology. It provides not only guidance to the investigation, but also supplies the Court accurate information regarding the identification of the criminal.

16. In the case of ***Pravin Suryabhanji Gube Vs. State of Maharashtra, reported in 2019 (2) ABR (CRI) 70,*** the Bombay High Court has held that DNA is a modern scientific technique, which is very useful and helpful not only for investigators, but also for Courts to reach to the truth. DNA conclusively points the finger of guilt towards the perpetrator of a crime. However, while considering this scientific piece of evidence, the Court is required to examine as to whether at any point of time, it could be said that there was the slightest chance of playing with the samples and/or tampering with it by anyone.

17. In the case of ***Mukesh Vs. State (NCT of Delhi) 2017 6 SCC 1***, the Hon'ble Supreme Court spoke on the importance of DNA evidence. It observed in paragraph Nos. 216 and 217 as follows:-

*"216. DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the court accrued information about the tending features of identification of criminals. The recent advancement in modern biological research has regularized Forensic Science resulting in radical help in the administration of justice. In our country also like several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the amendment in the Criminal Procedure Code by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner.*

*217. Similarly, under Section 164A inserted by Act 25 of 2005, for medical examination of the victim of rape, the description of material taken from the person of the woman for DNA profiling is a must."*

18. In the case of ***Pantangi Balarama Venkata Ganesh Vs. State of A.P***, reported in ***2009 14 SCC 607***, the Supreme Court held that experts opine that identification by DNA profiling is hundred percent precise. However, there is a need for quality control. Further, the evidence of experts is admissible in evidence in terms of Section 45 of the Evidence Act, 1872. The Supreme Court in the above case has held at paragraph No. 41 as follows:-

*"41. Submission of Mr. Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means:*

*(Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on.*

*Using this genetic fingerprinting identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred percent precise, experts opine."*

19. In the case of ***Prakash Nishad Alias Kewat Zinak Nishad Vs. State of Maharashtra***, reported in ***AIR 2023 SC (CRIMINAL) 1081***, the Supreme Court has held that even though the DNA evidence by way of a report was present, its reliability is not infallible, especially not so in light of the fact that the uncompromised nature of such evidence cannot be established.

20. In the case of ***Pattu Ranjan Vs. State of T.N***, reported in ***AIR 2019 SC 1674***, the Supreme Court has held at paragraph No. 52 as follows:-

*"52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on the facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party."*

21. In the case of ***Manoj Vs. State of M.P***, reported in ***AIR Online 2022 SC 767***, the Supreme Court has held at paragraph No. 158 as follows:-

*"158. This Court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. Notably, the reliance was to corroborate. This Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case."*

22. Section 53A(2)(iv) Cr.PC provides that a registered medical practitioner shall prepare a report of his examination, of a person/material taken from the person, arrested on a charge of committing an offence of rape or an attempt to commit rape by way of DNA profiling, if there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence. Section 164A (2)(iii) Cr.PC provides that the registered medical practitioner, to whom a victim of rape or attempted to be raped is sent, shall, without delay, examine her person and prepare a report of his examination giving various particulars, one of them being, the description of material taken from the person of the woman for DNA profiling.

23. Section 53A Cr.PC and Section 164A Cr.PC are reproduced herein below as follows:-

***"Section 53A of Cr.PC:- Examination of person accused of rape by medical practitioner ---***

*(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.*

*(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;*

*(i) the name and address of the accused and of the person by whom he was brought,*

*(ii) the age of the accused,*

*(iii) marks of injury, if any, on the person of the accused,*

*(iv) the description of material taken from the person of the accused for DNA profiling, and".*

*(v) other material particulars in reasonable detail.*

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

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

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

***Section 164A Cr.PC:- Medical examination of the victim of rape---***

*(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner*

*within twenty-four hours from the time of receiving the information relating to the commission of such offence.*

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

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

*(ii) the age of the woman;*

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

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

*(v) general mental condition of the woman; and*

*(vi) other material particulars in reasonable detail.*

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

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

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

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

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

24. In the case of ***Santosh Kumar Singh Vs. State, reported in 2010 9 SCC 747***, which was in respect of a young girl who was raped and murdered, the DNA report relied upon by the High Court was approved by the Supreme Court and held that the DNA report can be accepted as being scientifically accurate and an exact science as held by the Supreme Court in *Kamti Devi Vs. Poshi Ram*, reported in ***2001 5 SCC 311***.

25. In the case of Krishan Kumar Malik Vs. State of Haryana, reported in 2011 7 SCC 130, which was a case of gang rape, the prosecution had not conducted the DNA test or made any analysis and matching of the semen of the accused with that found on the undergarments of the prosecutrix. The Supreme Court has held at paragraph No. 44 as follows:-

*"44. Now, after the incorporation of Section 53-A in the Criminal Procedure Code w.e.f. 23.06.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in Cr.PC the prosecution could have still restored to this*

*procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences."*

26. In the case of ***Sandeep Vs. State of U.P***, reported in 2012 6 SCC 107, which was a case of murder of a pregnant girlfriend and the unborn child of the accused, the Supreme Court held that the DNA report confirmed the accused as the father of the unborn child.

27. In the case of ***Rajkumar Vs. State of M.P***, reported in 2014 5 SCC 353, which was a case involving the rape and murder of a 14 year old girl, the Supreme Court held that the DNA report established the presence of the semen of the accused in the vaginal swab of the prosecutrix.

28. The above cases show that there is no bar or restriction in having a DNA profiling of an accused in a case of rape. In the present case, not only is there an allegation of rape against the appellant, but the appellant has been accused of being the father of the child born due to the rape inflicted by the appellant. It is quite clear that DNA profiling of the appellant could prove whether the appellant was the father of the child born to the victim. As Section 53A Cr.PC allows for examination of a person accused of rape through DNA profiling on the request of a Police Officer not below the rank of Sub-Inspector, we do not find any bar or restriction for this Court to pass a direction for DNA profiling of the appellant, which would prove whether the appellant was the father of the child and thus further prove the question whether any rape had been committed on the victim by the appellant.

29. Now let us see whether DNA profiling can be done in civil cases, wherein paternity of a child between couples is in question.

30. In the case of ***Bhabani Prasad Jena Vs. Orissa State Commission for Women***, reported in ***2010 8 SCC 633***, the Supreme Court has held that depending on the facts and circumstances of a case, it would be permissible for a Court to direct the holding of a DNA examination to determine the paternity of a child. However, the Court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is needed. Thus, in a case relating to the charge by the husband regarding the alleged infidelity of the wife, the same could be ordered by the Court depending upon the facts and circumstances of the case.

31. In the case of ***Dipanwita Roy Vs. Ronobroto Roy***, reported in 2015 1 SCC 365, the Apex Court has allowed the DNA test to be done with regard to the paternity of the child born to his wife, to establish whether or not the husband was the father of the child, so as to prove the alleged infidelity of the wife. It also held that in view of the issue involved in the above case, Section 112 of the Evidence Act was not strictly attracted to the case.

32. As can be seen even in civil cases regarding disputes with regard to infidelity of the wife and paternity of a child, the Supreme Court has allowed DNA test to be done, after balancing the interests of the parties, keeping in view the facts and circumstances of a case. The case in hand is however different, as it pertains to a criminal case and in the view of this Court, the right to preserve individual privacy claimed by the appellant, has to give way to the object of finding out the truth, otherwise the same could amount to sacrificing the cause of justice. Thus, in criminal cases, the requirement of finding out the truth would override the stand of the appellant, in not agreeing to undertake a DNA test.

33. The present case is with regard to whether the appellant had committed a crime against society, which can be proved by way of a DNA test. We are of the view that the principal of proportionality is also in favour of the Court resorting to DNA testing, to find out whether a crime had been committed by the appellant, keeping in view the allegation made by the victim and the fact that a child has been born.

34. A perusal of the orders passed by the Supreme Court clearly go to show that DNA test/profiling is useful and helpful in coming to a decision with regard to identifying the perpetrator of a crime. The Supreme Court has in many cases as referred to above, supported the use of DNA test/profiling. However, it is only in respect of civil cases where the paternity of a child is in dispute between the married couples that the Hon'ble Supreme Court has given words of caution that DNA test/profiling should not be done at the drop of a hat, in view of Section 112 of the Evidence Act. As stated in the earlier paragraphs, the Supreme Court in the case of ***Sandeep Vs. State of U.P. (supra)*** has accepted the confirmation that the accused therein was the father of the unborn child, who had died during the murder of a pregnant woman, determined on the basis of a DNA test. In the present case, the victim has accused the appellant of raping her and making her pregnant. In that view of the matter, we are of the view that the DNA test/profiling would conclusively prove whether the appellant had fathered the child and whether he had raped the victim, as he has denied raping her.

35. In view of the reasons stated above, we are of the view that additional evidence is required to be taken in terms of Section 391 Cr.P.C, as DNA test of the appellant and the child born to the victim, would conclusively prove whether the child has been fathered by the appellant and whether the appellant was the perpetrator of the rape committed on the victim. Accordingly, we direct the learned Trial Court to take additional evidence under Section 391 Cr.PC, by taking steps for ensuring that a DNA test/profiling of the appellant and the child of the victim alleged to have been fathered by the appellant, is undertaken, after taking the samples from the

appellant and the child in the presence of the learned Judge of the learned Trial Court. In this regard, necessary directions may be issued by the learned Trial Court to the Superintendent of the concerned Jail to produce the appellant and also to the victim to produce the child. The learned Trial Court shall ensure all precautions are taken at the time of taking of samples from the above persons and making sure the samples are not compromised in any manner. The learned Trial Court shall also ensure that the persons/institution which is going to conduct the DNA test/profiling takes all possible precautions so that the entire testing procedure is not compromised in any manner. The entire exercise should be conducted at the earliest and preferably within a period of 2 (two) months from the date of receipt of a copy of this order."

10. The relevant paragraphs of the judgment of the Delhi High Court passed in the case of ***Meera Devi*** (supra) are as under:-

"10. It is fundamental duty of the Court to ascertain the truth and do justice on the basis of truth. In Ved Prakash Kharbanda v. Vimal Bindal, 198 (2013) DLT 555, this Court has discussed the relevant principles relating to the discovery of the truth. Relevant portion of the said judgment is reproduced hereunder:-

*"11**. Truth should be the Guiding Star in the Entire Judicial Process***

*11.1 Truth is the foundation of justice. Dispensation of justice, based on truth, is an essential feature in the justice delivery system. People would have faith in Courts when truth alone triumphs. The justice based on truth would establish peace in the society.*

*11.2* ***Krishna Iyer J****. in Jasraj Inder Singh v. Hemraj Multanchand,* (1977) 2 SCC 155 *described truth and justice as under:*

***"8. …Truth, like song, is whole, and half-truth can be noise! Justice is truth, is beauty and the strategy of healing injustice is discovery of the whole truth and harmonising human relations. Law's finest hour is not in meditating on abstractions but in being the delivery agent of full fairness.*** *This divagation is justified by the need to remind ourselves that the grammar of justice according to law is not little litigative solution of isolated problems but resolving the conflict in its wider bearings."*

11.3 In Union Carbide Corporation v. Union of India, (1989) 3 SCC 38, *the Supreme Court described justice and truth to mean the same. The observations of the Supreme Court are as under:*

*"30. ...when one speaks of justice and truth, these words mean the same thing to all men whose judgment is uncommitted. Of Truth and Justice, Anatole France said:*

*"Truth passes within herself a penetrating force unknown alike to error and falsehood. I say truth and you must*

*understand my meaning. For the beautiful words* ***Truth and Justice*** *need not be defined in order to be understood in their true sense.* ***They bear within them a shining beauty and a heavenly light****. I firmly believe in the triumph of truth and justice. That is what upholds me in times of trial....”*

11.4 In Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271, *the Supreme Court observed that the presiding officer of a Court should not simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost and that there is a legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice.*

*11.5 In* Chandra Shashi v. Anil Kumar Verma, (1995) 1 SCC 421, *the Supreme Court observed that to enable the Courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, pre-variation and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any Court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail.* ***People would have faith in Courts when they would find that truth alone triumphs in Courts.***

11.6 In A.S. Narayana Deekshitulu v. State of A.P., (1996) 9 SCC 548, *the Supreme Court observed that from the ancient times, the constitutional system depends on the foundation of truth. The Supreme Court referred to Upanishads, Valmiki Ramayana and Rig Veda.*

11.7 In Mohan Singh v. State of M.P., (1999) 2 SCC 428 *the Supreme Court held that effort should be made to find the truth; this is the very object for which Courts are created. To search it out, the Court has to remove chaff from the grain. It has to disperse the suspicious, cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt.* ***So it is a solemn duty of the Courts, not to merely conclude and leave the case the moment suspicions are created. It is onerous duty of the Court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot free. There is no mathematical formula through which the truthfulness of a prosecution or a defence case could be concretised. It would depend on the evidence of each case including the manner of deposition and his demeans, clarity, corroboration of witnesses and overall, the conscience of a judge evoked by the evidence on record. So Courts have to proceed further and make genuine efforts within judicial sphere to search out the truth and not stop at the***

***threshold of creation of doubt to confer benefit of doubt.***

11.8 In Zahira Habibullah Sheikh v. State of Gujarat, (2006) 3 SCC 374, *the Supreme Court observed that right from the inception of the judicial system it has been accepted that* ***discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice.***

11.9 In Himanshu Singh Sabharwal v. State of Madhya Pradesh, (2008) 3 SCC 602, *the Supreme Court held that the trial should be a search for the truth and not a bout over technicalities. The Supreme Court's observation are as under:*

*"5. ... 31. In 1846, in a judgment which Lord Chancellor Selborne would later describe as 'one of the ablest judgments of one of the ablest judges who ever sat in this Court', Vice-Chancellor Knight Bruce said [Pearse v. Pearse, (1846) 1 De G&Sm. 12: 16 LJ Ch 153: 63 ER 950: 18 Digest (Repl.) 91, 748]: (De G&Sm. pp. 28-29):*

*"31. The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination,...* ***Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.***

xxx xxx xxx

*35. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the 'majesty of the law'.*

xxx xxx xxx

***38. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty."***

*(Emphasis Supplied)*

11.10 In Ritesh Tewari v. State of U.P., (2010) 10 SCC 677, *the Supreme Court reproduced often quoted quotation:* ***'Every trial is voyage of discovery in which truth is the quest'***

11.11 In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370, *the Supreme Court again highlighted the significance of truth and observed that* ***the truth should be the guiding star in the entire legal process and it is the duty of the Judge to discover truth to do complete justice. The Supreme Court stressed that Judge has to play an active role to discover the truth and he should explore all avenues open to him in order to discover the truth. The Supreme Court observed as under:***

*"32. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies.*

*33.* ***The truth should be the guiding star in the entire judicial process.Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth.*** *Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.*

xxx xxx xxx

35. **What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.**

xxx xxx xxx

52. ***Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth."***

*(Emphasis supplied)*

11.12 In A. Shanmugam v. Ariya Kshatriya, (2012) 6 SCC 430, *the Supreme Court held that* ***the entire journey of a judge is to discern the truth from the pleadings, documents and arguments of the parties. Truth is the basis of justice delivery system****. The Supreme Court laid down the following principles:*

*"43. On the facts of the present case, following principles emerge:*

*43.1.* ***It is the bounden duty of the Court to uphold the truth and do justice.***

*43.2. Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts.*

*43.3. The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful.*

*43.4. Once the court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrong doer in the temple of justice****. Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice****.*

*43.5. It is the bounden obligation of the Court to neutralize any unjust and/or undeserved benefit or advantage*

*obtained by abusing the judicial process."*

*(Emphasis supplied)*

11.13 In Ramesh Harijan v. State of Uttar Pradesh, (2012) 5 SCC 777*, the Supreme Court emphasized that it is the duty of the Court to unravel the truth under all circumstances.*

*11.14* In Bhimanna v. State of Karnataka*,* (2012) 9 SCC 650*, the Supreme Court again stressed that the Court must endeavour to find the truth. The observations of the Supreme Court are as under:*

*"28. The court must endeavour to find the truth. There would be "failure of justice" not only by unjust conviction but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and safeguarded but they should not be overemphasised to the extent of forgetting that the victims also have rights."*

*11.15 In the recent pronouncement in* Kishore Samrite v. State of U.P., MANU/SC/0892/2012*, the Supreme Court observed that truth should become the ideal to inspire the Courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. The observations of Supreme Court are as under:*

*"31. It has been consistently stated by this Court that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice Delivery System.*

*32. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice.* ***Therefore, the truth should become the ideal to inspire the courts to pursue.*** *This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood, must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this*

*tendency is to impose realistic or punitive costs."*

*(Emphasis supplied)*

*11.16* ***Malimath Committee on Judicial Reforms*** *discussed the paramount duty of Courts to search for truth. The relevant observations of the Committee are as under:-*

*- The Indian ethos accords the highest importance to truth. The motto* ***Satyameva Jayate*** *(Truth alone succeeds) is inscribed in our National Emblem "Ashoka Sthambha". Our epics extol the virtue of truth.*

*-****For the common man truth and justice are synonymous. So when truth fails****, justice fails. Those who know that the acquitted accused was in fact the offender, lose faith in the system.*

*-In practice however we find that the Judge, in his anxiety to demonstrate his neutrality opts to remain passive and truth often becomes a casualty.*

*-****Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Justice System. For justice to be done truth must prevail. It is truth that must protect the innocent and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice.*** *Therefore truth should become the ideal to inspire the courts to pursue.*

*-Many countries which have Inquisitorial model have inscribed in their Parliamentary Acts a duty to find the truth in the case. In Germany Section 139 of the so called 'Majna Charta', a breach of the Judges' duty to actively discover truth would promulgate a procedural error which may provide grounds for an appeal.*

*-For Courts of justice there cannot be any better or higher ideal than quest for truth."*

11. Section 165 of the Indian Evidence Act empowers the Courts to examine any witness or party at any stage to discover the truth. In Jai Prakash v. National Insurance Company, (2010) 2 SCC 607, the Supreme Court directed the Claims Tribunal to use of 165 of the Indian Evidence Act to discover the truth. Relevant portion of the said judgment is reproduced hereunder:-

*"The Tribunal shall take an active role in deciding and expeditious disposal of the applications for compensation and make effective use of Section 165 of the Evidence Act, 1872, to determine the just compensation."*

12. In Ved Prakash Kharbanda v. Vimal Bindal (supra), this Court considered the scope of the Section 165 of the Indian Evidence Act. Relevant portion of the said judgment is reproduced hereunder:-

15***. Section 165 of the Indian Evidence Act, 1872***

*15.1 Section 165 of the Indian Evidence Act, 1872 invests the Judge with plenary powers to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The*

*effect of this section is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements.*

*15.2 Section 165 of the Indian Evidence Act, 1872 reads as under:*

***"Section 165. Judge's power to put questions or order production**.-*

*The Judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question*:

*Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:*

*Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted."*

*15.3 The object of a trial is, first to ascertain truth by the light of reason, and then, do justice upon the basis of the truth and the Judge is not only justified but required to elicit a fact, wherever the interest of truth and justice would suffer, if he did not.*

*15.4 The Judge contemplated by Section 165 is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. A Judge, who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses that every point is brought out, is not fulfilling his duty.*

*15.5 The framers of the Act, in the Report of the **Select Committee** published on 31st March, 1871 along with the Bill settled by them, observed:*

*"In many cases, the Judge has to get at the truth, or as near to*

*it as he can by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him but to inquire to the utmost into the truth of the matter."*

*15.6* ***Cunningham, Secretary to the Council of the Governor - General*** *for making Laws and Regulations at the time of the passing of the Indian Evidence Act stated:*

*"It is highly important that the Judge should be armed with full power enabling him to get at the facts. He may, accordingly, subject to conditions to be immediately noticed, ask any question he pleases, in any form, at any stage of the proceedings, about any matter relevant or irrelevant, and he may order the production of any document or thing. No objection can be taken to any such question or order, nor are the parties entitled, without Court's permission to cross-examine on the answers given."*

*15.7 The relevant judgments relating to Section 165 of the Indian Evidence Act, 1872 are as under:-*

*15.7.1 The Supreme Court in* Ram Chander v. State of Haryana, (1981) 3 SCC 191 *observed that under Section 165, the Court has ample power and discretion to control the trial effectively.* ***While conducting trial, the Court is not required to sit as a silent spectator or umpire but to take active part within the boundaries of law by putting questions to witnesses in order to elicit the truth*** *and to protect the weak and the innocent. It is the duty of a Judge to discover the truth and for that purpose he may "ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant".*

*15.7.2 In* Ritesh Tewari v. State of Uttar Pradesh, (2010) 10 SCC 677*, the Supreme Court held that* ***every trial is a voyage of discovery in which truth is the quest****. The power under Section 165 is to be exercised with the object of subserving the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth.* ***It is an extraordinary power conferred upon the Court to elicit the truth and to act in the interest of justice.*** *The purpose being to secure justice by full discovery of truth and an accurate knowledge of facts, the Court can put questions to the parties, except those which fall within exceptions contained in the said provision itself.*

*15.7.3 In* Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158, *the Supreme Court held that Section 165 of the Indian Evidence Act and* ***Section 311 of the Code of Criminal Procedure confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. The Judge can control the proceedings effectively so that ultimate objective i.e. truth is arrived at****. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The Section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, essential to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. Though justice is depicted to be blind-folded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administering justice and not to ignore or turn the mind/attention of the Court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings*.

15.7.4 In State of Rajasthan v. Ani, (1997) 6 SCC 162, *the Supreme Court held that* ***Section 165 of the Indian Evidence Act confers vast and unrestricted powers on the Court to elicit truth.*** *Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved.* ***A Judge is expected to actively participate in the trial to elicit necessary materials from witnesses in the appropriate context which he feels necessary for reaching the correct conclusion.***

15.7.5 In Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271, *referring to Section 165 of the Indian Evidence Act and Section 311 of the Code of Criminal Procedure, the Supreme Court stated that the said two sections are complementary to each other and between them, they confer*

*jurisdiction on the Judge to act in aid of justice. It is a well-accepted and settled principle that a Court must discharge its statutory functions - whether discretionary or obligatory - according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done*.

15.7.6 In Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 SC 178, *the Supreme Court held that Section 165 of the Indian Evidence Act and Section 540 of the Code of Criminal Procedure, 1898 confer jurisdiction on the Judge to act in aid of justice. In criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it.*

15.7.7 In Sessions Judge Nellore Referring Officer v. Intha Ramana Reddy, 1972 CriLJ 1485, *the Andhra Pradesh High Court held that* ***every trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice.*** *For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may ask any question he pleases, in any form at any time, of any witness, or of the parties about any fact, relevant or irrelevant."*

13. In *Ved Prakash Kharbanda v. Vimal Bindal* (supra), this Court also discussed the importance of the Trial Court in justice delivery system as under: -

*"16.* ***Importance of Trial Courts***

*The Law Commission of India headed by* ***H.R. Khanna, J****. in its* ***Seventy Seventh Report*** *relating to the* ***'Delays and Arrears in Trial Courts'*** *dealt with the importance of Trial Courts in the justice delivery system. The relevant portion of the said Report is reproduced as under:*

*-"If an evaluation were made of the importance of the role of the different functionaries who play their part in the administration of justice, the top position would necessarily have to be assigned to the Trial Court Judge. He is* ***the key-man in our judicial system, the most important and influential participant in the dispensation of justice. It is mostly with the Trial Judge rather than with the appellate Judge that the members of the general public come in contact, whether as parties or as witnesses.*** *The image of the judiciary for the common man is projected by the Trial Court Judges and this, in turn depends upon their intellectual, moral and personal qualities."*

***- Personality of Trial Court Judges***

*"Errors committed by the Trial Judge who is not of the right*

*caliber can sometimes be so crucial that they change the entire course of the trial and thus result in irreparable miscarriage of justice. Apart from that, a rectification of the error by the appellate Court which must necessarily be after lapse of a long time, can hardly compensate for the mischief which resulted from the error committed by the Trial Judge."*

***-The 'Upper Court' Myth***

*"The notion about the provisional nature of the Trial Court decisions being subject to correction in appeal, or what has been called the "upper-Court myth" ignores the realities of the situation.* ***In spite of the right of appeal, there are many cases in which appeals are not filed.*** *This apart, the appellate Courts having only the written record before them are normally reluctant to interfere with the appraisement of evidence of witnesses by the* ***Trial Judges who have had the advantage of looking at the demeanour of the witnesses.*** *The appellate Court, it has been said, operates in the partial vacuum of the printed record. A stenographic transcript fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the mere words signify. The best and most accurate record of oral testimony is like a dehydrated peach; it has neither the substance nor the flavor of the peach before it was dried."*

*14. The principles of law summarised by this Court in Ved Prakash Kharbanda v. Vimal Bindal (supra) are reproduced hereunder:-*

*"21.* ***Summary of Principles***

*21.1* ***Truth should be the Guiding Star in the Entire Judicial Process***

*• Truth is foundation of Justice. Dispensation of justice, based on truth, is an essential and inevitable feature in the justice delivery system. Justice is truth in action.*

*• It is the duty of the Judge to discover truth to do complete justice.*

*The entire judicial system has been created only to discern and find out the real truth.*

*• The justice based on truth would establish peace in the society. For the common man truth and justice are synonymous. So when truth fails, justice fails. People would have faith in Courts when truth alone triumphs.*

*• Every trial is voyage of discovery in which truth is the quest. Truth should be reigning objective of every trial. Judge has to play an active role to discover the truth and he should explore all avenues open to him in order to discover the truth.*

*• The Trial Judge is the key-man in the judicial system and he is in a unique position to strongly impact the quality of a trial to affect system's capacity to produce and assimilate truth. The Trial Judge should explore all avenues open to him in order to discover the truth. Trial Judge has the advantage of looking at the demeanour of the witnesses. In*

*spite of the right of appeal, there are many cases in which appeals are not filed. It is mostly with the Trial Judge rather than with the appellate Judge that the members of the general public come in contact, whether as parties or as witnesses.*

*21.2* ***What is 'Truth' and how to discover it***

*• Law's Truth is synonymous with facts established in accordance with the procedure prescribed by law.*

*• The purpose of judicial inquiry is to establish the existence of facts in accordance with law.*

*• Facts are proved through lawfully prescribed methods and standards.*

*• The belief of Courts about existence of facts must be based on reason, rationality and justification, strictly on the basis of relevant and admissible evidence, judicial notice or legally permitted presumptions. It must be based on a prescribed methodology of proof. It must be objective and verifiable.*

*21.3* ***Section 3 of Indian Evidence Act, 1872***

*• "Evidence" of a fact and "proof" of a fact are not synonymous terms. "Proof" in the strict sense means the effect of evidence.*

*• A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.*

*• The term "**after considering the matters before it**" in Section 3 of the Evidence Act means that for judging whether a fact is or not proved, the Court is entitled to take into consideration all matters before it which shall include the statement of the witnesses, admissions of the parties, confession of the accused, documents proved in evidence, judicial notice, demeanour of witnesses, local inspections and presumptions.*

*• The term "**believes it to exist**" in the definition of "proof" is a "judicial belief" of the Judge based on logical/rational thinking and the power of reason, and the Court is required to give reasons for the belief. The reasons are live links between the mind of the decision maker and the belief formed. Reasons convey judicial idea in words and sentences. Reasons are rational explanation of the conclusion. Reason is the very life of law. It is the heart beat of every belief and without it, law becomes lifeless. Reasons also ensure transparency and fairness in the decision making process. The reasons substitute subjectivity by objectivity. Recording of reasons also play as a vital restraint on possible arbitrary use of the judicial power. The recording of reasons serve the following four purposes:-*

*- To clarify the thought process.*

*- To explain the decision to the parties.*

*- To communicate the reasons to the public.*

*- To provide the reasons for an appellate Court to consider.*

*• Non-recording of reasons would cause prejudice to the litigant who would be unable to know the ground which weighed with the Court and also cause impediment in his taking adequate grounds before the appellate Court in the event of challenge.*

*• Nothing can be said to be "proved", however much material there may be available, until the Court believes the fact to exist or considers its existence so probable that a prudent man will act under the supposition that it exists. For example, ten witnesses may say that they saw the sun rising from the West and all the witnesses may withstand the cross-examination, the Court would not believe it to be true being against the law of nature and, therefore, the fact is 'disproved'. In mathematical terms, the entire evidence is multiplied with zero and, therefore, it is not required to be put on judicial scales. Where the Court believes the case of both the parties, their respective case is to be put on judicial scales to apply the test of preponderance.*

*• The approach of the Trial Court has to be as under:-*

*If on consideration of all the matters before it, the Court believes a fact to exist or considers its existence probable, the fact is said to be 'proved'. On the other hand, if the Court does not believe a fact either to exist or probable, such fact is said to be 'disproved'. A fact is said to be 'not proved' if it is neither proved nor disproved.*

*• The test whether a fact is proved is such degree of probability as would satisfy the mind of a reasonable man as to its existence. The standard of certainty required is of a prudent man. The Judge like a prudent man has to use its own judgment and experience and is not bound by any rule except his own judicial discretion, human experience, and judicial sense.*

*21.**4 Section 114 of the Indian Evidence Act, 1872***

*• Section 114 is a useful device to aid the Court in its quest for truth by using common sense as a judicial tool. Section 114 recognizes the general power of the Court to raise inferences as to the existence or non-existence of unknown facts on proof or admission of other facts.*

*• Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts.*

*• The source of presumptions is the common course of natural events, human conduct and public or private business, and the Section proceeds on the assumption that just as in nature there prevails a fixed order of things, so the volitional acts of men placed in similar circumstances exhibits, on the whole, a distinct uniformity which is traceable to the impulses of human nature, customs and habits of society.*

*• The illustrations though taken from different spheres of human activity, are not exhaustive. They are based upon human experience and have to be applied in the context of the facts of each*

*case. The illustrations are merely examples of circumstances in which certain presumptions may be made. Other presumptions of a similar kind in similar circumstances can be made under the provisions of the section itself.*

*• Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the Court can draw an inference and that would remain until such inference is either disproved or dispelled.*

*• Presumptions of fact can be used by the Courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it. The function of a presumption is to fill a gap in evidence.*

*• Section 114 of the Indian Evidence Act applies to both civil and criminal proceedings.*

*• Whether or not a presumption can be drawn under the section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid down. Human behaviour is so complex and room must be left for play in the joints. It is not possible to formulate a series of exact propositions and con-flue human behaviour within straitjackets.*

*• No rule of evidence can guide the Judge on the fundamental question whether evidence as to a relevant fact should be believed or not. Secondly, assuming that the Judge believes very few cases, guide him on the question what inference he should draw from it as to assist a Judge in the very smallest degree in determining the master question of the whole subject - whether and how far he ought to believe what the witnesses say? The rules of evidence do not guide what inference the Judge ought to draw from the facts in which, after considering the statements made to him, he believes. In every judicial proceeding whatever these two questions - Is this true, and, if it is true what then? - ought to be constantly present in the mind of the Judge, and the rules of evidence do not throw the smallest portion of light upon them.*

*21.5 Section 165 of the Indian Evidence Act, 1872*

*• Section 165 of the Indian Evidence Act, 1872 invests the Judge with plenary powers to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this Section is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements.*

*• The object of a trial is, first to ascertain truth by the light of reason, and then, do justice upon the basis of the truth and the Judge*

*is not only justified but required to elicit a fact, wherever the interest of truth and justice would suffer, if he did not.*

*• The Judge contemplated by Section 165 is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. A Judge, who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses that every point is brought out, is not fulfilling his duty."*

11. Upon due consideration of the aforesaid including the consent of the prosecution regarding DNA test, this Court finds that no interference is required in the matter, as the impugned order dated 12.02.2024 is not in violation of the provisions and the judgment(s) referred above. The instant application is accordingly dismissed.

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**(2024) 7 ILRA 967**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 19.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Application U/s 482 No. 9131 of 2024

**Dr. Hemika Agarwal & Anr. ...Petitioners**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Petitioners:**
Sri Ashok Kumar Singh, Ms. Pratibha Singh, Sri Satish Kumar Tyagi

**Counsel for the Respondent:**
G.A., Sri Harish Chandra, Sri Vivek Kumar Singh

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Section 204 - Issue of process, Section 200 - statement of complainant, Section 202 - statement of witnesses, Indian Penal Code, 1860 - Sections 384 - Extortion, Section 504 - Intentional insult, Section 506 - Criminal intimidation - 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 , inherent power could be invoked to quash criminal proceedings.(Para - 10)**

**(B) Indian Penal Code, 1860 - Section 504 - Intentional insult - mere abuse, discourtesy, rudeness, or insolence may not be considered an intentional insult if it doesn't incite a breach of peace - accused must intend to provoke the person insulted or know they are likely to commit a breach of peace - Each case of abusive language must be decided based on the facts and circumstances of the case - an offense under Section 504, I.P.C. is sufficient if the insult is calculated to cause the other party to lose their temper and act violently. (Para -8)**

Son of opposite party No.2 (complainant) was married with applicant No.1 - applicant No.2 is her father - who filed a false dowry case against her and her family - opposite party no. 2 claimed applicant demanded ₹1.5 crores to settle the case - filed a complaint - alleging threats and abuse – finding of trial court - Prima facie case exists applicant, her father, and mother - Ingredients of extortion offense

present - court issued summons – hence petition. **(Para - 1 to 5)**

**HELD: -** Present proceedings were initiated by opposite party only in order to wrecking vengeance as they were facing criminal proceedings on a complaint of applicant No.1 for committing offences related to a woman. Criminal proceedings quashed due to lack of essential ingredients for extortion, proceedings initiated with mala fide intentions, no specific abusive words mentioned in FIR, insufficient evidence for intentional insult. **(Para – 7 to 11)**

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

**List of Cases cited**:

1. Dhananjay @ Dhandnjay Kumar Singh Vs St. of Bihar & ors., (2007) 14 SCC 768

2. Salib @ Shalu @ Salim Vs St. of U.P. & ors., 2023 INSC 687

3. Sanjay Gupta @ Sanju Mohan Vs St. of U.P. & anr., 2024: AHC:105492

4. Mohd. Wajid & Anr. Vs St. of U.P. & ors., 2023 SCC OnLine SC 951

5. St. of Har. Vs Bhajan Lal, 1992 Supp (1) SCC 335: 1992 SCC (Cri) 426

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Sri Satish Kumar Tyagi, learned counsel for applicants, Sri Vivek Kumar Singh, learned counsel for opposite party No.2/complainant and Sri Mithilesh Kumar, learned A.G.A. for State.

2. Applicants are aggrieved by an order dated 28.02.2024 passed under Section 204 Cr.P.C., whereby they have been summoned for offence under Sections 384, 504, 506 I.P.C. in Complaint Case No.6204 of 2024 (Anju Garg Vs. Dr. Hemika Agarwal and others), Police Station- Kavi Nagar, District – Ghaziabad by Chief Judicial Magistrate, Ghaziabad.

3. Learned counsel appearing on behalf of applicants has referred contents of complaint, statement of complainant recorded under Section 200 Cr.P.C. as well as statement of witnesses recorded under Section 202 Cr.P.C. that even they are considered to be true in their entirety, still ingredients of offences under Sections 384, 504, 506 I.P.C. are not made out.

4. Learned counsel further submits that son of opposite party No.2 (complainant) was married with applicant No.1, whereas applicant No.2 is her father. Present proceedings were initiated to put pressure on applicant side as they have lodged an FIR against complainant and other, for offence of demand of dowry and other offences. For reference, statements recorded under Sections 200 and 202 Cr.P.C. as well as impugned order are reproduced hereinafter :-

***"बयान अन्तर्गत धारा 200 दं. प्र. सं.***

*आज दिनांक 2-2-2024 को अंजू गर्ग पत्नी श्री प्रदीप कुमार गर्ग निवासी ए-65, सेक्टर-33 नोएडा, थाना सेक्टर-24, नोएडा, गौतमबुद्धनगर ने सशपथ बयान किया कि मेरे पुत्र डा. प्रखर गर्ग का विवाह दिनांक 15- 7-2021 को विपक्षी डा. हेमिका अग्रवाल से हुआ था। मेरी पुत्रवधु ने मेरे तथा परिवार के अन्य लोगों के खिलाफ दहेज मांगने का झूठा मुकदमा दर्ज करा दिया था, जिसके फैसले की एवज में विपक्षीगण ने हमसे डेढ करोड़ रूपये की मांग की तथा कहा कि उक्त धनराशि दे दोगे तो फैसला कर लेंगे। इसकी शिकायत करने मै दिनांक 26-1-2024 को शाम करीब 5-00 बजे थाना कविनगर पर अपने पुत्र तथा पति के साथ गयी, जहां पर थानाध्यक्ष नहीं मिले। इसके बाद जब हम वापस जा रहे थे तो थाने के बाहर रास्तें पर मेरी पुत्रवधु डा. हेमिका अग्रवाल अपने पिता डा राकेश चन्द्र अग्रवाल तथा मां दिव्या अग्रवाल के*

साथ गाडी संख्या यू. पी. 14 डी. एस. 2581 से आयी तथा थाने के बाहर सर्विस लेन में आगे चलकर जब हम अपनी गाडी यू. पी. 16 डी. के. 2917 में बैठने जा रहे थे, तब रोककर तीनों ने हमे धमकी दी तथा गाली गलौच की तथा दहेज के केस को निपटाने के बदले डेढ करोड़ रुपये की अवैध मांग दोहरायी तथा कहा कि उनकी जान पहचान बदमाशों से है अगर पुलिस में शिकायत की तो जान से मरवा देंगे। हमने तुरन्त थाने पर वापस जाकर इस सम्बन्ध में लिखित रिपोर्ट दी परन्तु थाने वालों ने रिपोर्ट दर्ज नहीं की तथा कोर्ट से कार्यवाही करने को कहा। इस पुलिस तहरीर की स्वहस्ताक्षरित छायाप्रति नै आज दाखिल कर रही हूं।

PW2

202 सी.आर.पी.सी.

09.02.2024

नाम-प्रदीप कुमार गर्ग पुत्र श्याम सुन्दर गर्ग आयु 64 वर्ष पेशा रिटायर नि० A-65 10-33 नोएडा, थाना सै०-24 नौएडा जिला गौतमबुद्धनगर ने सशपथ बयान किया कि मेरी पुत्रवधू हेमिका ने मेरे व मेरे पुत्र व पत्नी के खिलाफ दहेज मांगने आदि का एक झूठा मुकदमा कराकर फैसले में डेढ करोड की मांग की थी, इसी मामले में अपनी बात कहते दिनाक 26.01.24 की शाम लगभग पांच वजे मैं अपने पुत्र प्रखर व पत्नी श्रीमती अंजू गर्ग के साथ थाना कविनगर आया। हमने अपनी कार थाना सर्विस लेन में आगे कट पर खड़ी कर दी थी, क्योंकि हमे दूसरे पक्ष से डर था कि कहीं वो थाने में आकर हमसे बदतमीजी न करे, थाने से वापस पैदल आकर जब कार में बैठने लगे तो डा० हेमिका अपने पिता राकेश, राकेश व माता दिव्या के साथ I-10 कार रजि० नं० U.P. 14 D.S-2581 में आयी और हमे गाडी में बैठने से रोक कर इन तीनो ने हमे गन्दी-2 गालिया दी और हमसे दहेज के इस केस को निपटाने के बदले में डेढ करोड रूपये की अवैध मांग की, उन्होने यह भी धमकी दी कि हमारी जान पहचान बदमाशो से है. अगर इसकी शिकायत पुलिस में की तो तुम्हें जान से मारवा देगे। हमने तुरन्त जाकर थाने में लिखित तहरीर दी, लेकिन थाने वालों ने रिपोर्ट दर्ज नहीं की और कोर्ट से कार्यवाही करने के लिए बोला। हमे पुलिस पर भरोसा न होने की वजह से मेरी पत्नी अन्जू ने ये परिवाद कोर्ट में पेश की है। पुलिस को दी शिकायत की कापी भी मेरी पत्नी ने अपने हस्ताक्षर में प्रमाणित करके अपने बयानो के साथ कोर्ट में दी है। कृपया हमे न्याय देने की कृपा करे। यही मेरा बयान है।

**28-02-2024**

पत्रावली पेश हुई। विगत तिथि पर परिवादी के विद्वान अधिवक्ता को तलबी के बिन्दु पर विस्तार पूर्वक सुना जा चुका है। पत्रावली का सम्यक अवलोकन किया।

संक्षेप में परिवाद कथानक इस प्रकार है कि परिवादनी श्रीमति अंजु गर्ग की पुत्रवधु डा० हेमिका अग्रवाल पुत्री डा० राकेश चन्द्र अग्रवाल निवासी आर 13/76, राजनगर, गाजियाबाद ने परिवादिनी उसके परिवार के खिलाफ दहेज मांगने आदि का झूठा मुकदमा कराकर फैसले में डेढ करोड की माँग की थी। इसी मामले में दिनांक 26.01.2024 को शाम लगभग 5 बजे वह अपने पति प्रदीप कुमार गर्ग व बेटे प्रखर गर्ग के साथ थाना कविनगर आयी तो डा० हैमिका अपने पिता राकेश व माता दिव्या के साथ आई-टेन कार रजि० नं० यू०पी० 14 डी0 एस0-2581 में आयी और थाने वाली सर्विस लेन में आगे चलकर कट पर उनकी गाड़ी से रोककर इन तीनों ने उन्हें गन्दी गन्दी गालियों दी और उनसे दहेज के इस केस को निपटाने के बदले में डेढ करोड रूपये की अवैध माँग की। इन्होने यह भी धमकी दी कि उनकी जान पहचान बदमाशों से है अगर इसकी पुलिस में शिकायत की तो जान से मरवा देगे। हमने तुरन्त जाकर थाने में लिखित रिपोर्ट दी लेकिन थाने वालों ने रिपोर्ट दर्ज नहीं की और कोर्ट से कार्यवाही करने को कहा। पुलिस पर भरोसा न होने की वजह से यह परिवाद कोर्ट में पेश किया है।

परिवाद के समर्थन में मौखिक साक्ष्य के रूप में धारा-200 दं०प्र०सं० के तहत परिवादिनी ने स्वयं को परीक्षित कराया तथा 202 दं०प्र०सं० के तहत साक्षीगण प्रखर गर्ग व प्रदीप कुमार गर्ग को परीक्षित कराया गया है तथा संलग्न सूची में वर्णित सम्बन्धित प्रपत्र दाखिल किये गये हैं।

परिवादी द्वारा अपने बयान अंतर्गत धारा-2०० दं०प्र०सं० में कथन किया है कि "मेरे पुत्र डा. प्रखर गर्ग का विवाह दिनांक 15-7-2021 को विपक्षी डा. हेमिका अग्रवाल से हुआ था। मेरी पुत्रवधु ने मेरे तथा परिवार के अन्य लोगों के खिलाफ दहेज मांगने का झूठा मुकदमा दर्ज करा दिया था, जिसके फैसले की एवज में विपक्षीगण ने हमसे डेढ करोड रूपये की मांग की तथा कहा कि उक्त धनराशि दे दोगे तो फैसला कर

*लेंगे। इसकी शिकायत करने मै दिनांक 26.01.2024 को शाम करीब 5.00 बजे थाना कविनगर पर अपने पुत्र तथा पति के साथ गयी, जहां पर थानाध्यक्ष नही मिले। इसके बाद जब हम वापस जा रहे थे तो थाने के बाहर रास्ते पर मेरी पुत्रवधू डा. हेमिका अग्रवाल अपने पिता डा. राकेश चन्द्र अग्राल तथा मां दिव्या अग्रवाल के साथ गाडी संख्या यू.पी. 14 डी.एस. 2581 से आयी तथा थाने के बाहर सर्विस लेन में आगे चलकर जब हम अपनी गाडी यू.पी. 16 डी.के. 2917 में बैठने जा रहे थे, तब रोककर तीनों ने हमे धमकी दी तथा गाली गलौच की तथा दहेज के केस को निपटाने के बदले डेढ करोड रूपये की अवैध मांग दोहरायी तथा कहा कि उनकी जान पहचान बदमाशों से है अगर पुलिस में शिकायत की तो जान से मरवा देंगे। हमने तुरन्त थाने पर वापस जाकर इस सम्बन्ध में लिखित रिपोर्ट दी परन्तु थाने वालों ने रिपोर्ट दर्ज नहीं की तथा कोर्ट से कार्यवाही करने को कहा। इस पुलिस तहरीर की स्वहस्ताक्षरित छायाप्रति मेै आज दाखिल कर रही हूँ।*

*परिवादी की ओर से धारा-202 दं०प्र०सं० के तहत परीक्षित कराये गये साक्षीगण ने परिवादी के उपरोक्त बयानों का समर्थन किया है।*

*<u>प्रस्तुत प्रकरण में परिवाद कथानक में वर्णित विपक्षीगण द्वारा परिवादिनी व उसके पति व पुत्र को गालीगलौच कर साशय अपमानित करने, उद्यापन कारित करने व जान से मारने की धमकी देने के तथ्य का समर्थन परिवादी साक्ष्य अंतर्गत धारा-200 व 202 दं०प्र०स० से होता है। मामले के तथ्यों परिस्थितियों व उपलब्ध साक्ष्य के दृष्टिगत विपक्षीगण 1 ता 3 तो को धारा-504, 506, 384 भा०दं०सं० के अपराध में विचारण हेतु तलब किये जाने हा आधार पर्याप्त है।</u>*

*आदेश*

*विपक्षीगण डा० हैमिका अग्रवाल, डा० राकेश चन्द अग्रवाल व श्रीमती दिव्या अग्रवाल को धारा-504, 506, 384 भा०दं०सं० के अपराध में विचारण हेतु जरिये सम्मन तलब किया जाता है। परिवादी द्वारा पैरवी किये जाने के उपरान्त कार्यालय नियमानुसार आदेशिकाएं दिनांक 28-03-2024 के लिए जारी करे।"*

5. Learned counsel for opposite party No.2 has also referred above quoted statements that there are prima facie case against accused persons. The learned Trial Court has assigned requisite reason that there are sufficient grounds to proceed.

6. In order to appreciate rival submission and to scrutinize whether prima facie ingredients of offence of Extortion is made out or not, the Court takes note of following paragraphs of **Dhananjay @ Dhandnjay Kumar Singh Vs. State of Bihar and others, (2007) 14 SCC 768** and **Salib @ Shalu @ Salim Vs. State of U.P. and others, 2023 INSC 687**, as referred in a judgment passed by this Court in **Sanjay Gupta @ Sanju Mohan Vs. State of U.P. and another, 2024:AHC:105492 :-**

> *"10. In order to appreciate, whether contents of Section 387 IPC are made out or not, it would be appropriate to reproduce relevant part of judgments passed by Supreme Court in Dhananjay @ Dhandnjay Kumar Singh Vs. State of Bihar and others, (2007)14 SCC 768 and Salib @ Shalu @ Salim vs. State of U.P. and others, 2023 INSC 687:*
>
> ***<u>Dhananjay @ Dhandnjay Kumar Singh (Supra)</u>***
>
> *"5.Section 384 provides for punishment for extortion. What would be*

*an extortion is provided under Section 383 of the Penal Code in the following terms:*

*"383.Extortion.-- Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion'."*

***6.A bare perusal of the aforementioned provision would demonstrate that the following ingredients would constitute the offence:***

***1. The accused must put any person in fear of injury to that person or any other person.***

***2. The putting of a person in such fear must be intentional.***

***3. The accused must thereby induce the person so put in fear to deliver to any person any property, valuable security or anything signed or sealed which may be converted into a valuable security.***

***4. Such inducement must be done dishonestly.***

*7. A First Information Report as is well known, must be read in its entirety. It is not in dispute that the parties entered into transactions relating to supply of bags. The fact that some amount was due to the appellant from the First Informant, is not in dispute. The First Information Report itself disclosed that accounts were settled a year prior to the date of incident and the appellant owed a sum of about Rs.400-500 from (sic) Gautam Dubey (sic).*

*8. According to the said Gautam Dubey, however, a sum of Rs.1500/- only was due to him.*

*9. It is in the aforementioned premise the allegations that Gautam Dubey and the appellant slapped the first informant and took out Rs.1580/- from his upper pocket must be viewed.*

***10. No allegation was made that the money was paid by the informant having been put in fear of injury or putting him in such fear by the appellant was intentional.***

***11. The first informant, admittedly, has also not delivered any property or valuable security to the appellant.***

***12. A distinction between theft and***

***extortion is well known. Whereas offence of extortion is carried out by overpowering the will of the owner; in commission of an offence of theft the offender's intention is always to take without that person's consent.***

*13. We, therefore, are of the opinion that having regard to the facts and circumstances of the case, no case under Section 384 of the Penal Code was made out in the first information report."*

***Salib @ Shalu @ Salim (supra)***

*"21. "Extortion" has been defined in Section 383 of the IPC as follows:—*

*"Section 383. Extortion.—Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits 'extortion.*

***Illustrations***

*(a) A threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.*

*(b) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain monies to A. Z sings and delivers the note. A has committed extortion.*

*(c) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.*

*(d) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z sings and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security. A has committed extortion."*

*22. So from the aforesaid, it is clear that one of the necessary ingredients of the offence of extortion is that the victim must be induced to deliver to any person any property or valuable security, etc. That is to say, the delivery of the property must be with consent which has been obtained by putting the person in fear of any*

*injury. In contrast to theft, in extortion there is an element of consent, of course, obtained by putting the victim in fear of injury. In extortion, the will of the victim has to be overpowered by putting him or her in fear of injury. Forcibly taking any property will not come under this definition. It has to be shown that the person was induced to part with the property by putting him in fear of injury. The illustrations to the Section given in the IPC make this perfectly clear.*

*23. In the aforesaid context, we may refer to the following observations made by a Division Bench of the High Court of Patna in Ramyad Singh v. Emperor Criminal Revision No. 125 of 1931 (Pat):-*

*"If the facts had been that the complainant's thumb had been forcibly seized by one of the petitioners and had been applied to the piece of paper notwithstanding his struggles and protests, then I would agree that there is good ground for saying that the offence committed whatever it may be, was not the offence of extortion because the complainant would not have been induced by the fear of injury but would have simply been the subject of actual physical compulsion."*

*It was held:-*

*"It is clear that this definition makes it necessary for the prosecution to prove that the victims Narain and Sheonandan were put in fear of injury to themselves or to others, and further, were thereby dishonestly induced to deliver papers containing their thumb impressions. The prosecution story in the present case goes no further than that thumb impressions were 'forcibly taken' from them. The details of the forcible taking were apparently not put in evidence. The trial Court speaks of the wrists of the victims being caught and of their thumb impressions being then 'taken' ……. The lower Courts only speak of the forcible taking of the victim's thumb impression; and as this does not necessarily involve inducing the victim to deliver papers with his thumb impressions (papers which could no doubt be converted into valuable securities), I must hold that the offence of extortion is not established."*

*24. Thus, it is relevant to note that nowhere the first informant has stated that out of fear,*

*she paid Rs. 10 Lakh to the accused persons. To put it in other words, there is nothing to indicate that there was actual delivery of possession of property (money) by the person put in fear. In the absence of anything to even remotely suggest that the first informant parted with a particular amount after being put to fear of any injury, no offence under Section 386 of the IPC can be said to have been made out.”*

*(Emphasis supplied) ”*

7. In the above factual and legal background, the Court takes note of statement of complainant as well as of witnesses as referred above, that it is not their case that any amount allegedly demanded was delivered to applicants, therefore, in view of above **Dhananjay @ Dhandnjay Kumar Singh (supra) Salib @ Shalu @ Salim (supra)**, essential ingredient of offence of ‘extortion’ is not made out.

8. The Court also takes note of a judgment passed by Supreme Court in case of **Mohammad Wajid and Another Vs. State of U.P. And Others, 2023 SCC OnLine SC 951**, that whether ingredients of Sections 504 and 506 I.P.C. are made out or not. The relevant parts of **Mohammad Wajid and Another (supra)** are reproduced hereinafter :-

***“SECTIONS 503, 504 AND 506 OF THE IPC***

*24. Chapter XXII of the IPC relates to Criminal Intimidation, Insult and Annoyance. Section 503 reads thus:—*

***“Section 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 threat, commits criminal intimidation.*

*Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.*

*Illustration*

*A, for the purpose of inducing B to resist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.”*

***25**. Section 504 reads thus:—*

***“Section 504. Intentional insult with intent to provoke breach of the peace.**—Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”*

*26. Section 506 reads thus:—*

***"Section 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."*

*27. An offence under Section 503 has following essentials:—*

*1) Threatening a person with any injury;*

*(i) to his person, reputation or property; or*

*(ii) to the person, or reputation of any one in whom that person is interested.*

*2) The threat must be with intent;*

*(i) to cause alarm to that person; or*

*(ii) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat; or*

*(iii) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.*

***28. Section 504 of the IPC contemplates intentionally insulting a person and thereby provoking such person insulted to breach the peace or intentionally insulting a person knowing it to be likely that the person insulted may be provoked so as to cause a breach of the public peace or to commit any other offence. Mere abuse may not come within the purview of the section. But, the words of abuse in a particular case might amount to an intentional insult provoking the person insulted to commit a breach of the public peace or to commit any other offence. If abusive language is used intentionally and is of such a nature as would in the ordinary course of events lead the person insulted to break the peace or to commit an offence under the law, the case is not taken away from the purview of the Section merely because the insulted person did not actually break the peace or commit any offence having exercised selfcontrol or having been subjected to abject terror by the offender. In judging whether particular abusive language is attracted by Section 504, IPC, the court has to find out what, in the ordinary circumstances, would be the effect of the abusive language used and not what the complainant actually did as a result of his peculiar idiosyncrasy or cool temperament or sense of discipline. It is the ordinary general nature of the abusive language that is the test for considering whether the abusive language is an intentional insult***

***likely to provoke the person insulted to commit a breach of the peace and not the particular conduct or temperament of the complainant.***

***29. Mere abuse, discourtesy, rudeness or insolence, may not amount to an intentional insult within the meaning of Section 504, IPC if it does not have the necessary element of being likely to incite the person insulted to commit a breach of the peace of an offence and the other element of the accused intending to provoke the person insulted to commit a breach of the peace or knowing that the person insulted is likely to commit a breach of the peace. Each case of abusive language shall have to be decided in the light of the facts and circumstances of that case and there cannot be a general proposition that no one commits an offence under Section 504, IPC if he merely uses abusive language against the complainant. In King Emperor v. Chunnibhai Dayabhai, (1902) 4 Bom LR 78, a Division Bench of the Bombay High Court pointed out that:—***

*"To constitute an offence under Section 504, I.P.C. it is sufficient if the insult is of a kind calculated to cause the other party to lose his temper and say or do something violent. Public peace can be broken by angry words as well as deeds."*

*(Emphasis supplied)*

*30. A bare perusal of Section 506 of the IPC makes it clear that a part of it relates to criminal intimidation. Before an offence of criminal intimidation is made out, it must be established that the accused had an intention to cause alarm to the complainant.*

*31. In the facts and circumstances of the case and more particularly, considering the nature of the allegations levelled in the FIR, a prima facie case to constitute the offence punishable under Section 506 of the IPC may probably could be said to have been disclosed but not under Section 504 of the IPC. The allegations with respect to the offence punishable under Section 504 of the IPC can also be looked at from a different perspective. In the FIR, all that the first informant has stated is that abusive language was used by the accused persons. What exactly was uttered in the form of abuses is not stated in the FIR. One of the essential elements, as discussed above, constituting an offence under Section 504 of the IPC is that there should have been an act or conduct amounting to intentional insult. Where that act is the use of the abusive words, it is necessary to know what those words were in order to decide whether the use of those words amounted to intentional insult. In the absence of these words, it is not possible to decide whether the ingredient of intentional insult is present."*

9. In above background, the Court further considered the statement of complainant recorded under Section 200 Cr.P.C. as well as of witnesses recorded under Section 202 Cr.P.C. however, there is nothing that applicants have put the

complainant on alarm or provoked him to commit any act which could breach the peace. The words used for alleged insult are also not specific except that "गाली गलौच की" or "गन्दी गन्दी गालियाँ दी". Accordingly, in view of **Mohammad Wajid and another (supra),** even ingredients of offences under Sections 504 and 506 I.P.C. are also made as well as the Court is of view that present proceedings were initiated by opposite party only in order to wrecking vengeance as they were facing criminal proceedings on a complaint of applicant No.1 for committing offences related to a woman.

10. The outcome of above discussion is that facts of present case are squarely falls within the parameters as referred in a judgment passed by Supreme Court in **State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426**, where inherent power could be invoked to quash criminal proceedings, and for reference para 102(7) of Bhajan Lal (supra) is reproduced hereinafter:

"(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."

11. Accordingly, impugned order dated 28.02.2024 is set aside and consequently criminal proceedings arising out of complaint Case No.6204 of 2024 under Sections 504, 506, 384 I.P.C. (Anju Garg Vs. Dr. Hemika Agarwal and others) are also quashed.

12. Accordingly, application is **Allowed**.

13. Registrar Compliance to take steps.

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**(2024) 7 ILRA 977**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 15.07.2024**

**BEFORE**

**THE HON'BLE ARUN BHANSALI, C.J.**
**THE HON'BLE JASPREET SINGH, J.**

Appeal Under Section 37 of Arbitration and Conciliation Act No. 66 of 2023

**M/S Shyam Lalit Dubey & Anr.** **...Appellants**

**Versus**

**U.O.I. & Anr.** **...Respondents**

**Counsel for the Appellants:**
Pritish Kumar, Shantanu Gupta

**Counsel for the Respondents:**
Deepanshu Dass, Varun Pandey

**Civil Law (The Arbitration and Conciliation Act, 1996-Sections 31(7), 34 & 37) (The Indian Contract Act-1872-Section 70)-** The disputes and differences have to arise out of or in connection with the contract in question. As has been firmly established in the present case that while the contract in question pertains to rebuilding of Bridge No. 70 at Km 34/13-14 between Lalgopalganj (LGO) and Bhadri (BHDR) Station, the same has nothing to do with epoxy grouting in relation to the other bridges. The said work was wholly alien and independent to the work under contract and as only incidentally the contract in question was in existence, it cannot be said that the work of epoxy grouting arose out of or in connection with the contract in question-In an arbitral dispute with reference to *quantum meruit* or Section 70 of the Act, 1872, for a work undertaken which is wholly independent of the contract containing the arbitration clause, the same cannot become an arbitral dispute. **(Para 34, 35 & 42)**

**Appeal partly allowed.** (E-15)

**List of Cases cited:**

1. U.O.I. Vs Promode Kumar Agarwalla & anr. 1967 Lawsuit (Cal) 293,

2.Municipal Corporation of Delhi Vs Ravi Kumar in OMP No. 273 of 2008 decided on 22.11.2017 by Delhi High Court

3.Bharat Sanchar Nigam Limited Vs Vihaan Networks Ltd., : 2023 Lawsuit (Del) 3385.

4.M/s. Patel Engineering Co. Ltd. Vs Indian Oil Corporation Ltd. : 1975 AIR (Patna) 212,

5. U.O.I. Vs Monoranjan Mondal : 2006(1) ICC 168

6.The Sports Authority of Assam Vs Larsen and Tourbo Ltd. 2024 (1) GauLR 894

7.Renusagar Power Co. Ltd. Vs General Electric Co.& anr. (1984) 4 SCC 679

8. U.O.I. Vs. Salween Timber Construction (India) : AIR 1969 SC 488

9.A. M. Mair & Co. Vs Gordhandas Sagarmull : 1951 AIR (SC) 9

(Delivered by Hon'ble Arun Bhansali, C.J.)

1. This appeal is directed against the judgement dated 28.06.2023 passed by the Commercial Court, Lucknow whereby the petition filed by the respondents under Section 34 of the Arbitration and Conciliation Act, 1996 (for short the 'Act, 1996') has been allowed and the arbitral award dated 6.11.2020 has been set aside.

2. Tender offer of the appellants for the work of rebuilding of Bridge No. 70 at Km 34/13-14 between Lalgopalganj (LGO) and Bhadri (BHDR) Station on ARC Section under ADEM/PRG of Lucknow Divison was submitted in pursuance of the tender notice dated 21.12.2016, which was accepted by the competent authority at the offered rates. The total cost of assigned work was Rs.2,50,86,758.87P.

3. Pursuant to the said acceptance, Letter of Acceptance (LoA) dated 01.05.2017 was issued. Pursuant to the terms of the contract, earnest money deposited by the appellants with the tender documents was retained and balance security deposit was to be recovered from the progressive bills @ 10% till full security amount was recovered. A performance guarantee of Rs.12,54,340/- was required to be submitted, which was submitted in the shape of FDRs by the appellants. A formal agreement was entered into between the parties to which the general conditions of Railways contract ('GCC') were applicable. Under the agreement, the appellants were required to complete the work within eight months from the date of issue of LoA i.e. by 31.12.2017 in conformity with the approved drawing.

4. It was claimed by the appellants that it arranged the entire paraphernalia and infrastructure including labour, staff, tools and materials at the site to execute the awarded contract. However, the contract could not be carried out between the period 01.05.2017 to 31.12.2017 in terms of the agreement as the respondents failed to provide approved drawing to construct the bridge, though it was provided that the same would be supplied at the time of execution of the agreement. The contract period was extended without penalty from 01.01.2018 to 31.07.2018. However, even during the extended period the approved drawing was not supplied.

5. It is claimed that in June, 2018, the appellants were directed by the Senior

Divisional Engineer-IV to perform epoxy grouting work on Bridges No. 4, 6, 8, 12, 110, 115, 119, 96, 151, 148, 146, 146A, 147, 144, 140, 120, 116, 105A, 105, 117, 104A, 104, 127, 123, 109 & 131A. It is further claimed that though the said work was not provided in the contract, keeping in view the long standing association of the appellants with the Railways and emergent and urgent nature of the work, the same was performed whereby the appellants expended about Rs.65 Lakhs. The said epoxy grouting work was approved and verified by the competent Railway Authorities. However, the payment was not made.

6. Since the approved drawing was not provided to the appellants within time to complete the work awarded to them under the contract and on account of non payment of their dues for epoxy grouting, the respondents were requested to appoint an Arbitrator under clause 64 of the GCC. However, when the Arbitrator was not appointed, the appellants approached the High Court, which appointed a sole Arbitrator by its order dated 06.01.2020.

7. The Arbitrator passed the arbitral award dated 06.11.2020 and awarded the following amounts along with 12% pendente lite interest :

A. Amount under earnest money : Rs. 2,72,500.00

B. Amount under the performance guarantee : Rs.12,54,340.00

C. Amount of epoxy grouting work : Rs.61,24,732.79

D. Amounts under mobilization of resources : Rs.34,13,437.50

E. Amount under 10% loss of profit : Rs.25,08,675.89

F. Fee and Expenses (Rs.360937.50 + 172000.00) : Rs. 5,32,937.50

**Total** : **Rs.1,41,06,623.68**

8. Feeling aggrieved, the petition under Section 34 of the Act, 1996 was filed by the respondents.

9. After hearing the parties, the Commercial Court dealt with the issues raised and came to the conclusion that so far as the award pertaining to mobilization of resources was concerned, appreciation and re-appreciation of facts, evidence adduced by the parties in arbitral proceedings under Section 34 of the Act, 1996 was not permissible. For the claim pertaining to epoxy grouting, it was held that the claim of epoxy grouting was not an arbitrable dispute. The Commercial Court also came to the conclusion that in terms of the proviso to Section 31(7) of the Act, 1996 read with clause 16(3) of the GCC in question, interest was not payable and based on its discussion, on finding that the award suffers from patent illegality, set aside the same.

10. The present appeal has been filed by the appellants seeking to question - (i) Setting aside of the entire award by the Commercial Court despite coming to the conclusion that the award made pertaining to mobilization of resources was justified and on other items no finding against the award was recorded (ii) Rejection of claim pertaining to epoxy grouting and (iii)

setting aside of award of interest pendente lite.

11. During the course of submissions, counsel for the appellants submitted that in so far as the Commercial Court has set aside the award of interest for the period the cause of action arose till the award was delivered, in view of the provisions of Section 31(7)(a) of the Act, 1996, the appellants do not press the said ground in appeal.

12. Learned counsel for the appellants made submissions that the Commercial Court was not justified in setting aside the entire award once it came to the conclusion that in so far as the award of claim towards mobilization of resources was justified, only because it came to the conclusion that the award pertaining to epoxy grouting and interest was not justified.

13. Learned counsel further submitted that setting aside of the entire award, is contrary to the proviso to Section 34(2)(a)(iv) of the Act, 1996, which clearly provides that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside and therefore, to that extent the judgment impugned deserves to be set aside.

14. For the issue relating to epoxy grouting, submissions were made that it has not been denied by the respondents that the work was done as directed by Engineer In Charge of the site, who had forwarded the record to ADRM for approval, which was denied in view of the GCC for lack of any written contract, which situation was squarely covered by the provisions of Section 70 of the Contract Act, 1872 (for short the 'Act, 1872') and the principle of quantum meruit and therefore, setting aside of the award on the said count also is not justified.

15. It was prayed that the judgement of the Commercial Court to the extent the claim pertaining to epoxy grouting has been denied and/or setting aside of the entire award deserves to be set aside.

16. Reliance was placed on ***Union of India v. Promode Kumar Agarwalla & another : 1967 Lawsuit (Cal) 293, Municipal Corporation of Delhi v. Ravi Kumar in OMP No. 273 of 2008*** decided on 22.11.2017 by Delhi High Court and ***Bharat Sanchar Nigam Limited v. Vihaan Networks Ltd., : 2023 Lawsuit (Del) 3385.***

17. Learned counsel for the respondents supported the judgement impugned. Submissions were made that the Arbitrator was not justified in coming to the conclusion that the claim made by the appellants pertaining to mobilization of resources etc. was required to be accepted. Submissions were also made that when it was proved on record that in so far as Bridge No. 70 qua which contract was entered into never took off, the fact that the appellants had undertaken work of epoxy grouting qua other bridges and the amendment sought in the agreement was specifically rejected by the competent authority, there was no reason to award the amount towards epoxy grouting.

18. Further submissions were made that reliance placed on Section 70 of the Act, 1872 is wholly misplaced inasmuch as once the work relating to

epoxy grouting does not form part of the contract in question, with reference to Section 70 of the Act, 1872, the same cannot become an arbitrable dispute and once the said dispute was beyond the scope of the arbitration clause, the award impugned was wholly without jurisdiction and has rightly been set aside.

19. Further submissions were made that once the award on epoxy grouting was found by the Commercial Court as beyond the arbitration clause and award of interest contrary to provisions of Section 31(7) of the Act, setting aside of the entire award as patently illegal cannot be questioned and therefore, the appeal deserves dismissal.

20. Reliance was placed on ***M/s. Patel Engineering Co. Ltd. v. Indian Oil Corporation Ltd. : 1975 AIR (Patna) 212, Union of India vs. Monoranjan Mondal : 2006(1) ICC 168 and The Sports Authority of Assam v. Larsen and Tourbo Limited : 2024 (1) GauLR 894.***

21. We have considered the submissions made by the counsel for the parties and have perused the material available on record.

22. A bare perusal of the judgement impugned passed by the Commercial Court would reveal that apparently out of 6 claims on which award was passed the challenge was laid to 2 claims and award of interest. The court has dealt with three issues, pertaining to mobilization of resources, epoxy grouting and award of interest by the Arbitrator in his arbitral award dated 06.11.2020. The Court while upholding the findings in the award pertaining to mobilization of resources, came to conclusion that the issue of epoxy grouting work was beyond the arbitration clause and the award of interest was contrary to the provisions of Section 31(7) of the Act, 1996. However, without further discussing as to why the appellants were not entitled to the amount, as awarded by the Arbitrator, pertaining to mobilization of resources, the Court on its finding that the award passed was patently illegal, has set aside the entire award.

23. We are firmly of the opinion that setting aside of the entire award, apparently is contrary to the proviso to sub-clause (iv) of clause (a) of sub-section (2) of Section 34 of the Act, 1996. The provision reads as under :

> ***"34. Application for setting aside arbitral award****. - (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
>
> *(2) An arbitral award may be set aside by the Court only if –*
>
> *(a) the party making the application establishes on the basis of the record of the arbitral tribunal that –*
>
> *(i) …………..*
>
> *(ii) ………….*
>
> *(iii) …………*
>
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration :*
>
> *Provided that, if the decisions on matters submitted to arbitration can be separated from*

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

*(v) ……………….*

*(b) ………………*

*(2-A)*

……………………………….."

24. A perusal of the above would reveal that power, conferred on the Court to set aside the arbitral award is subject to establishing on the basis of record of the arbitral tribunal on the ground contained in sub-clause (i) to (v) of clause (a) and (b) of sub-section (2) of Section 34 of the Act, 1996. While clause (iv) of Section 34(2)(a) of the Act, 1996 provides that the arbitral award, which deals with a dispute not contemplated by or not falling within the terms of the arbitration or it contains decisions on matters beyond the scope of the submission to arbitration, the same can be set aside by the court. However, the proviso saves the decisions on matters submitted to arbitration and mandates that only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.

25. In the present case, the Commercial Court though came to the conclusion that the issue pertaining to epoxy grouting was not arbitrable and that award of interest was contrary to the provisions of Section 31(7) of the Act, 1996, still in light of the above proviso to Section 34(2)(a)(iv), the award pertaining to mobilization of resources was not required to be set aside/interfered with and to the said extent the judgement impugned passed by the Commercial Court, cannot be sustained.

26. Coming to the issue of award pertaining to epoxy grouting, the findings recorded by the Commercial Court reads as under :

*"Keeping in view the law laid down above it has to be seen whether the work of epoxy grouting can be said to have been done within the frame work of original contract no. 48/WA/Ag/work/26/ Sr.DEN-IV-LKO/ 2016-17. From the perusal of the agreement it is crystal clear that as per clause 22(1) of the G C C the work of 'Rebuilding of Bridge no. 70 at Km. 34/13-14 between Lalgopal ganj (LGO) & Bhadri (BHDR) station on ARC section under ADENPRG of Lucknow Division (Estt.No. 169-2014) had to be performed as per I.S. specifications and in conformity with the drawing. Since the drawing was not made available to the Respondent/Claimant hence the work of rebuilding bridge no. 70 at Km. 34/13-14 between Lalgopal ganj (LGO) & Bhadri (BHDR) station on ARC section under ADENPRG of Lucknow Division (Estt.No. 169-2014) never started. The work of epoxy grouting was done at the oral insrtruction of the Senior Divisional Manager (IV) on several bridges bearing no. 46, 8, 12, 110, 115, 119, 96, 151, 148, 146, 146A, 147, 144, 140, 120, 116, 105A, 105, 117, 104A, 104,127, 123,109 and 131A. It is undisputed that the said work of epoxy grouting was never made a part of the contract. In this way it is palpably clear that the work of epoxy grouting was not in any way*

*connected with the original contract no. 48/ WA/ Ag/ work/ 26/ Sr.DEN-IV-LKO/2016-17. Thus the work of epoxy grouting was not covered by the agreement no. 48/ WA/ Ag/ work/ 26/ Sr.DEN-IV-LKO/2016-17 containing arbitration clause. Therefore the claim of epoxy grouting is not arbitrable dispute. It is true that the Respondent/Claimant has performed the epoxy grouting work and the Petitioners/Railways are enjoying its benefit so respondent/Claimant is entitled to be compensated for the epoxy grouting work some where else but not under the present arbitration case because the work of epoxy grouting was never made a part of contract and the work of epoxy grouting was not with in the frame work of the agreement. In this way the learned Arbitrator has entertained a non arbitrable dispute. Thus the award passed under the head epoxy grouting is contrary to provisions of the Arbitration and Conciliation Act, 1996. Therefore the impugned award is a result of patent illegality, being against the public policy of India."*

27. The findings of the Commercial Court are specific that epoxy grouting work pertaining to several bridges was never made part of the contract and the same was not in any way connected with the contract in question and therefore, the work of epoxy grouting was not covered by the agreement containing arbitration clause and consequently, the same was not an arbitrable dispute.

28. The Arbitrator and counsel for the appellants have relied on the provisions of Section 70 of the Act, 1872 for supporting the award, pertaining to epoxy grouting.

29. Section 70 of the Act, 1872 reads as under :

> ***"70. Obligation of person enjoying benefit of non-gratuitous act.*** *- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."*

30. The above provision deals with an obligation of a person enjoying the benefit of non-gratuitous act and provides that the beneficiary is bound to make compensation to the person for those non-gratuitous services.

31. In the present case, it is not in dispute that the appellants had undertaken the work of epoxy grouting at several bridges under the oral instructions of Senior Divisional Railway Manager-IV and the officer attempted to get the same included in the contract in question. However, the effort made in this regard was specifically rejected by the competent authority i.e. ADRM on 08.03.2018 in the following terms :

> *"Introduction of a new item 22073 for amount Rs.1,24,75,485/- in a contract of Rs.2,50,86,758.87 is not agreeable, in view of objection that asking for a rate for*

*new item 22073 may fetch a competitive rate in open tender."*

32. Once the said addition to the contract was specifically refused, it cannot be said that the said work undertaken by the appellants had any relation whatsoever with the contract, which was awarded to them pertaining to Bridge No. 70 qua which, no work was undertaken though resources were mobilized. The arbitration clause, which forms part of the GCC, to the extent relevant inter-alia reads as under :

> ***"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.*
>
> ***64.(1) Demand for Arbitration :***
>
> ***64.(1)*** *(i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.*
>
> ***64.(1)****(ii) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference."*

33. A perusal of the above reveals that for disputes and differences of any kind whatsoever arising out of or in connection with the contract can be

referred by the contractor to the GM and the GM is required to make and notify decisions on all matters referred to by the contractor in writing within 120 days and in case the GM fails to make a decision within 120 days, demand in writing can be made that the disputes and differences be referred to arbitration.

34. From the above, it is apparent that the disputes and differences have to arise out of or in connection with the contract in question. As has been firmly established in the present case that while the contract in question pertains to rebuilding of Bridge No. 70 at Km 34/13-14 between Lalgopalganj (LGO) and Bhadri (BHDR) Station, the same has nothing to do with epoxy grouting in relation to the other bridges. The said work was wholly alien and independent to the work under contract and as only incidentally the contract in question was in existence, it cannot be said that the work of epoxy grouting arose out of or in connection with the contract in question.

35. In so far as reliance placed on provisions of Section 70 of the Act, 1872, i.e. principle of quantum meruit is concerned, though in present circumstance in relation to epoxy grouting the same may apply but as to whether on account of provisions of Section 70 of the Act, 1872, the same can ipso facto become an arbitrable dispute in relation to an arbitration clause contained in an agreement subject matter of which had no relation to the work non gratuitously done by the appellants ? Qua the said aspect of the matter, wherein some extra work etc. pertaining to the same contract has been undertaken may form part of the arbitrable dispute, however, in an arbitral dispute with reference to quantum meruit or Section 70 of the Act, 1872, for a work undertaken which is wholly independent of the contract containing the arbitration clause, the same cannot become an arbitral dispute.

36. Hon'ble Supreme Court in **Renusagar Power Co. Ltd. Vs. General Electric Company And Another : (1984) 4 SCC 679**, dealing with the said aspect while referring to the judgement in **Union of India Vs. Salween Timber Construction (India) : AIR 1969 SC 488**, observed as under:

> *"Arbitration Clause in the contract covered any question or dispute arising under the contract or "in connection with the contract". On the question whether the arbitrators had jurisdiction to adjudicate upon that claim this Court, relying upon its earlier decision in Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar held, that the test for determining the question is whether recourse to the contract, by which both the parties are bound, was necessary for the purpose of determining whether the claim of the respondent was justified or otherwise and since it was necessary in the case to have recourse to the terms of the contract for the purpose of deciding the matter in dispute the matter was within the scope of the arbitration clause and the arbitrators had jurisdiction to decide it."*

The Hon'ble Court laid down the test for determining the question whether the arbitrator had jurisdiction to adjudicate upon the claim i.e. whether recourse to the

contract was necessary for the purpose of determining whether the claim was justified or otherwise.

37. In the present case, for determination of issue pertaining to epoxy grouting, no reference whatsoever was required to be made to the contract in question as the same only pertained to rebuilding the Bridge No. 70, the dispute in this regard, cannot and does not fall within the arbitrable dispute. The Commercial Court was perfectly justified in observing that the appellants may be entitled to be compensated for epoxy grouting work somewhere else but not under the present arbitration case.

38. So far as the judgement relied on by the counsel for the appellants are concerned, none of the judgements apparently deal with execution of non-gratuitous work wholly independent of the contracted work.

39. In the case of ***Promode Kumar Agarwalla (Supra)*** also, the court referred to the judgement in **A. M. Mair & Co. v. Gordhandas Sagarmull : 1951 AIR (SC) 9** wherein also the principle was laid down that if a party has to take recourse to the contract to establish the claim, the dispute in respect of which the claim arises is a dispute under or arising out of the contract. As noticed herein-before, the case of the appellants fails on the touchstone of the said principle laid down by Hon'ble Supreme Court.

40. In case of ***Ravi Kumar (Supra)***, the dispute pertained to additional work, in relation to the contract in question. Similarly, in the case of ***Bharat Sanchar Nigam Limited (Supra)*** also the dispute arose out of the contract containing an arbitration clause and was found to be arbitrable.

41. In view of the above discussions, findings recorded by the Commercial Court in relation to the claim pertaining to epoxy grouting being not arbitrable cannot be faulted.

42. Consequently, the appeal is **partly allowed**. The judgement impugned dated 28.06.2023 passed by the Commercial Court in Arbitration Case No. 19 of 2021 is set aside. While the Arbitral Award dated 06.11.2020 relating to claim of the appellants pertaining to epoxy grouting amounting to Rs.61,24,732.79P. and payment of interest @ 12% from the date on which the cause of action arose till the date of award, is set aside, the rest of the award is upheld.

43. The appellant, except for the amount of epoxy grouting and pendente lite interest awarded by the Arbitrator, would be entitled to execute the rest of the award in accordance with law.

44. No order as to costs.

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**(2024) 7 ILRA 986**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 15.07.2024**

**BEFORE**

**THE HON'BLE PANKAJ BHATIA, J.**

Crl. Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 1422 of 2024

**Achchey Lal Jaiswal ...Applicant**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Applicant:**

Jitendra Saksena

**Counsel for the Respondents:**
G.A.

**Criminal Law - Indian Penal Code, 1860 - Sections 120B, 420, 465, 466, 467, 468 & 471 - The Code of Criminal Procedure, 1973 - Sections 437 & 482 - Constitution of India – Article 226 - Allahabad High Court Rules, 1952 - Chapter XVIII Rule 18-A - As per FIR, mother of informant was owner of property and adjacent to the said property, there was property of applicant's son-in-law, a registered Will was executed by her in which, the applicant's son-in-law, his wife and applicant were shown as heirs of her, applicant was attesting witness - Issue before Court, whether the non-disclosure of previous legal actions by applicant by filing a writ petition and an application u/s 482 , Cr.P.C. would be fatal to anticipatory bail application or not – Held, civil litigations are there in between the parties, the FIR has been lodged after almost 8 years - Injunction order was confirmed after hearing both the parties, coupled with fact that he is aged about 74 years - Only allegation against him is that he was an attesting witness - Applicant is neither at a flight risk nor can adversely effect the trial, entitled to anticipatory bail - Directions accordingly (Para 3, 13, 21)**

**The application allowed.** (E-13)

**<u>List of Cases cited</u>:**

1. Madhya Pradesh Vs Pradeep Sharma, (2014) 2 SCC 171

2. Lavesh Vs State (NCT of Delhi), (2012) 8 SCC 730

3. K. Jayaram & ors. Vs Bangalore Development Authority & ors., (2022) 12 SCC 815

4. Shivam Vs St. of U.P. & anr., 2021 (4) ALJ 132

5. Srikant Upadhyay & ors. Vs St. of Bihar & anr., (2024) 3 SCR 421

6. Kamlesh & anr. Vs The St. of Rajasthan & anr., Crl Misc. Appeal No.1006 of 2019 (arising out of SLP (Crl.) No.1530 of 2018)

7. Sardool Singh & ors. Vs Nasib Kaur (Smt.), 1987 Supp SCC 146

8. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr., (2020) 5 SCC 1

9. Gurbaksh Singh Sibbia Vs St. of Pun., (1980) 2 SCC 565

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

1. Heard learned Counsel for the applicant as well as Sri V.K. Singh, learned Government Advocate assisted by Sri Shivendra Shivam Singh Rathore, learned brief holder and Sri Vivek Kumar Rai, learned Counsel appearing on behalf of the complainant and perused the record.

2. The present application has been filed by the applicant aged about 74 years under Section 438 of Cr.P.C. seeking anticipatory bail apprehending arrest in FIR No.298 of 2023, under Sections 120B, 420, 465, 466, 467, 468, 471 IPC, Police Station Kotwali Nagar, District Sultanpur.

3. It is stated that an FIR dated 10.04.2023 was lodged with the allegations that the mother of the informant was owner of the property and adjacent to the said property, there was a property of the son-in-law of the applicant and on account of bad intention, a registered Will was executed by the mother on 17.07.2019, in which, the son-in-law of the applicant and his wife and the applicant were shown as heirs of the said mother. It was stated that the applicant was the attesting witness to the said Will.

4. The Counsel for the applicant argues that the Will was a registered Will and on account of the dispute in between

the parties, a civil suit was filed being Original Suit No.1343 of 2016, in which, the informant had appeared and has filed his written statement taking a specific plea that the Will was a forged Will. Despite the said, an injunction order came to be passed in favour of the plaintiffs on 15.02.2023 after hearing the parties and after the injunction order was made final, the present FIR was registered on 10.04.2023 at the instance of defendants of civil suit.

5. The Counsel for the applicant also draws my attention to the proceedings pending in the court of Tehsildar, Sadar in between the parties in respect of the said land. He thus argues that essentially after the informant having failed in the civil suit for vacation of the injunction, the present FIR was lodged. Essentially a civil case is being converted into a criminal case.

6. The Counsel for the informant and the learned G.A. Sri V.K. Singh oppose the prayer for grant of anticipatory bail mainly on the ground that there was concealment of material facts.

7. It was stated by the Counsel for the State that the applicant had approached this Court by filing a petition under Article 226 of the Constitution of India for quashing of the FIR, in which, an interim order was obtained in favour of the applicant being Criminal Misc. Writ Petition No.3559 of 2023. In pursuance thereto, the applicant was not arrested. The said writ petition was dismissed on 18.08.2023 for want of prosecution. Thereafter, an application was filed for recall of the order dated 18.08.2023 and ultimately, the said order was recalled and also extended the interim order till the next date of listing, while issuing notice to the private opposite parties. It is argued that despite the restoration of the writ petition, the applicant filed an application under Section 482 of Cr.P.C. being Application No.9084 of 2023 challenging the charge-sheet, as the charge-sheet has already been filed on 09.08.2023 and the court had taken cognizance on 11.08.2023. He thus argues that the filing of an application under Section 482 of Cr.P.C. demonstrates that the applicant was aware of the charge-sheet and despite being aware, the Criminal Misc. Writ Petition No.3559 of 2023 was got restored and the interim order was got extended.

8. The Counsel for the State further argues that the Application U/S 482 Cr.P.C. No.10202 of 2023 filed by the applicant came to be dismissed on 17.01.2024 mainly noticing the conduct of the applicant in getting the writ petition restored despite the charge-sheet having been filed, however, the Court had made observations that as the applicant is an old person and suffering from various aliments, he may avail his remedy in the light of the provisions of Section 437 of Cr.P.C. and also may avail his remedy of filing discharge application, which has to be decided on merit.

9. It is argued by the Counsel for the State that these material facts have not been disclosed in the present application, as such, the Court should not exercise the jurisdiction under Section 438 of Cr.P.C. in favour of the applicant as the jurisdiction by virtue of Section 438 of Cr.P.C. is a discretionary jurisdiction and considering the conduct of the applicant, discretion cannot be exercised in his favour.

10. The Counsel for the State places reliance on the judgment of the Hon'ble Supreme Court in the case of State

of ***Madhya Pradesh vs Pradeep Sharma; (2014) 2 SCC 171***, which is to the effect that jurisdiction under Section 438 of Cr.P.C. should not be exercised if any one is declared as absconder/ proclaimed offender. He argued that in the case of the applicant, non-bailable warrants have been issued. He further draws my attention to a similar judgment in the case of ***Lavesh vs State (NCT of Delhi); (2012) 8 SCC 730.***

11. The learned G.A. further argues that it is well settled that equitable jurisdiction under Article 226 of the Constitution of India cannot be invoked unless of the material facts are disclosed. For the said proposition, reliance is placed in the case of ***K. Jayaram and others vs Bangalore Development Authority and others; (2022) 12 SCC 815***. My attention has also been drawn to a co-ordinate Bench judgment of this Court in the case of ***Shivam vs State of U.P. and another; 2021 (4) ALJ 132***, wherein, this court had laid down the conditions, in which, anticipatory bail cannot be granted to an accused after submission of the charge-sheet. Lastly my attention has been drawn to the judgment of the Hon'ble Supreme Court in the case of ***Srikant Upadhyay and others vs State of Bihar and another; (2024) 3 SCR 421*** laid emphasis of paragraphs 16 and 24, which are to the following effect:

> *"16. For a proper consideration of the aforesaid contentions and allied questions, it is only appropriate to refer to certain provisions of law as also certain relevant decisions. From the chronology of events narrated hereinbefore, it is evident that for reasons best known to the appellants, subsequent to the filing of the final report in terms of the provisions under Section 173(2), Cr.P.C in FIR No.79/2020 and issuance of summons, issuance of bailable warrants and issuance of non-bailable warrants; pursuant to the failure of the appellants to appear before the Court on the date fixed for their appearance based on bailable warrants, they did not care to take any action in accordance with law except moving applications for bail. Same was the position even after the issuance of the proclamation under Section 82, Cr.PC. As noted earlier, in the case of similarly situated co-accused of the appellants, they appeared and obtained regular bail pursuant to the issuance of bailable warrants. Thus, a scanning of the acts and omissions of the appellants, it can only be seen that virtually, the appellants were defying the authority of law and moving applications for bail when they apprehended arrest owing to their non- attendance and dis-obedience. It is in the context of the aforesaid facts revealed from the materials on record that the contention of the appellants that they were only pursuing their right to file application for anticipatory bail and, therefore, they were not either evading the arrest or absconding, has to be appreciated.*
>
> *24. We have already held that the power to grant anticipatory bail is an extraordinary power. Though in many cases it was held that bail is said to be a rule, it cannot, by any stretch of imagination, be said that anticipatory bail is the rule. It cannot be the rule and the question*

*of its grant should be left to the cautious and judicious discretion by the Court depending on the facts and circumstances of each case. While called upon to exercise the said power, the Court concerned has to be very cautious as the grant of interim protection or protection to the accused in serious cases may lead to miscarriage of justice and may hamper the investigation to a great extent as it may sometimes lead to tampering or distraction of the evidence. We shall not be understood to have held that the Court shall not pass an interim protection pending consideration of such application as the Section is destined to safeguard the freedom of an individual against unwarranted arrest and we say that such orders shall be passed in eminently fit cases. At any rate, when warrant of arrest or proclamation is issued, the applicant is not entitled to invoke the extraordinary power. Certainly, this will not deprive the power of the Court to grant pre-arrest bail in extreme, exceptional cases in the interest of justice. But then, person(s) continuously, defying orders and keep absconding is not entitled to such grant."*

12. In respect to the said preliminary objection, the Counsel for the applicant argues that the present application has been filed by the applicant apprehending his arrest in pursuance to the non-bailable warrant, which has already been issued, in a case, which is otherwise a civil case being given the colour of criminal case. He draws my attention to the order of the Hon'ble Supreme Court in the case of ***Kamlesh and another vs The State of Rajasthan and another***, decided on 09.07.2019 [Criminal Misc. Appeal No.1006 of 2019 (arising out of SLP (Crl.) No.1530 of 2018)], wherein, it was observed that even if a petition under Section 482 of Cr.P.C. is dismissed, the same could not be a reason for rejecting the anticipatory bail application. He also argues that on the basis of an order passed by the Hon'ble Supreme Court in the case of ***Sardool Singh and other vs Nasib Kaur (Smt.); 1987 Supp SCC 146***, wherein, a criminal prosecution was instituted on the allegation that the Will is a forged one, it was observed that the said issue is to be decided in the civil proceedings.

13. Considering the submissions made at the bar, the first question that arises is whether the non-disclosure of the fact of the applicant filing a writ petition and an application under Section 482 of Cr.P.C. would be fatal to be consideration of the anticipatory bail application or not?

14. Section 438 of Cr.P.C. was extensively discussed by the Hon'ble Supreme Court in the case of ***Sushila Aggarwal and others vs State (NCT of Delhi) and another; (2020) 5 SCC 1***, the nature of the power of grant of anticipatory bail was discussed and the earlier view of the Hon'ble Supreme Court in the case of ***Gurbaksh Singh Sibbia vs State of Punjab; (1980) 2 SCC 565*** was affirmed. The Hon'ble Supreme Court had culled the conclusion drawn by the Hon'ble Supreme Court in the case of Gurbaksh Singh Sibbia (Supra) in paragraph 52, which is as under:

*52. In the light of the relevant extracts of Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980*

*SCC (Cri) 465] , it would now be worthwhile to recount the relevant observations on the issue. The discussion and conclusions in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] are summarised as follows:*

*52.1. Grant of an order of unconditional anticipatory bail would be "plainly contrary to the very terms of Section 438". Even though the terms of Section 438(1) confer discretion, Section 438(2) "confers on the court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of that sub-section".*

*52.2. Grant of an order under Section 438(1) does not per se hamper investigation of an offence; Sections 438(1)(i) and (ii) enjoin that an accused/applicant should cooperate with investigation. Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] also stated that courts can fashion appropriate conditions governing bail, as well. One condition can be that if the police makes out a case of likely recovery of objects or discovery of facts under Section 27 (of the Evidence Act, 1872), the accused may be taken into custody. Given that there is no formal method prescribed by Section 46 of the Code if recovery is made during a statement (to the police) and pursuant to the accused volunteering the fact, it would be a case of recovery during "deemed arrest". (Para 19 of Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.3. The accused is not obliged to make out a special case for grant of anticipatory bail; reading an otherwise wide power would fetter the court's discretion. Whenever an application (for relief under Section 438) is moved, discretion has to be always exercised judiciously, and with caution, having regard to the facts of every case. (Para 21, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.4. While the power of granting anticipatory bail is not ordinary, at the same time, its use is not confined to exceptional cases. (Para 22, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab,*

*(1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.5. It is not justified to require courts to only grant anticipatory bail in special cases made out by accused, since the power is extraordinary, or that several considerations — spelt out in Section 437—or other considerations, are to be kept in mind. (Paras 24-25, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.6. Overgenerous introduction (or reading into) of constraints on the power to grant anticipatory bail would render it constitutionally vulnerable. Since fair procedure is part of Article 21, the court should not throw the provision (i.e. Section 438) open to challenge "by reading words in it which are not to be found therein". (Para 26)*

*52.7. There is no "inexorable rule" that anticipatory bail cannot be granted unless the applicant is the target of mala fides. There are several relevant considerations to be factored in, by the court, while considering whether to grant or refuse anticipatory bail. Nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the accused's presence not being secured during trial; a reasonable apprehension that the witnesses might be tampered with, and "the larger interests of the public or the State" are some of the considerations. A person seeking relief (of anticipatory bail) continues to be a man presumed to be innocent. (Para 31, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.8. There can be no presumption that any class of accused i.e. those accused of particular crimes, or those belonging to the poorer sections, are likely to abscond. (Para 32, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.9. Courts should exercise their discretion while considering applications for anticipatory bail (as they do in the case of bail). It would be unwise to divest or limit their discretion by prescribing "inflexible rules of general application". (Para 33, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab,*

*(1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.10. The apprehension of an applicant, who seeks anticipatory bail (about his imminent or possible arrest) should be based on reasonable grounds, and rooted on objective facts or materials, capable of examination and evaluation, by the court, and not based on vague unspelt apprehensions. (Para 35, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.11. The grounds for seeking anticipatory bail should be examined by the High Court or Court of Session, which should not leave the question for decision by the Magistrate concerned. (Para 36, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.12. Filing of FIR is not a condition precedent for exercising power under Section 438; it can be done on a showing of reasonable belief of imminent arrest (of the applicant). (Para 37, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.13. Anticipatory bail can be granted even after filing of an FIR — as long as the applicant is not arrested. However, after arrest, an application for anticipatory bail is not maintainable. (Paras 38-39, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.14.A blanket order under Section 438, directing the police to not arrest the applicant, "wherever arrested and for whatever offence" should not be issued. An order based on reasonable apprehension relating to specific facts (though not spelt out with exactness) can be made. A blanket order would seriously interfere with the duties of the police to enforce the law and prevent commission of offences in the future. (Paras 40-41, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )*

*52.15. The Public Prosecutor should be issued notice, upon considering an application under Section 438; an ad interim order can be made. The application "should be re-examined in the light of the respective contentions of the parties". The ad interim order too must*

*conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage:*

> *"42.... Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time." (SCC p. 591, para 42, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] )"*

15. Explaining further in the case of Sushila Aggarwal (Supra), the Court specifically held that there is no offence per se, which stands excluded from the purview of Section 438 of Cr.P.C with the following term:

> *"75. For the above reasons, the answer to the first question in the reference made to this Bench is that there is no offence, per se, which stands excluded from the purview of Section 438, except the offences mentioned in Section 438(4). In other words, anticipatory bail can be granted, having regard to all the circumstances, in respect of all offences. At the same time, if there are indications in any special law or statute, which exclude relief under Section 438(1) they would have to be duly considered. Also, whether anticipatory bail should be granted, in the given facts and circumstances of any case, where the allegations relating to the commission of offences of a serious nature, with certain special conditions, is a matter of discretion to be exercised, having regard to the nature of the offences, the facts shown, the background of the applicant, the likelihood of his fleeing justice (or not fleeing justice), likelihood of cooperation or non-cooperation with the investigating agency or police, etc. There can be no inflexible time-frame for which an order of anticipatory bail can continue.*

16. In the case of Sushila Aggarwal (Supra), the conclusions were recorded in paras 84 to 87, which reads as under:

*"84. This Court answers the reference in the following manner:*

*84.1. Regarding Question 1, it is held that the protection granted under Section 438 CrPC should not always or ordinarily be limited to a fixed period; it should enure in favour of the accused without any restriction as to time. Usual or standard conditions under Section 437(3) read with Section 438(2) should be imposed; if there are peculiar features in regard to any crime or offence (such as seriousness or gravity, etc.), it is open to the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event or time-bound), etc.*

*84.2. The second question referred to this Court is answered, by holding that the life of an anticipatory bail does not end generally at the time and stage when the accused is summoned by the court, or after framing of charges, but can also continue till the end of the trial. However, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.*

*85. Having regard to the above discussion, it is clarified that the court should keep the following points as guiding principles, in dealing with applications under Section 438 CrPC:*

*85.1. As held in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , when a person apprehends arrest and approaches a court for anticipatory bail, his apprehension (of arrest), has to be based on concrete facts (and not vague or general allegations) relatable to a specific offence or particular offences. Applications for anticipatory bail should contain clear and essential facts relating to the offence, and why the applicant reasonably apprehends his or her arrest, as well as his version of the facts. These are important for the court which is considering the application, the extent and reasonableness of the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not a necessary condition that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.*

*85.2. The court, before which an application under Section 438 is filed, depending on the seriousness of the threat (of arrest) as a measure of caution, may issue notice to the Public Prosecutor and obtain facts, even while granting limited interim anticipatory bail.*

*85.3. Section 438 CrPC does not compel or oblige courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While*

*weighing and considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified — and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The necessity to impose other restrictive conditions, would have to be weighed on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.*

*85.4. Courts ought to be generally guided by the considerations such as nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while assessing whether to grant anticipatory bail, or refusing it. Whether to grant or not is a matter of discretion; equally whether, and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.*

*85.5. Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the charge-sheet till end of trial. Also orders of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.*

*85.6. Orders of anticipatory bail do not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.*

*85.7. The observations in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia [Gurbaksh Singh Sibbia v. State of*

*Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] had observed that : (SCC p. 584, para 19)*

*"19. ... if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya [State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504] ."*

*85.8. It is open to the police or the investigating agency to move the court concerned, which granted anticipatory bail, in the first instance, for a direction under Section 439(2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc. The court, in this context, is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.*

*85.9. The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the State or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. (See Prakash Kadam v. Ramprasad Vishwanath Gupta [Prakash Kadam v. Ramprasad Vishwanath Gupta, (2011) 6 SCC 189 : (2011) 2 SCC (Cri) 848] , Jai Prakash Singh [Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379 : (2012) 2 SCC (Cri) 468] and State of U.P. v. Amarmani Tripathi [State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] .) This does not amount to "cancellation" in terms of Section 439(2) CrPC.*

*85.10. The judgment in Mhetre [Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] (and other similar decisions) that restrictive conditions cannot be imposed at all, at the time of granting anticipatory bail are hereby overruled. Likewise, the decision in Salauddin [Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667 : 1996 SCC (Cri) 198] and subsequent decisions (including K.L. Verma [K.L. Verma v. State, (1998) 9 SCC 348 : 1998 SCC (Cri) 1031] , Nirmal Jeet Kaur [Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558 : 2004 SCC (Cri) 1989] ) which state that such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.*

*86. In conclusion, it would be useful to remind oneself that the rights which the citizens cherish deeply, are fundamental — it is not the restrictions that are fundamental. Joseph Story, the great jurist and US Supreme Court Judge, remarked that "personal*

*security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice".*

*87. The history of our Republic — and indeed, the Freedom Movement has shown how the likelihood of arbitrary arrest and indefinite detention and the lack of safeguards played an important role in rallying the people to demand Independence. Witness the Rowlatt Act, the nationwide protests against it, the Jallianwala Bagh Massacre and several other incidents, where the general public were exercising their right to protest but were brutally suppressed and eventually jailed for long. The spectre of arbitrary and heavy-handed arrests : too often, to harass and humiliate citizens, and oftentimes, at the interest of powerful individuals (and not to further any meaningful investigation into offences) led to the enactment of Section 438. Despite several Law Commission Reports and recommendations of several committees and commissions, arbitrary and groundless arrests continue as a pervasive phenomenon. Parliament has not thought it appropriate to curtail the power or discretion of the courts, in granting pre-arrest or anticipatory bail, especially regarding the duration, or till charge-sheet is filed, or in serious crimes. Therefore, it would not be in the larger interests of society if the Court, by judicial interpretation, limits the exercise of that power : the danger of such an exercise would be that in fractions, little by little, the discretion, advisedly kept wide, would shrink to a very narrow and unrecognisably tiny portion, thus frustrating the objective behind the provision, which has stood the test of time, these 46 years."*

17. In the light of the two Constitutional Bench judgments what flows out is that an anticipatory bail could be considered by a Sessions Court or by a High Court irrespective of the nature of the offences unless barred by a statute in the cases it deems fit without any restrictions.

18. In the light of the law as explained in the case of Sushila Aggarwal (Supra) following the earlier Constitutional Bench judgment in the case of *Gurbaksh Singh Sibbia (Supra),* the judgment cited by the G.A. specifically in the case of *Shivam vs State of U.P. (Supra)* merits rejection as the restrictions of bail has culled out in paragraph 43 of the said judgment would have to give way to the judgment of the Hon'ble Supreme Court in the case of *Sushila Aggarwal (Supra)*.

19. The other argument of the learned G.A. based upon the judgment rendered in the case of *Srikant Upadhyay (Supra) and State of Madhya Pradesh vs Pradeep Sharma (Supra)* also merits rejection as in the present case admittedly, no proceedings have been initiated and the applicant has not been declared to be proclaimed offender.

20. The other argument of the learned G.A. that as the applicant has not come with clean hand, the discretionary relief cannot be extended. On the foundation of the judgment in the case of *K. Jayaram vs Bangalore Development*

*Authority (Supra)* merits rejection as it is fairly well settled that constitutional power under Article 226 are extraordinary discretionary power conferred upon the constitutional courts and the court can refuse to exercise the said power on various factors one of them being that the person not approaching clean hand and concealing the material facts whereas in the present case, the power invoked by the court is under Section 438 of Cr.P.C., which is a statutory power and does not confer extraordinary discretion and cannot be exercised on the same analogy, as is required for exercise of power under Article 226. Further more in terms of the provisions contained in Chapter XVIII Rule 18-A of the Allahabad High Court Rules, 1952, the application for bail under Section 438 of Cr.P.C. are required to disclose facts as specified from sub-rule 1 to sub-rule 8. In short, the requirements of exercise of powers under Article 226 are on different footing and the exercise of power under Section 438 of Cr.P.C. cannot be exercised on the same lines.

21. In the present case, admittedly civil litigations are going on in between the parties, the FIR has been lodged after almost 8 years of the alleged incident and after the injunction order was confirmed after hearing both the parties coupled with the fact that the applicant is aged about 74 years and only allegation against him is that he was an attesting witness. Further more there is no material to suggest that the applicant is either at a flight risk or in any way can adversely effect the trial, if enlarged on bail, thus, on these grounds the applicant is entitled for the benefit of anticipatory bail till conclusion of the trial. Accordingly, the anticipatory bail application is allowed.

22. In the event of arrest, let the applicant ***Achchey Lal Jaiswal*** be released on anticipatory bail in the abovesaid first information report number till conclusion of the trial on his furnishing personal bonds and two reliable sureties of Rs.20,000/- each to the satisfaction of the court concerned with the following conditions:

(a) The applicant shall execute a bond to undertake to attend the hearings;

(b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and

(c) 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.

(d) The applicant shall not leave India without the previous permission of the Court.

23. This Court appreciates its appreciation provided by Ms. Rajshree Lakshmi, Research Associate/ Law Clerk in deciding the case.

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**(2024) 7 ILRA 999**

**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 09.07.2024**

**BEFORE**

**THE HON'BLE ROHIT RANJAN AGARWAL, J.**

Crl. Misc. Ist Bail Application No. 11804 of 2024

**Shriniwas Rav Nayak ...Applicant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Applicant:**
Sri Patsy David, Ms. Sanju Lata, Sri Saurabh Pandey

**Counsel for the Respondent:**
G.A.

**A. Criminal Law – Unlawful conversion of religion - Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021 - Sections 3/5 (1), 2(a) & 4, 2(i) - institution of India: Article 25 - Presence of Religion Convertor when the conversion is taking place is not necessary for it to be a punishable act.** The Act does not provide that a Religion Convertor should be present when the conversion is taking place. (Para 19)

In the instant case, the informant was persuaded to convert to another religion, which is prima facie sufficient to decline bail to the applicant as it establishes that a conversion programme was going on where many villagers belonging to Scheduled Castes community were being converted from Hindu religion to Christianity. There arises no occasion as to why the informant would rope in the applicant, who is a resident of Andhra Pradesh, falsely in a case of unlawful religion conversion. Neither in the bail application nor during argument, it has been submitted that there stood any enmity between the informant and the applicant. (Para 20)

This Court finds that prima facie a case for unlawful religion conversion is made out under the Act of 2021 and the applicant cannot be enlarged on bail, as the Act prohibits religion conversion u/s 3, which is punishable u/s 5 of the Act of the 2021. (Para 21)

**Bail application rejected**. (E-4)

**Present application u/s 439 of Cr.P.C., is for seeking enlargement on bail, during the pendency of trial.**

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Ms. Sanju Lata, learned counsel for the applicant and Sri Sunil Kumar, learned A.G.A. for the State.

2. By means of this application under Section 439 of Cr.P.C., applicant who is involved in Case Crime No. 78 of 2024, under Sections 3/5 (1) of Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021 (*hereinafter referred as 'the Act of 2021'*), Police Station- Nichlaul, District- Maharajganj seeks enlargement on bail, during the pendency of trial.

3. The prosecution story as unfolded in the First Information Report is that on 15.02.2024, the informant was invited to the house of co-accused, Vishwanath. When he reached there he saw that many people of village were there, most of them belonging to Scheduled Castes community. Along with the co-accused, Vishwanath, his brother, Brijlal, the applicant and one Ravindra were present. He was asked to leave Hindu religion and accept Christianity. He was told that once he accepts Christianity, all his pain would come to an end and he would progress in life. Some of the villagers on the assurance had accepted Christianity and started praying. The informant after making an excuse ran away and informed the Police.

4. Learned counsel for the applicant submitted that the applicant has no connection with the alleged conversion and is a domestic help of one of the co-accused and is resident of Andhra Pradesh and has been falsely roped in in the instant case. Learned counsel for the applicant submitted that the FIR does not disclose any religion convertor as defined under Section 2(I)(i) of the Act of 2021. Further, statement of witnesses as alleged by the

Police cannot be accepted as no undue influence was put for converting. Moreover, no person who has accepted Christianity has come forward to make any complaint.

5. Learned A.G.A. while opposing the bail application has submitted that mass conversion was going on, and the informant who was asked to accept Christianity had refused and had informed the Police in writing upon which the applicant was arrested. According to him, case under Section 3/5 of the Act of 2021 is made out against the applicant who is a resident of Andhra Pradesh and had come to the place in question at Maharajganj where the conversion was taking place and was actively participating in the conversion from one religion to another which is against the law.

6. I have heard respective counsel for the parties and perused the material on record.

7. The U.P. Act No. 3 of 2021 came into force on 4th March, 2021 after receiving assent of the Governor. It was published in the Government Gazette on 5th March, 2021. The statement of object and reason for enforcing the Act was to provide for prohibition of unlawful conversion from one religion to another by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage and for the matters connected therewith or incidental thereto.

8. The Constitution of India guarantees religious freedom to all persons which reflects the social harmony and spirit of India. The objective of this right is to sustain the spirit of secularism in India. According to the Constitution, State has no religion and all religions are equal before the State, and no religion shall be given preference over the other. All the persons are free to preach, practice and propagate any religion of their choice.

9. The Constitution confers on each individual the fundamental right to profess, practice and propagate his religion. However, the individual right to freedom of conscience and religion cannot be extended to construe a collective right to proselytize; the right to religious freedom belongs equally to the person converting and the individual sought to be converted.

10. Section 2(a) of the Act of 2021 defines “Allurement”, Section 2(b) defines “Coercion”, Section 2(c) defines “Conversion”, Section 2(e) defines “Fraudulent means”, Section 2(f) defines “Mass Conversion”, Section 2(h) defines “Religion”, Section 2(i) defines “Religion Convertor” and Section 2(j) defines “Undue influence”. The definition of above are extracted hereasunder:-

> *“Section 2(a) “Allurement" means and includes offer of any temptation in the form of:*
>
> *(i) any gift, gratification, easy money or material benefit either in cash or kind;*
>
> *(ii) employment, free education in reputed school run by any religious body; or*
>
> *(iii) better lifestyle, divine displeasure or otherwise;.*
>
> *(b) "Coercion" means compelling an individual to act against his/her will by the use of psychological pressure or physical*

*force causing bodily injury or threat thereof;*

*(c) "Conversion" means renouncing one's own religion and adopting another religion;*

*(e) "Fraudulent means" includes impersonation of any kind, by false name, surname, religious symbol or otherwise;*

*(f) "Mass Conversion" means where two or more persons are converted;*

*(h) "Religion" means any organized system of worship pattern, faith, belief, worship or lifestyle, as prevailing in India or any part of it, and defined under any law or custom for the time being in force;*

*(i) "Religion Convertor" means person of any religion who performs any act of conversion from one religion to another religion and by whatever name he is called such as Father, Karmkandi, Maulvi or Mulla etc;.*

*(j) "Undue influence" means the unconscientious use by one person of his/her power or influence over another in order to persuade the other to act in accordance with the will of the person exercising such influence."*

11. Section 3 prohibits conversion from one religion to another religion by misrepresentation, force, fraud, undue influence, coercion and allurement. It further states that no person shall abet, convince or conspire such conversion.

12. Section 4 provides for lodging of First Information Report by any person aggrieved, his/her parents, brother, sister, or any other person who is related to him/her by blood, marriage or adoption which contravenes the provisions of section 3. Section 5 provides for punishment for contravention of provisions of section 3.

13. From the reading of the above, it is clear that the Act in Section 3 clearly prohibits conversion from one religion to another religion on the basis of misrepresentation, force, fraud, undue influence, coercion and allurement. The Act further provides for punishment for contravention of provisions of the section which also restricts a person not to abet, convince or conspire such conversion.

14. Article 25 of Constitution of India provides freedom of conscience and free profession, practice and propagation of religion. For better appreciation, it is extracted as under:-

***"25. Freedom of conscience and free profession, practice and propagation of religion.*** *– (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.*

*(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—*

*(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;*

*(b) providing for social welfare and reform or the throwing open of Hindu religious institutions*

> *of a public character to all classes and sections of Hindus.*
>
> *Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.*
>
> *Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."*

15. The Constitution clearly envisages and permits its citizens right to freedom of religion in respect to their professing, practising and propagating its religion. It does not allow or permit any citizen to convert any citizen from one religion to another religion.

16. The Act of 2021 was enacted keeping in view the above constitutional provision for prohibiting of unlawful conversion from one religion to another.

17. In the instant case, the informant was invited by the co-accused, Vishwanath to his house on 15.02.2024 for attending a programme where it was found by the informant that number of villagers had gathered, mostly belonging to Scheduled Castes community who were being allured and misrepresented to convert to Christianity leaving their religion on the premise that their pain and sorrow will come to an end, and they will progress in life. Some of the villagers on the assurance had accepted Christianity, while the informant ran away from the programme and informed the Police in writing.

18. Moreover, during the investigation, the Police had recorded statement of independent witnesses which has been brought on record by State through counter affidavit which clearly reveals that such function was held in which the conversion was taking place.

19. The argument raised from the applicant side that there was no Religion Convertor present when the conversion was taking place is of no help as Section 2(i) only defines "Religion Convertor". The Act does not provide that a Religion Convertor should be present when the conversion is taking place.

20. In the instant case, the informant was persuaded to convert to another religion, which is *prima facie* sufficient to decline bail to the applicant as it establishes that a conversion programme was going on where many villagers belonging to Scheduled Castes community were being converted from Hindu religion to Christianity. There arises no occasion as to why the informant would rope in the applicant, who is a resident of Andhra Pradesh, falsely in a case of unlawful religion conversion. Neither in the bail application nor during argument, it has been submitted that there stood any enmity between the informant and the applicant.

21. This Court finds that *prima facie* a case for unlawful religion conversion is made out under the Act of 2021 and the applicant cannot be enlarged on bail, as the Act prohibits religion conversion under Section 3, which is punishable under Section 5 of the Act of the 2021.

22. In view of above, the bail application stands rejected.

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**(2024) 7 ILRA 1004**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 03.07.2024**

**BEFORE**

**THE HON'BLE KRISHAN PAHAL, J.**

Crl. Misc. Bail Application No. 18596 of 2024

**Satish Alias Chand ...Applicant**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Applicant:**
Manvendra Kumar

**Counsel for the Respondents:**
G.A.

**Criminal Law – Indian Penal Code, 1860 - Sections 363, 366 & 376 - The Protection of Children from Sexual Offences Act, 2012 – Sections 5(J)2/6 - The Code of Criminal Procedure, 1973 – Section 164 - As per prosecution - Applicant have enticed away the minor daughter of informant on 13.6.2023 – Held, principle of "Presumption of Innocence Unless Proven Guilty," gives rise to the concept of bail as a rule and imprisonment as an exception - A person's right to life and liberty, guaranteed by Article 21, cannot be taken away simply because he or she is accused of committing an offence until guilt is established beyond a reasonable doubt - Challenge lies in distinguishing between genuine cases of exploitation and those involving consensual relationships - It requires a nuanced approach and careful judicial consideration to ensure justice - Applicant have made out a case for bail (Para 4, 5, 11, 15, 16)**

**Bail application allowed.** (E-13)

**List of Cases cited:**

1. Jaya Mala Vs St. of J & K, (1982) 2 SCC 538

2. Mohd. Imran Khan Vs State (Govt. of NCT of Delhi), (2011) 10 SCC 192

3. Satender Kumar Antil Vs Central Bureau of Investigation and another, 2022 SCC OnLine SC 825

4. Ramashankar Vs St. of U.P., 2022:AHC-LKO:29649

(Delivered by Hon'ble Krishan Pahal, J.)

1. List has been revised.

2. Learned A.G.A. has informed that notice to the informant has been served on 10.5.2024.

3. Heard Sri Manvendra Kumar, learned counsel for the applicant and Sri Pranshu Kumar, learned A.G.A. for the State and perused the record.

4. Applicant seeks bail in Case Crime No.205 of 2023, under Sections 363, 366, 376 I.P.C. and 5(J)2/6 POCSO Act, Police Station- Barahaj, District- Deoria, during the pendency of trial.

**PROSECUTION STORY:**

5. As per prosecution story, the applicant is stated to have enticed away the minor daughter of the informant on 13.6.2023 at about 04:00 p.m.

**RIVAL CONTENTIONS:**

***(Arguments on behalf of applicant)***

6. Learned counsel for the applicant has stated that the applicant is absolutely innocent and has been falsely implicated in the present case. The FIR is delayed by about four days and there is no

proper explanation of the said delay caused. The victim is a consenting party which is but evident from her statement recorded under Section 164 Cr.P.C. and as per her own statement she was 18 years old.

7. It is further argued that the victim did not raise any alarm during the said sojourn to Deoria and thereupon to Surat, Gujarat which categorically indicates her consent. It is further argued that the victim and applicant were madly in love with each other and out of fear of their parents had eloped and solemnized their marriage at a temple which is not registered. The applicant and the victim belong to the same village and were neighbours. The victim was pregnant by six months at that time and is stated to have given birth to a female child about four months back. He further argued that the applicant proposes to rear his child as he is the father and he is very much willing to keep his married wife and the newborn baby with him.

8. 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. There is no criminal history of the applicant. The applicant is languishing in jail since 5.1.2024. In case, the applicant is released on bail, he will not misuse the liberty of bail.

***(Arguments on behalf of State/Opposite party)***

9. Per contra, learned A.G.A. has vehemently opposed the bail application but has not disputed the fact that out of the said union of the couple, a baby girl was born and she is more than four months old at present, who is being taken care of by the parents of the victim, although he has not disputed the fact that the applicant has no criminal history.

**CONCLUSION:**

10. Admittedly, the age of the victim is 18 years as per the ossification test report. The Supreme Court in **Jaya Mala vs. State of J & K**[1] and **Mohd. Imran Khan vs. State (Govt. of NCT of Delhi)**[2] has been opined that the radiologist cannot predict the correct date of birth rather there is a long margin of 1 to 2 years on either side.

11. The well-known principle of "Presumption of Innocence Unless Proven Guilty," gives rise to the concept of bail as a rule and imprisonment as an exception. A person's right to life and liberty, guaranteed by Article 21 of the Indian Constitution, cannot be taken away simply because he or she is accused of committing an offence until the guilt is established beyond a reasonable doubt. Article 21 of the Indian Constitution states that no one's life or personal liberty may be taken away unless the procedure established by law is followed, and the procedure must be just and reasonable. The said principle has been reiterated by the Supreme Court in **Satender Kumar Antil vs. Central Bureau of Investigation and another**[3]. Learned AGA has not shown any exceptional circumstances which would warrant denial of bail to the applicant.

12. It is settled principle of law that the object of bail is to secure the attendance of the accused at the trial. No material particulars or circumstances suggestive of the applicant fleeing from

justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like have been shown by learned AGA for the State.

13. This Court earlier on in the case of **Ramashankar vs. State of U.P.**[4] has observed as under:

> "9. In this conservative and non-permissive society, it is true that marriage in the same village is prohibited and is not customary, and it may be an after effect of media and cinema. Instances of marriage in the same village are on the rise. This does adversely affect the social fabric. Both the accused and the victim are of very young age and have barely attained the age of majority. A baby girl has been born out of their wedlock. Though, the marriage may not be described as per the law of the land, but the Court has to apply a pragmatic approach in such conditions and indeed both the families are required to act practically. A lot of water has flown down the Ganges. Now, it's time to move ahead.
>
> 10. The youth in their tender age become victim to the legal parameters though rightly framed by the legislature, but here this Court is being drawn to make an exception in the extraordinary circumstances of the case. The life of a newborn child is at stake. She cannot to be left to face the stigma during her life.
>
> 11. The mathematical permutations and combinations have to be done away with. A hypertechnical and mechanical approach shall do no good to the parties and why should an innocent baby out of no fault of her bear the brutalities of the society in the present circumstances. Human psychosis and that too of the adolescents has to be taken into account.
>
> 12. This Court in the case of **Atul Mishra vs. State of U.P. And 3 others**[5], has also done away with the stringent provisions of the P.O.C.S.O. Act under the extra-ordinary circumstances of the case."

14. This court has every now and then expressed concern regarding the application of the Protection of Children from Sexual Offences (POCSO) Act on adolescents. While the Act's primary objective is to protect children under the age of majority (18) from sexual exploitation, there are cases where it has been misused, particularly in consensual romantic relationships between teenage persons. When addressing these cases, it is crucial to:

> A. Assess the Context: Each case should be evaluated on its individual facts and circumstances. The nature of the relationship and the intentions of both parties should be carefully examined.
>
> B. Consider Victim's Statement: The statement of the alleged victim should be given due consideration. If the relationship is consensual and based on mutual affection, this should be factored into decisions regarding bail and prosecution.

C. Avoid Perversity of Justice: Ignoring the consensual nature of a relationship can lead to unjust outcomes, such as wrongful imprisonment. The judicial system should aim to balance the protection of minors with the recognition of their autonomy in certain contexts. Here the age comes out to be an important factor.

D. Judicial Discretion: Courts should use their discretion wisely, ensuring that the application of POCSO does not inadvertently harm the very individuals it is meant to protect.

15. The challenge lies in distinguishing between genuine cases of exploitation and those involving consensual relationships. This requires a nuanced approach and careful judicial consideration to ensure justice is served appropriately.

16. Considering the facts and circumstances of the case, submissions made by learned counsel for the parties, the evidence on record, and 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.

17. Let the applicant- **Satish Alias Chand** involved in aforementioned case crime number be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions.

(i) **The applicant is being released on bail on the assurance of the learned counsel for the applicant that he is very much willing to take care of his wife (victim) and the infant. The applicant shall deposit (fixed deposit) a sum of Rs.2,00,000/- in the name of new born child of the victim till her attaining the age of majority within a period of six months from the date of release from jail.**

(ii) The applicant will not tamper with the evidence during the trial.

(iii) The applicant will not pressurize/ intimidate the prosecution witness.

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

(v) The applicant shall not commit an offence similar to the offence of which he is accused, or suspected of the commission of which he is suspected.

(vi) 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.

18. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail. Identity, status and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

19. 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.

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**(2024) 7 ILRA 1008**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 24.07.2024**

**BEFORE**

**THE HON'BLE KRISHAN PAHAL, J.**

Crl. Misc. Bail Application No. 24630 of 2024

**Ravindra Singh Rathaur ...Applicant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Applicant:**
Sri Sandeep Mishra

**Counsel for the Respondent:**
G.A.

**A. (Criminal Law-The Indian Penal Code-1860-Sections 328, 376, 323, 344, 354-C, 384, 504 & 506) (Code of Criminal Procedure, 1973-Section 439)-** It is impossible for an inexperienced man to anaesthetise a sleeping person without disturbance, so as to substitute artificial sleep for natural sleep. Hence the story often published in the lay press of a woman having been rendered suddenly unconscious by a handkerchief soaked in chloroform held over her face and then raped is not to be believed-

B. A well-known principle of "Presumption of Innocence Unless Proven Guilty," gives rise to the concept of bail as a rule and imprisonment as an exception. A person's right to life and liberty, guaranteed by Article 21 of the Indian Constitution, cannot be taken away simply because the person is accused of committing an offence until the guilt is established beyond a reasonable doubt. Article 21 of the Indian Constitution states that no one's life or personal liberty may be taken away unless the procedure established by law is followed, and the procedure must be just and reasonable. **(Para 13, 14 & 16)**

**Bail Application allowed.** (E-15)

**List of Cases cited:-**

1. Satender Kumar Antil Vs C.B.I. & ors., 2022 (10) SCC 51

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Sandeep Mishra, learned counsel for the applicant and Sri Amit Kumar, learned A.G.A. for the State and perused the material available on record.

2. Applicant seeks bail in **Case Crime No**. 63 of 2024, **under Sections** 328, 376, 323, 344, 354-C, 384, 504, 506 of I.P.C., **Police Station** - Dadri, **District** - Gautam Buddha Nagar, during the pendency of trial.

**Prosecution Story:**

3. The applicant is stated to have entered into corporeal relationship with the informant and had even performed fake marriage with her in the year 2022. The applicant is also stated to have concealed the fact that he already had two siblings from his first marriage.

4. It is alleged that the informant had earlier instituted the FIR No.474 of 2022, u/s 366 of IPC against him in which police filed a closure report on account of her own statement recorded u/s 164 Cr.P.C. The applicant is stated to have rendered the informant intoxicated and thereafter her statement has been recorded by the Magistrate. The applicant is even stated to have filed a habeas corpus Writ Petition No. 517 of 2023 before this Court although the same was dismissed.

5. The applicant had threatened the informant to make the indecent videos of

her viral which he is stated to have recorded.

***Arguments on behalf of applicant:***

6. The applicant has been falsely implicated in the present case due to ulterior motive. He has nothing to do with the said offence as alleged in the FIR. The FIR is delayed as it has been instituted after moving an application u/s 156(3) Cr.P.C. by the informant.

7. It is stated that the victim in her statement recorded u/s 164 Cr.P.C. has stated that she was under the influence of drugs at the behest of the applicant and has wrongly deposed before the Magistrate u/s 164 Cr.P.C. earlier on, as such, the said statement cannot be relied on. It is argued that the Magistrate is not an interested person and he would never record the statement of an intoxicated person.

8. As per the statement of the victim, she is major being 22 years of age, as such, at the time of offence, she was 20 years of age. The victim is a consenting party. It is further stated that earlier FIR was also found false by the police although the closure report is yet to be accepted.

9. The applicant has no other criminal history except the two FIR instituted by the same informant. There is no medical report to corroborate the prosecution story.

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.

11. The applicant is languishing in jail since 28.02.2024, having no previous criminal history to his credit, deserves to be released on bail. In case, the applicant is released on bail, he will not misuse the liberty of bail and shall cooperate with trial.

***Arguments on behalf of State:***

12. The bail application has been opposed on the ground that the applicant had rendered the victim unconscious by putting his handkerchief soaked with chloroform on her nose and has committed the said offence although he could not dispute the fact that except two FIRs instituted by the same informant, there are no other criminal history of the applicant.

**Conclusion:**

13. As far as the fact of rendering a person unconscious by putting a handkerchief on her face is concerned, in the Modi's Medical Jurisprudence & Toxicology, Twenty-Second Edition (Student Edition) at page 511, it is observed as:

> *"………………..Concerning the administration of an anaesthetic drug, such as chloroform, it must be remembered that it is impossible to anaesthetise a woman against her will while she is awake. Even a skilled anaesthetist requires the help of one or two assistants to hold a patient forcibly down on the operating table during the first stage of anaesthesia, although the patient voluntarily inhales it for an operation.* ***It is also impossible for an inexperienced man to anaesthetise a sleeping person***

> ***without disturbance, so as to substitute artificial sleep for natural sleep. Hence the story often published in the lay press of a woman having been rendered suddenly unconscious by a handkerchief soaked in chloroform held over her face and then raped is not to be believed.*** *It must be borne in mind that a woman, especially of an excitable and emotional temperament, during the stage of anaesthesia, might get a dream or hallucination that she has been raped, and may insist on the belief after the effects of anaesthesia have passed off, so that she brings an accusation of violation against her medical attendant. ………."*

14. The well-known principle of "Presumption of Innocence Unless Proven Guilty," gives rise to the concept of bail as a rule and imprisonment as an exception. A person's right to life and liberty, guaranteed by Article 21 of the Indian Constitution, cannot be taken away simply because the person is accused of committing an offence until the guilt is established beyond a reasonable doubt. Article 21 of the Indian Constitution states that no one's life or personal liberty may be taken away unless the procedure established by law is followed, and the procedure must be just and reasonable. The said principle has been reiterated by the Supreme Court in ***Satender Kumar Antil Vs. Central Bureau of Investigation and Ors., 2022 (10) SCC 51***. Learned AGA could not bring forth any exceptional circumstances which would warrant denial of bail to the applicant.

15. It is settled principle of law that the object of bail is to secure the attendance of the accused at the trial. No material particulars or circumstances suggestive of the applicant fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like have been shown by learned AGA.

16. Considering the facts and circumstances of the case, submissions made by learned counsel for the parties, the evidence on record, pending trial, complicity of accused, severity of punishment and also considering the opinion expressed in the book of Modi's Medical Jurisprudence & Toxicology and the age of the victim coupled by the fact that there is no injury to corroborate the prosecution story, at this stage, 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**.

17. Let the applicant- **Ravindra Singh Rathaur**, 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.

18. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

19. 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.

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**(2024) 7 ILRA 1011**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 31.07.2024**

**BEFORE**

**THE HON'BLE AJAY BHANOT, J.**

Crl. Misc. Bail Application No. 59258 of 2022

**Ryen @ Ren Chao** ...**Applicant**
**Versus**
**State of U.P.** ...**Respondent**

**Counsel for the Applicant:**
Abhas Sharma, Pradeep Kumar Mishra, Rajesh Kumar Sharma

**Counsel for the Respondent:**
G.A.

**Criminal Law - Indian Penal Code, 1860 - Sections 419, 420, 467, 468, 471, 120B & 201 - Foreigners Act, 1946 - Sections 14, 14(A), 14(B) & 14(C) - IT Act - Section 66D - The Code of Criminal Procedure, 1973 - Sections 309, 445 - The applicant, a Chinese national came to India on work visa - Applicant never worked in employer company, started working illegally for HTZN, engaged in business of extracting chips from e-waste, exported chips to China, operated illegal gaming apps, laundered money to foreign countries in form of bitcoins, had no authority in law to do business in India - Applicant's visa had long expired, stayed on illegally - Place of residence in Visa is different - The well structured crime machinery, included persons who facilitated illegal entry of Chinese nationals in India, aided their unlawful exit, created fake identity documents - Applicant is part of a larger international mafia engaged in organized criminal activities - Strong likelihood that he had committed the offence - Applicant flouted visa conditions, overstayed after expiry of visa and carried on criminal activities, no respect for Indian laws – In view of availability of crime network, the applicant is likely to indulge in nefarious activities if released on bail - Applicant is an high flight risk, poses a danger to process of law. (Para 21, 22, 24, 38, 44, 70)**

**Bail application dismissed.** (E-13)

**List of Cases cited:**

1. Hans Muller of Nurenburg Vs Superintendent, Presidency Jail, Calcutta & ors., 1955 SCC OnLine SC 35

2. Michal Benson Nwaogu @ Chuna Benson Vs St., 2024 SCC OnLine Del 665

3. Hussainara Khatoon & ors. (I) Vs Home Secretarty, St. of Bihar, (1980) 1 SCC 81

4. A.R.Antulay Vs R.S.Nayak & anr., (1992) 1 SCC 225

5. Sheela Barse & ors.Vs U.O.I.& ors., (1986) 3 SCC 632

6. P. Rama Chandra Rao Vs St. of Karnataka, (2002) 4 SCC 578

7. P. Chidambaram Vs Directorate of Enforcement, Criminal Appeal No. 1831/2019 (Arising out of S.L.P.(Crl) No. 10493 of 2019)

8. King vs Porter, (1910) 1 KB 369

9. Zoro Daniel Vs St., 2012 SCC OnLine Del 1065

10. Nagendra Vs King Emperor, 1924 SCC OnLine Cal 318

11. Gurbaksh Singh Sibbia Vs St. of Pun., (1980) 2 SCC 565

12. Supreme Court Legal Aid Committee representing undertrial Prisoners Vs Union, 1994 (6) SCC 731

13. Frank Vitus Vs Narcotics Control Bureau & ors., Criminal Appeal @ SLP (Crl) No. 6339-40 of 2023

14. Charles Sobhraj Vs St., 1996 SCC OnLine Del 300

15. Nastor Farirai Ziso Vs NCB, 2022 SCC OnLine Del 1024

16. Mohd. Masroor @ Mansoor @ Guddu Vs St. of U.P, Jail Appeal No. 802 of 2013

17. Babul Khan & anr. Vs St. of Karn., 2020 SCC OnLine Kar 3438

18. Bhanwar Singh @ Karamvir Vs St. of U.P, 2023 SCC OnLine All 734

19. Jitendra Vs St. of U.P, Criminal Misc. Bail Application No.9126 of 2023

20. Noor Alam Vs St. of U.P, 2024 (5) ADJ 766

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

1. The judgment is being structured in the following conceptual framework to facilitate the discussion:

| | | | |
|---|---|---|---|
| I | Introduction: | | |
| | | A | The accused |
| | | B | F.I.R. |
| | | C | Investigations |
| II | Submissions of learned counsels for the parties | | |
| III | Rights of Foreign Nationals: | | |
| | | A | Constitution of India |
| | | B | Right to fair trial |
| | | C | Right to seek bail : Considerations |
| IV | Merits: | | |
| | | A | Likelihood of the applicant committing the offence and material against him |
| | | B | Gravity of the offence & impact on society |
| | | C | Likelihood of the applicant reoffending |
| V | Flight Risk and Foreign Nationals : | | |
| | | A | System of sureties |
| | | B | Coercive jurisdiction of Courts |
| | | C | Stand of Government of India and State Government |
| | | D | Applicant as a flight risk : Assessment |
| VI | Conclusion | | |

**I. Introduction :**

**I-A. The accused:**

2. The accused in the instant case is a Chinese national who is facing trial in Case Crime No. 408 of 2022 at Police Station Beta-2, District- Gautam Buddha Nagar under Sections 419, 420, 467, 468,

471, 120B, 201 IPC and Section 14(A), 14(B), 14(C), 14 of Foreigners Act and Section 66D IT Act. The applicant is in jail since 09.07.2022.

3. This is the first bail application filed by the aforesaid Chinese national before this Court. The bail application of the applicant was rejected by the trial court on 07.11.2022.

**I-B. FIR:**

4. The gravamen of the prosecution case as set out in the FIR is that reports of tampering of E-FRRO reports and fraudulent Visa extensions came to the notice of police authorities. Raids conducted at Taj Hotel led to recovery of various items including a BMW car, Aadhar Cards, ATM Cards, laptops, mobile phones and passports. Subsequent raids during the investigations at a flat in J.P. Greens yielded incriminating articles namely fake Aadhar Cards and Passports. A Chinese national by the name of XUE-FEI @ Koei was arrested and questioned. XUE-FEI @ Koei had forged his identity papers with the collaboration of his business associate Ravi Kumar Natwarlal Thakkar. Police interrogation of Pete Khrienuo @ Pette disclosed that she had assisted XUE-FEI @ Koei and two other Chinese nationals to illegally obtain false IDs' like voter card, Aadhar card from Nagaland. She had facilitated the illegal entry of two Chinese nationals into the country and also travelled with them and Xue-Fei @ Koei to various places in India. She had purchased Indian sim cards on her ID.

**I-C. Investigations:**

5. The applicant was not named in the FIR. However during the course of investigations, the police authorities unearthed several incriminatory evidences against the applicant which according to them establish the culpability of the applicant in various offences.

**II. Submissions of learned counsels for the parties:**

6. Shri Vinay Saran, learned Senior Counsel assisted by Shri Pradeep Kumar Mishra, learned counsel and Shri Abhishek Srivastava, learned counsel for the applicant made the following submissions.

i. The applicant was a simple workman who extracted chips in a unit set up by a company called HTZN.

ii. No incriminating article has been recovered from the applicant. The stamp pad in the name of the applicant recovered from the factory premises in the name of the applicant at the pointing out of the co-accused was not used for any fraudulent transaction. Travel tickets which were recovered from the applicant do not connect the applicant with any offence.

iii. The applicant was nominated in the statement of co-accused Ashu Kumar and Pradeep Kumar while in custody of police authorities. The only offence against the applicant (without prejudice to his defence) is that of overstaying the visa which may constitute an offence under Section 14 of the Foreigners Act, 1946. The offence alleged against he applicant are petty in nature.

7. Shri Manish Goyal, learned Additional Advocate General assisted by Shri Rupak Chaubey, learned A.G.A. for the State made the following submissions:

i. The statement of the co-accused made before the police authorities while in the custody of the latter can be relied upon against the applicant in bail application in appropriate cases especially when other credible evidences corroborate the same.

ii. Further credible evidence has also been unearthed against the applicant which directly connects him to various offences for which he is being tried.

iii. The applicant was in-charge of day to day functioning and was in the higher management of the company.

iv. The applicant tried to falsely pose as a workman only to ensure that his illegal activities go undetected. The applicant is a part of a larger criminal organization and an international crime network which has been committing crimes of a serious nature in India. There is no legal documentation of the business of HTZN and it is connected with other fake companies.

v. Various evidences like statements of persons connected with the company, recovered articles, CDRs, documentary evidences and fraudulent transactions clearly point to the guilt of the applicant.

vi. The applicant entered India as an employee of another company who started working for HTZN without any permission.

vii. The applicant remained in India after overstaying his visa only in furtherance of his criminal activities and interests.

viii. The applicant has no regard for Indian laws and is likely to flee the country if enlarged on bail. There are no prospects of getting the applicant extradited or procuring his presence in court if he leaves the territorial boundaries of India.

ix. The offences are grave in nature and pose a threat to national security and the national economy.

8. Shri S.P. Singh, learned Additional Solicitor General of India assisted by Shri R.P.S. Chauhan, learned Central Government Counsel submits that the Government of India does not have treaty arrangement or legal framework with the Peoples Republic of China and in case the applicant escapes from India there is little or no possibility of ensuring his presence in India to face the trial.

**III. Rights of Foreign Nationals**

9. In today's age of a globalized world order, digital technologies and integrated economies have wrought far reaching changes in human societies and have also brought complex legal challenges in their wake. The character and nature of crime is undergoing a change. Some of these offences impact the national economy or national security in a significant manner. The response of the Indian laws and courts to the emerging legal challenges will be critical.

**III-A. Constitutional Rights/Fundamental Rights**

10. The Constitution and the Indian system of laws bound India into an indissoluble union and gave irrevocable guarantees of fundamental rights and justice to all citizens. Ancient Indian values of Vasudhaive Kutumbakam are in embodied constitutional law pronouncements of higher courts in modern India. Foreign nationals in India also cherish the ample fruits of liberties in this land. Life and some liberties of such foreign nationals are protected in many ways under the Indian laws.

11. The discussion can profit by reference to authorities in point.

12. While determining the question whether the guarantee of fundamental rights vested in Indian citizens by the Constitution applies to foreign nationals and extent of the protection, the Supreme Court in **Hans Muller of Nurenburg Vs. Superintendent, Presidency Jail, Calcutta and others**[1] set forth the law as under:

> "33. Article 19 of the Constitution confers certain fundamental rights of freedom on the citizens of India, among them, the right "to move freely throughout the territory of India" and "to reside and settle in any part of India", subject only to laws that impose reasonable restrictions on the exercise of those rights in the interests of the general public or for the protection of the interests of any Scheduled Tribe. No corresponding rights are given to foreigners. All that is guaranteed to them is protection to life and liberty in accordance with the laws of the land. This is conferred by Article 21 which is in the following terms:
>
> "No person shall be deprived of his life or personal liberty except according to procedure established by law".
>
> (Also See: Judgment of Delhi High Court in **Michal Benson Nwaogu @ Chuna Benson Vs. State**[2])

**III-B. Right to Fair Trial**

13. The defining attributes of criminal trials in India are fairness, transparency, legal aid and endeavours to conclude the same expeditiously.

14. Foreign nationals being away from their home land undoubtedly face certain hardships while facing criminal trial in India. However, constitutional law in India has to evolve in conformity with its earlier precedents to mitigate such hardships and exclude all possibilities of unfairness or miscarriage of justice in a criminal trial. A fair procedure for foreign nationals facing criminal trials is integral to the realization of the guarantees of life and liberty under Article 21 of the Constitution of India assured to such foreign nationals. Article 21 of the Constitution of India insofar as it relates to fair and just procedure in criminal trials does not distinguish between Indian citizens and foreign nationals.

15. Right to legal aid and Right to speedy trial were exalted as fundamental rights of citizens of India flowing from Article 21 of the Constitution of India by the Supreme Court in **Hussainara Khatoon and others (I) vs. Home Secretarty, State of Bihar**[3] and **A.R.Antulay vs R.S.Nayak and Anr.**[4],

**Sheela Barse and ors. vs Union of India and ors**.[5], **P. Rama Chandra Rao vs State of Karnataka**[6] , respectively.

16. The foreign nationals including the applicant facing trials in India are vested with the following rights which ensure procedural fairness and transparency. These rights are concomitant rights of Article 21 of the Constitution vested in foreign nationals in India.

A. Right to a translator to translate the court proceedings in their native language.

B. Right to legal aid in case the foreign national is bereft of or is desirous of obtaining legal aid.

C. Foreign nationals have a right to communicate with their families as per the arrangements made by the jail authorities/appropriate Government.

D. Right to counsellor/embassy access.

E. Right to a speedy trial.

17. This Court by order dated 12.03.2024 had directed the State authorities and the trial court to ensure that the above facilities are duly provided to the applicant. The response of the State Government in this regard has been most encouraging. By affidavits dated 15.04.2024 and 01.07.2024 respectively the State Government have disclosed that the applicant has been provided a translator and given the option of legal aid. He is also provided with counsellor access and a channel to communicate with his family.

**III-C. Right to seek bail: Considerations**

18. The foreign nationals are entitled to seek bail as per the applicable laws, and conditionalities as may be imposed in the facts and circumstances of a case.

19. The bail jurisdiction and criteria for grant of bail has been settled more by conventions and practices which entered into judicial precedents over time. While considering grant of bail the courts have to consider various aspects including the likelihood that the accused committed the offence, the nature and gravity of the offence, and the impact on the society. Besides, the Court has also to examine the criminal antecedents of the under trial, likelihood of the accused reoffending and assess whether the accused is a flight risk. The essence of bail jurisdiction is to balance the demands of personal liberty with the imperatives of the court process. Attaining this balance is an exercise undertaken in every bail application.

**IV. Merits**

**A. Likelihood of the applicant committing the offence and material against him:**

20. After hearing learned counsels for the parties and upon examination of the record, the following facts are disclosed.

21. The applicant came to India on the strength of a work visa. The name of the applicant's employer company was Shenzhen Luckin Electronic Technology Co. Ltd. However, the applicant never worked in the said company. In fact, the applicant started illegally working for HTZN and got engaged in the business of extracting chips from e-waste. He had no authority in law to do such business in

India. The applicant's visa had long expired but he stayed on illegally in the country. The place of residence of the applicant recorded in the Visa is different from the one disclosed to the police during investigations.

22. The HTZN company in which the applicant was depicted as the employee was only a front to carry on unlawful activities and commit offences against Indian laws. The HTZN company was connected with other sham companies in an intricate web of an organized international crime network in India. Fake companies were set up only to disguise their activities and give an impression of lawful businesses. The aforesaid companies were essentially one entity and working with the common object of engaging in various criminal activities in the country. HTZN unlawfully exported chips to China. The proceeds of the aforesaid exports were not received in India. The said companies also operated illegal gaming apps, laundered money to foreign countries in form of bitcoins. The game apps were used to dupe many small Indian investors of their money. Financial transactions of HTZN with other front companies like Sudden Fix Pvt. Ltd., TD Max and Tiashang Renjion Co. Ltd. have been demonstrated from the bank account details. The well structured crime machinery included persons who facilitated illegal entry of Chinese nationals in India, aided their unlawful exit from India and also created fake identity documents for them.

23. Collectively the entire conglomerate of the sham companies which included Sudden Fix Pvt. Ltd., TD Max and Tiashang Renjion Co. Ltd. run by the applicant and his accomplices were intimately twined together and engaged in various criminal acts. In fact the crime racket had become so big that a hotel was set up which became a hub of such activities. Entry of Indians was barred in the said hotel.

24. The criminal operations of the said companies were executed through the applicant and other accomplices who were both Chinese and Indians. In fact the applicant is part of a larger international mafia engaged in organized criminal activities in India.

25. The applicant tried to pass for a workman. The cloak of ordinariness so created was only to avoid attention to the applicant. The applicant was in fact a part of the higher management and was also engaged in day to day functioning of HTZN. When the veil was raised it was found that HTZN was in fact an aggregation of Chinese nationals who with their Indian accomplices committed the aforesaid offences.

26. Office of HTZN was not found in the place depicted as the registered office in the ROC documents. The board of Exigo was affixed at the premises of HTZN to create a false impression.

27. Ashu Bhardwaj, the owner of a courier company which had done business with HTZN gave his statement to the police during the investigations. The said statement shows that the applicant had a major role in running of HTZN company. The applicant negotiated the cargo rates, showed chip samples and settled the contract with the said Ashu Bhardwaj for exporting chips to Hong Kong.

28. The recoveries made at the premises of HTZN included the stamp pad

of the applicnat which is consistent with his higher role in the company. The stamp pads of other sham companies Sudden Fix Pvt. Ltd., Noida, TD Max etc. were also recovered. The said companies do not have any authentic registration or any lawful business to show for, but only provided a cover for illegal activities. In fact legal documentation of the said companies and their transactions are almost entirely absent. Further, foreign currencies including Chinese currencies and Hong Kong dollar were also recovered from the premises of HTZN.

29. The supervisory role of the applicant in the aforesaid company is also depicted in the statements of Vishal who was the accountant for HTZN and TD Max. The said Vishal has clearly stated that he worked under instructions from the applicant and other co-accused.

30. Packaging materials were paid for by the applicant in cash. The process of extraction of sim cards was undertaken by 35-40 employees of the company. The managerial role of the applicant in running of the company is also evident from the fact that the said 30-35 employees were paid in cash by the applicant. The salaries paid to the aforesaid employees were never accounted for. Cash payments do not create documentary trails and were used to avoid detection and cover up the crime. The said Vishal was frequently directed by the applicant and other principal offenders to create fabricated bills. The said Vishal was asked to obtain bills for purchase of scrap from Exigo. Exigo did not engage in the business of sale of scrap and declined to issue bills. However, payments were still received from Exigo.

31. The applicant along with co-accused Zong Hao Zhe @ Jon and He Zhuang Zhuang @ Johnson created fraudulent bills. Further, the evidence including implicatory chats between Ryen, Jon, Johnson, Ravi and Koei disclose that the said Vishal was directed to fabricate bills for the company. The documentary evidences in this regard shall be tendered as prosecution evidence during the trial.

32. The rent was paid by the applicant and the co-accused Johnson. Particulars of many of the fraudulent transactions committed by the applicant along with other co-accused have come to light during the investigations.

33. Various cryptocurrency purchases were made by Sudden Fix Pvt. Ltd. and Tianshang Renjian Pvt. Ltd. The cryptocurrency transactions by the said companies were in fact a means to launder Indian money and park Indian funds in foreign countries without any sanction in Indian laws or knowledge of competent Indian authorities. These unregulated and illegal transactions lead to drain of the wealth of India.

34. The former scrap suppliers Jatin and Ashif too have demonstrated that the applicant had a decisive role in the business of extracting chips from e-waste and sending them to China. The said Ashif and Jatin have also adverted to the illegal activities of the accused and HTZN.

35. The recoveries made from the person of the applicant included passports, an expired visa, mobile phones and airline tickets. The mobile phones and the sim cards were issued in the name of other Indian nationals. The IMEI numbers of the recovered mobiles and the sim cards used

therein have been tallied. The CDRs depict a regular conversations with principal offenders which depicts close collaboration in the aforesaid fraudulent transactions.

36. The recovered air tickets show that the applicant was a frequent traveller from Delhi to Hong Kong. He was in regular contact with persons in Hong Kong. His residential place his Shenzhen. These were not home visits.

37. The applicant was a regular visitor to the Noida Golf Club. Later on the applicant took membership of the Golf Club. The membership of an exclusive golf facility and repeated visits to the same and frequent foreign travels shows a high flying lifestyle which was funded through the proceeds of crime. The applicant was no ordinary workman he was projected to be. The applicant resided together with other co-accused Jon. The affinity between the aforesaid co-accused clearly shows intimate collaboration in the commission of crimes.

38. Prosecution evidence collected during the investigation is yet to tested in the court. For the purposes of this bail the material is credible enough and points to the culpability of the applicant in the offences. There is strong likelihood that the applicant committed the offence. It is clarified that the above findings are only for deciding the bail application. None of the observations shall influence the trial court and are not liable to be considered in the trial proceedings.

**IV-B. Gravity of the offence and impact on society:**

39. Material discussed above the evidences against the applicant disclosed commission of economic offences and fraud. Furthermore, the applicant appears to be part of a well organized international crime network of Chinese nationals and local accomplices in India.

40. Economic offences particularly those committed by well organized international crime networks have severe consequences on social cohesion. Economic offences of this nature create a parallel economy and threaten the national economic stability.

41. International criminal networks which are managed by Chinese nationals with Indian accomplices as in the instant case significantly impact the national security. Such international crime syndicates create fifth columnists in the host countries. What aggravates the crime further is that many beneficiaries of the crime proceeds are foreigners living abroad who are not even amenable to Indian law and whose identities are effectively concealed.

42. The narrative has the support of authority in point.

43. The Supreme Court in **P. Chidambaram vs. Directorate of Enforcement**[7] while examining the issue whether economic offences fell within the category of grave offence held:

> "21. ….However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would

befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused."

**IV-C. Likelihood of the applicant reoffending:**

44. The applicant flouted visa conditions, overstayed after expiry of visa and carried on criminal activities in the country. The applicant has shown no respect for Indian laws. Further, in view the ready availability of the said crime network, the applicant is likely to indulge in the aforesaid nefarious activities if released on bail.

**V. Flight Risk and Foreign Nationals:**

45. Determination of the fact as to whether the bail applicant is a flight risk is of fundamental importance in the criminal justice system. The possibility of an accused fleeing from justice after being enlarged on bail is a real and persisting one. The menace is grave enough to put the credibility of the criminal justice system and the foundations of law in the society at risk. The legislature and the courts have created measures to prevent accused persons escaping justice after being enlarged on bail.

V-A. System of Sureties

46. The purpose of sureties and their importance in the criminal law justice system cannot be stated more eloquently than the following passage in **King vs Porter**[8] :

> *"It is to the interest of the public that criminals should be brought to justice. Responsibility is fixed on the sureties to see that such a person does not escape. A duty is thus cast on the Court, in accepting or rejecting a surety, to see the sureties are solvent and persons of sufficient vigilance to secure the appearance and prevent the absconding of the accused."*

47. The liability of surety is limited to the extent of forfeiture of surety amount when the accused becomes a fugitive from the court process. This well settled position of law was stated by the Delhi High Court in **Zoro Daniel Vs. State**[9] , as under:

> "8. The liability/responsibility of the surety is to produce the accused as and when required by the Court. If he fails then he has to deposit the surety amount."

48. The probability of an accused to appear and take his trial was held to be a proper test while examining the grant of bail in **Nagendra Vs. King Emperor**[10]. The said observations were cited with approval by the Supreme Court in ***Gurbaksh Singh Sibbia v. State of Punjab***[11].

> "The requirements as to bail are to secure the attendance of the accused at the trial: R.v. Rose(1). The proper test to be applied in the solution of the

question, whether bail should be granted or refused, is whether it is probable that the party will appear to take his trial: Re Robinson (2), R. v. Scaife (3)"

49. An elaborate framework of bail bonds and sureties and coercive measures has been provided for in the Criminal Procedure Code to deter the accused from fleeing justice and to ensure their attendance at the trial proceedings without any break.

50. The concept of sureties is founded on the fact that a person has local roots and his sureties are prepared to stand assurance for his presence in the court during the trial. Surety demands imposed on the accused also serve to prevent him from entertaining any thoughts of escaping justice after being enlarged on bail. The system of sureties has proved to be an effective system which deters the accused from avoiding the trial process.

51. However, the said scheme of deterrence fails when the accused is not dissuaded by the consequences of absconding.

**V-B. Coercive jurisdiction of courts**

52. The trial courts as a matter of practice have also successfully adopted measures available in law to compel the appearance of the accused persons. These courses of action available with the courts include taking out coercive measures like bailable warrants, non bailable warrants and proceedings for attachment of the properties of the accused as per law. The measures so adopted by the learned trial courts have ensured that the fugitive accused are brought to justice in good time.

53. The concept of sureties undoubtedly is a system of credible deterrence and is serving the process of courts well. But the latter system of enforcing attendance of witnesses by issuance of coercive measures has proved most efficacious if the sureties fail to ensure the presence of the accused.

54. The issue of sureties to be submitted by foreign nationals and amenability of such persons to coercive measures adopted by the Courts in case they flee the territorial boundaries of India require special and a distinct consideration. The evolution of law in regard to sureties from foreign nationals goes to show that the constitutional courts in India were conscious of the complex nature of the issue.

55. Foreign nationals in India may have difficulties in arranging local sureties and may even fail to do so. Law has been evolved by constitutional courts to mitigate the aforesaid problems faced by nationals to enable them to enjoy the liberty granted by bail.

56. Deposit of passport is a form of surety created by the courts for foreign nationals. (***See: Supreme Court Legal Aid Committee representing undertrial Prisoners Vs. Union***[12])

57. Another condition which has been accepted by the Supreme Court in **Supreme Court Legal Aid Committee (supra)** relates to a certificate of assurance from Embassy. The relevant directions read thus:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport, he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

58. The aforesaid directions have been lately clarified by the judgment of the Supreme Court in **Frank Vitus Vs. Narcotics Control Bureau and Ors.**[13] by holding thus:

"11. Now, we come to the decision of the Supreme Court Legal Aid Committee1 relied upon by the High Court. In the first part of paragraph 15, the prayers made in the petition filed before this Court have been set out. We are quoting the relevant part of paragraph 15, which reads thus:

"15. But the main reason which motivated the Supreme Court Legal Aid Society to file this petition under Article 32 of the Constitution was the delay in the disposal of cases under the Act involving foreigners. The reliefs claimed included a direction to treat further detention of foreigners, who were languishing in jails as undertrials under the Act for a period exceeding two years, as void or in any case they be released on bail and it was further submitted by counsel that their cases be given priority over others. When the

petition came up for admission it was pointed out to counsel that such an invidious distinction between similarly situate undertrials who are citizens of this country and who are foreigners may not be permissible under the Constitution and even if priority is accorded to the cases of foreigners it may have the effect of foreigners being permitted to jump the queue and slide down cases of citizens even if their cases are old and pending since long. Counsel immediately realised that such a distinction if drawn would result in cases of Indian citizens being further delayed at the behest of foreigners, a procedure which may not be consistent with law. He, therefore, rightly sought permission to amend the causetitle and prayer clauses of the petition which was permitted. In substance the petitioner now prays that all undertrials who are in jail for the commission of any offence or offences under the Act for a period exceeding two years on account of the delay in the disposal of cases lodged against them should be forthwith released from jail declaring their further detention to be illegal and void and pending decision of this Court on the said larger issue, they should in any case be released on bail. …………" (emphasis added) In the same paragraph 15, directions have been issued which read thus:

"We, therefore, direct as under:

(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided, he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31A of the Act, such an

undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport, he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code." (emphasis added) However, paragraph 16 is relevant, which reads thus:

"16. We may state that the above are intended to operate as onetime directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to

grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order." (emphasis added)

11.1. The directions contained in paragraph 15 were to operate as onetime directions applicable only to the pending cases of the accused who were in jail on the date of the judgment. These conditions were required to be incorporated in the order while releasing an accused on bail as a onetime measure. Paragraph 16 clarifies that if a bail application is made to the Special Court with a grievance regarding inordinate delay in the disposal of pending cases, the Special Court will be empowered to exercise power to grant bail in light of what is held in paragraph 15. Therefore, it is not necessary that in every case where bail is granted to an accused in an NDPS case who is a foreign national on the ground of long incarceration of more than 50% of the minimum sentence, the condition of obtaining a 'certificate of assurance' from the Embassy/High Commission should be incorporated. It will depend on the facts of each case.

12. Even if such a condition is incorporated, on an application made by the accused, the concerned Embassy/High Commission declines or fails to issue the certificate within a reasonable time, say within a period of seven days, the Court always has the power to dispense with the said condition. Grant of such a certificate by the Embassy/High Commission is beyond the control of the accused to whom bail is granted. Therefore, when the Embassy/High Commission does not grant such a certificate within a reasonable time, as explained above, the accused, who is otherwise held entitled to bail, cannot be denied bail on the ground that such a condition, which is impossible for the accused to comply with, has not been complied with. Hence, the Court will have to delete the condition. If the Embassy/High Commission records reasons for denying the certificate and the reasons are based on the adverse conduct of the accused based on material, the Court can always consider the reasons recorded while considering an application for dispensing with the condition. However, the Courts must remember that the accused has no right to compel the Embassy/High Commission to issue such a certificate. There can be very many reasons for recording adversely which again cannot be the basis to deny bail already granted. In such a case, instead of the condition of obtaining such a certificate, the condition of surrendering the passport and regularly reporting to the local police station/Trial Court can

always be imposed, depending upon the facts of each case."

59. The likelihood of a prisoner absconding is one of the questions which a court has to ponder upon while deciding the bail application or fixing the sureties demands, as was held by Delhi High Court in **Charles Sobhraj Vs. State**[14]:

> "7. The principal purpose of bail being to secure that the accused person will return for trial if he is released after arrest, this consideration is not lost sight of in the provisions of section 445 of the Code. It is only an enabling section, and provides that a Court or officer may permit a person to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix in lieu of executing a bond except in cases where the bond is for good behaviour. Surely, we cannot and must not lose sight of the word "may" which indicates that accepting the deposit of money in lieu of surety is left to the discretion of the Court and that consequently the acceptance of deposit of money is not obligatory and the relief is to be granted only where the Court thinks fit to substitute a cash security. While considering the question of fitness, principal purpose of bail as underlined above, would always remain a paramount consideration. In short thus besides the question as to whether the accused can find sureties or not, the Court shall have to keep in mind the question as to whether the prisoner is likely to abscond or not and while meditating on the last question the Court may take into account various factors concerning him like the nature and circumstances of the offence charged, the weight of the evidence against him, length of his residence in the community, his family ties, employment, financial resources, character and mental condition, his record of convictions, reputation, character and his records of appearance at Court proceedings or flight to avoid prosecution or failure to appear at Court proceedings."

60. While deciding the bail application of a foreign national, Delhi High Court in **Nastor Farirai Ziso Vs. NCB**[15], opined that the apprehension that the accused may flee the course of justice, cannot be the sole determinative factor for denying benefit of Section 445 Cr.P.C. by holding:

> "10. It may be observed that it would be a negation of the principle of rule of law and violative of constitutional mandate and principles of human rights in case benefit of Section 445CrPC is denied to a foreign national merely on the ground that a foreign national is likely to escape, if released on bail. This would lead to incarceration of accused for an unlimited period till conclusion of trial even despite being granted the discretion of bail by the courts. A mere apprehension expressed by the prosecution that the accused may flee the course of justice, cannot be the sole determinative factor for denying benefit of Section 445CrPC without

consideration of other circumstances and balancing factors in this regard. This apprehension may still theoretically persist even in a case where surety bond is furnished but the liability of surety is only to the extent of amount mentioned in the surety bond."

61. Limitations of the sureties system become particularly severe when it comes to foreign nationals being prosecuted in Indian Courts. If such a foreign accused escapes from the territory of India the surety system becomes irrelevant. In fact the fugitive foreigner effectively goes beyond the reach of coercive jurisdiction of Indian courts. The criminal justice process would come to a dead end. This Court had asked the Government of India to produce the international instruments or the legal framework within which warrants and other coercive measures issued by the learned trial courts in India would be executed against foreign nationals who flee India to avoid criminal trial.

**V-C. Stand of Government of India and State Government,**

**V-D. Applicant as a flight risk: Assessment**

62. The affidavit submitted by the Government of India discloses that the issues of securing presence of foreign nationals who are fugitives from Indian law are more complex. The process requires interface of the two sovereign governments and also taking out proceedings/engaging with the judicial system of the foreign country. From the materials in the record it appears that the aforesaid process is cumbersome, time consuming, unpredictable, and often doomed to failure.

63. The innovations evolved by the Courts as substitutes for sureties like deposit of passports would be of little avail in such circumstances.

64. The above noted complexities become acute in respect of certain categories of foreign nationals facing criminal trials in India. In such cases it becomes necessary to assess the flight risk of the said accused in conjunction with the ability of the Government of India to compel the presence of such foreign accused in India country even after they escape the territorial jurisdiction of the country.

65. The brief or even terse response of the Government of India in the affidavit reveals that no credible legal framework or efficacious system exists to secure the presence of Chinese nationals who while facing criminal trials escape the territory of India.

66. The affidavit filed on behalf of Government of India in the companion bail application viz. Criminal Misc. Bail Application No. 59242 of 2022(Zong Hao Zhe @ Jon vs. State of U.P.) asserts that the Ministry of Home Affairs has entered into treaties on Mutual Legal Assistance in criminal cases with many foreign countries. However, the case at hand is not within the scope of such treaties. As per the affidavit India does not have any Mutual Legal Assistance Treaty with the Peoples Republic of China. The affidavit also states that to bring back fugitives or foreign accused who flee to foreign countries after committing criminal offences in India recourse to extradition is taken. However,

India and Peoples Republic of China do not have any extradition treaty or arrangement. The affidavit acknowledges that extradition is a long drawn process and in many cases becomes complicated "if the surrender of its own country's national is involved." The affidavit lastly admits that the possibility of the applicant fleeing this country cannot be ruled out even if the passport is deposited.

67. The State Government during the course of arguments have forcefully supported the stand of Government of India and further the State Government have reinforced their concerns about the applicant fleeing India to cheat justice which is coupled with the inability of either Government to ensure his presence in Court.

68. The Government of India have thus asserted their inability to compel the appearance of the applicant in the trial proceedings or to bring him back to Indian shores if he flees to another country. The Government of U.P. have been equally emphatic about the applicant escaping the territorial jurisdiction of India to scuttle the trial proceedings.

69. The applicant along with other Chinese nationals and Indian accomplices indulged in various unlawful activities and laundered money as noticed earlier. The criminal network of the applicant and others helped various Chinese nationals to create fake identity papers, make illegal entry into India and also facilitated their escape. The applicant flouted the visa conditions, and has also over stayed in this country only to carry on the aforesaid unlawful activities and commit criminal offences. The applicant has scant regard for Indian law.

70. A holistic consideration of the facts and the cumulative effect of the above factors lead to a conclusion that the applicant is an unacceptably high flight risk which poses a danger to the process of law.

71. There is another aspect which needs consideration insofar as grant of bail to foreign nationals is concerned. The visa of the applicant was only valid for 90 days and has long expired. Even if the applicant is enlarged on bail, he will not enjoy full liberty associated with Article 21 of the Constitution of India. The applicant will remain an illegal entrant in the country. If the applicant were to be granted bail he was required to be kept in detention centres as per law.

72. The discussion and these observations will be fortified by authorities in point.

73. A Division Bench of this Court in **Mohd. Masroor @ Mansoor @ Guddu vs. State of U.P.** passed in Jail Appeal No. 802 of 2013 held as under:

> "45. The appellant has already remained in jail for more than 15 years and has carried out the sentence imposed upon him with regard to the other offences for which we have found him guilty, however, considering the fact that he is an illegal entrant in the country without a valid passport and visa, he can not be released. If there are any centers which may have been earmarked or designated by the Government of India for keeping such illegal entrants, the appellant shall be released from jail and kept in such centers as per law, unless of course his custody is required in any other case in which case the law shall take its own

course. However, if there are no such centers, then, there is no other option but to keep the appellant in the prison where he is being kept at present but not as a prisoner who has been convicted of the offences referred hereinabove as he has already undergone the sentence, but, as one who is an illegal entrant in the country, till he is dealt with in accordance with law by the Government of India, in the sense, if he is to be deported back to Pakistan or if some other arrangement is permissible and required to be made in law, till it is made."

74. Examining the special considerations which apply to foreigners facing trial in India insofar as grant of bail is concerned, the Karnataka High Court in **Babul Khan and another Vs. State of Karnataka**[16] held:

"52. Once a case is registered when it is said that the provisions of bail is also applicable, but the question arises as to what is the procedure that should be followed at the time of granting or refusing bail to such persons under the provisions of Sections 436 to 439 of Cr.P.C. It is quiet natural that under the Foreigners Act, 1946, the foreigners who have violated the provisions of the said Act, they are not supposed to wonder around the country freely as if they are the citizens of the country, even if bail is granted to such persons. The bail cannot be treated as an authority or license to move around the country as if a legal document by the competent authorities. Therefore, the courts, without hearing the Competent Authorities, and the State, and without imposing necessary conditions, no such bails can be granted to such person to move freely anywhere in India even for a day without Passport or Visa, as he is presumed to be an illegal migrant. Therefore, it goes without saying that, an under-trial prisoner even during the investigation, inquiry and trial, whether he should be given a free hand to move anywhere as he likes, or his movements have to be restricted, or he has to be detained anywhere else is the question i.e., to be considered by the Courts."

75. Even if the foreign national is being prosecuted only under the Foreigners Act, 1946 various restriction are liable to be imposed and the accused has to be kept in a detention centre after release on bail in **Babul Khan (supra)** by holding:

"55. On meticulous reading and meaningful understanding of the above said provisions, it clears out the doubt that, a foreigner who is presumed to be an illegal migrant cannot remain in India or wonder or move around freely, unless and until he is authorized or permitted by the Competent Authorities to remain in India with certain conditions regulating his conduct with specifications as provided u/s.3 (2) (a) to (g) of the Foreigners Act. This provision empowers the competent authorities for any valid reasons to exercise their powers under section 3(2) (a) to (e), restricting the movements of a

foreigner, with specifications. In that eventuality Particularly under Section 3(2)(f) such person shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions; noted at sub clause 3(2)(a) to (e). In fact section 3(2)(g) empowers the competent authority that, they can arrest and detain or confine such persons, if no license or permission granted under section 3(a) to (e) and also make a provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters as may be, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

56. Therefore, subject to the above said conditions, the court has to examine while granting or refusing bail as to whether the said person has to be detained anywhere else other than regular jails. It goes without saying that, after registration of a criminal case, during investigation, inquiry and trial, the accused persons are entitled to make application for grant of bail as a matter of right. The court has to examine depending upon the facts and circumstances of the case applying the general guidelines for grant of bail and if for any reason, the court comes to the conclusion that the accused is entitled to be released on bail, the court has to examine whether the said person has to be kept in any detention centers during the pendency of investigation, inquiry or trial, even after acquittal or conviction of the said person.

57. As noted above, granting bail, should not be understood that it amounts ratifying or legalizing their illegal stay in the country. Therefore, the courts have to pass an order only after hearing the Competent Authorities (State) who are empowered to pass appropriate orders u/s.3 (2) of the Foreigners Act to ascertain whether the competent authority has got any grievance to keep the accused persons anywhere else other than the jails till the investigation, inquiry or trial is concluded. Further, the Competent Authorities can put any conditions, to them and on taking bond with or without surety for the due observance of conditions, they can be released on bail. Otherwise, if the accused persons have to be released on bail, the Central Government or the State Government as the case may be, have to make necessary arrangements to detain them in separate detention centers, till they are deported to their countries. This does not mean to say that the courts have no power to keep those persons in jail itself. It all depends upon the facts and circumstances of each case.

58. If the offences are committed apart from the Foreigners Act and Passports Act, and under any other penal laws, for the time being in force, where serious allegations are made, having committed serious heinous offences and if the court on considering the gravity of the

offence, nature of allegations made against them and in respect of that if it comes to the conclusion that even for such serious offence, apart from the Foreigners Act and Passports Act, if the court inclines to grant bail, then the court can definitely order to keep them in the jail itself because they should also be treated on par with the other accused persons who have committed similar offences under various other penal laws of the country. If the offence committed either under the Passports Act or the Foreigners Act, and prima facie found that they are the foreign nationals and no other offences under any other penal laws of the country has been committed, in such an eventuality, they should be treated as foreign nationals and till they are deported, normally, they should not be detained in the prison if bail is granted, the court has to direct them to be detained in the separate Detention Centre established by the Central Government or the State Government as the case may be. If for any reason they are not entitle for bail they can be ordered to be kept in regular jails."

76. The twin non negotiable requirements for the courts in all circumstances are to uphold the Indian Constitution and protect the rule of law in this country. To achieve these goals foreign nationals who are engaged in businesses in India need to be accountable to Indian laws; and foreign nationals who face criminal trials in India have to submit to the jurisdiction of Indian courts. Perception of foreign nationals about their immunity from Indian courts will encourage them act with impunity against Indian laws. Such state of affairs will undermine the Indian Constitution and laws and have grave consequences for national sovereignty.

77. The memories of foreign entities acting against Indian interests without fear of Indian law are too vivid to be recalled. The exactions of foreign interests working without scruples of international law are too severe to be reprised.

**VI. Conclusion**:

78. In wake of the preceding discussion the bail application of the applicant is liable to be dismissed and is accordingly dismissed.

79. No further directions will be required as this Court has already directed the trial court to expedite the trial proceedings in the bail application of another accused in consonance with the mandate of Section 309 Cr.PC. and the judgments of this Court in **Bhanwar Singh @ Karamvir Vs. State of U.P.17, Jitendra v. State of U.P.** [18] and **Noor Alam Vs. State of U.P.**[19]

80. A copy of this order translated in Mandarin Chinese be provided to the applicant by the State Government.

**Parting Observations:**

81. Before parting, this Court would like to make some observations. The presence of foreign nationals in India as travellers or traders or otherwise is an extant reality. It is true for other countries as well. Legal issues like criminal trials of foreign nationals though arising in the

domestic jurisdiction of one country have international ramifications. Criminal trial proceedings in the domestic courts of one country can get linked to the legal system and the Government of another country. There is a need for an international framework of laws which is created by consensus among the comity of nations in order to deal with such issues in a fair, transparent and just manner. For the moment this issue is not within the ken of this Court. However, it is a problem which the Government of India and other members of the comity of nations will have to address.

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**(2024) 7 ILRA 1032**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 29.07.2024**

**BEFORE**

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

Criminal Appeal No. 156 of 2004
AND
Criminal Appeal No. 147 of 2004

**Ramesh Yadav ...Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Bharat Singh Pankaj, Harindra Prasad Pal, Ramakant Singh, Vineet Kumar Singh

**Counsel for the Respondent:**
Govt. Advocate

**(A) Criminal Law - appeal against conviction - acquittal - Indian Penal Code, 1860 – Section 302 (Murder) r.w. 14 - Section 304 - (Culpable Homicide Not Amounting to Murder) - enmity is a double edged weapon - evidence of eyewitness, if found truthful, cannot be discarded simply because the witnesses were relatives of the deceased - evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution - testimony of a reliable witness must be of sterling quality on which implicit reliance can be placed for convicting the appellants.(Para - 26,32,33)**

Allegation of old enmity between deceased and accused – no whisper about the enmity with accused - Contradictions in eyewitness statements - Discrepancies in police witnesses' statements - Lack of strong motive for appellants to commit murder - False implication possible due to contradictions and lack of motive. **(Para - 43 to 49)**

**HELD: -** Trial judge erred in convicting appellants due to contradictions in eye and police witnesses' statements, making the entire story doubtful and benefiting the appellants. Accused appellants entitled to benefit of doubt. Impugned judgment of conviction set aside. Appellants acquitted of charges. Bail bonds cancelled. Sureties discharged. **(Para - 50)**

**Both criminal appeals were allowed.** (E-7)

**List of Cases cited:**

1. Daleep Singh Vs St. of Punj., AIR 1953 SC 364

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

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

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

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

1. We have heard Sri H.N. Singh, Advocate assisted by Sri Arvind Kumar Tiwari, learned counsel for the appellant as well as learned A.G.A. for the State in

extenso and have been taken through the entire material on record.

2. The afore-captioned both appeals arise out of the judgment and order dated 17.12.2003, passed by the then Additional Sessions Judge/Fast Track Court No. 2, District Mau, in Sessions Trial No. 59 of 2002 (State Vs. Narendra Singh and others) convicting the accused/ appellants Narendra Singh, u/s 302 I.P.C. and accused Dharmendra Singh and Ramesh Yadav, under Section 302 read with Section 34 IPC and sentenced accused Narendra Singh for R.I. for life and a fine of Rs.10,000/- with default clause and accused Dharmendra Singh and Ramesh Yadav, for life imprisonment, under Section 302 read with 34 with fine of Rs. 5,000/-, with default clause. Both these appeals are pending since year 2004 since then about 20 years have lapsed. Therefore, for the sake of precision, brevity and convenience, both the appeals have been clubbed and heard together and are being decided by a common judgment and order.

3. Bereft of unnecessary details, prosecution case, as culled out from the first information report, is that on 07.12.2001 at about 21.15 hrs. the complainant-Ram Pukar Singh s/o Raj Kumar Singh r/o Village Mirzapur, police station ranipur District Mau, gave a tehrir (Ext Ka-1) at P.S. Ranipur, District Mau divulging therein that the house of Kapil Singh S/o Gorakh Singh is situate on the southern side of his house. A programme (Path) of Ramayan recital, was staged, on 7.12.2001 from 10 a.m. He and his younger brother-Vijay Bahadur Singh alias Aangnu had gone to listen Ramayan. In the evening at about 6.00 pm., his younger brother Vijay Bahadur Singh went to wash his hands and face at the hand-pipe (nal), installed at the door of Kapil Dev Singh. Seeing Vijay Bahadur alias Angnu alone at the hand pipe (nal), Narendra Singh s/o Shri Ram Singhasan Singh, Dharmendra Singh s/o Mangla Singh and Ramesh Yadav s/o Ramchandar Yadav, came from their houses and exhorted to kill him. Meanwhile, Narendra Singh fired at his younger brother by a country made pistol, the bullet hit him on the back of his head. Vijay Bahadur fell down on the hand-pipe (nal) and died at the spot. Vijay Bahadur had old enmity with these people and in past, had threatened to kill them. On hearing the sound of fire, he alongwith Panchanand Singh s/o of Rama Shanker Singh, and Shiv Murat Singh son of Chandra Bhusan, ran towards the hand-pipe (nal) and saw the accused persons running away from the spot, after killing Vijay Bahadur. They chased the miscreants, but they managed to run away.

4. On the basis of the abovestated scribe (Ext Ka-1) a Criminal Case Crime No. 275 of 2001 u/s 302 IPC against Narendra Singh, Dharmendra Singh and Ramesh Yadav was registered at P.S. Ranipur, District Mau. Entries of the same were drawn in Kaimi G.D. (Ext Ka-7) and also in Chik FIR (Ext Ka-3). Initially, the investigation was entrusted to S.I. Yogendar Nath Singh (Pw-3).

5. On F.I.R. being launched, the investigation was set into motion. The Investigation Officer recorded the statements of several witnesses under Section 161 of Cr.P.C. collected blood stained and simple soil and other material from the spot. prepared site plan, and after appointing the witnesses, inquest of the corpse of the deceased Vijay Bahadur Singh, was conducted on 07.12.2001, at about 21:15 p.m. He also prepared the

inquest report. In the opinion of witnesses (panchan) the death of the deceased was the result of fire arm injury. However in order to confirm the exact cause of death, they suggested to carry out autopsy of the corpse of the deceased.

6. Consequentially I.O., prepared letter of request for postmortem to C.M.O., photos lash and other relevant and necessary papers and after wrapping the dead body in a cloth, sealed it, prepared sample of seal and sent it to mortuary for postmortem through constable Ram Ji Yadav and Ram Briksh Prashad on 08.12.2001. The autopsy was conducted by Dr. Anand Kumar Srivastava (Pw-5) who prepared postmortem report (Ext Ka-8) in his own writing and signature wherein he opined that the cause of death of the deceased Vijay Bahadur Singh is instantaneous, due to ante-mortem Injury.

7. I.O. sent the material collected from the spot to FSL, Lucknow. After duly completing the investigation and other necessary formalities, I.O. submitted the charge-sheet against the accused appellants namely Narendra Singh, Dharmendra Singh and Ramesh Yadav under Sections 302/34 I.P.C in the court of Chief Judicial Magistrate, Mau , who took the cognizance of the case. Finding the case being exclusively triable by the court of Sessions, Chief Judicial Magistrate, committed it to the court of Sessions Mau, on 19.03.2002 for trial. In the Court of sessions it was registered as Sessions Trial No. 59 of 2002 (State vs Narendra Singh and others) and in turn transferred it to court of Additional Sessions Judge / FTC Court No. 2, Mau for trial.

8. The learned trial Sessions Judge framed Charges against the accused/ appellant Narendra Singh u/s 302 I.P.C. and against accused/ appellant Dharmendra Singh and Ramesh Yadav u/s 302/34 IPC. The accused / appellants abjured the Charge, pleaded not guilty and claimed to be tried.

9. In order to bring the charge home, prosecution has examined, following witnesses of facts including the formal witnesses in in ocular evidence:-

| Sl no. | Name of the witnesses | PW Nos |
|---|---|---|
| 1 | Ram Pukar Singh (Informant) | PW1 |
| 2 | Panchanand Singh (witness) | PW2 |
| 3 | S.I. Yogendra Nath Singh, I- I.O. | PW3 |
| 4 | Subhash Varma, H.M | PW4 |
| 5 | Dr. Anand Kr Srivastava, (PMR) | PW5 |
| 6 | Vinod Kumar Tiwari II- I.O. | PW6 |
| 7 | C-Chandrabhan Pandey, Inquest conductor | PW7 |

10. To corroborate the oral evidence, prosecution also adduced following documentary evidence:-

| Sl. Nos. | Particulars | Ext. Nos. | Proved by |
|---|---|---|---|
| i | Ii | Iii | Iv |
| 1. | Tehrir | Ext. Ka-1 | PW-1 |
| 2. | Inquest report | Ext. Ka-2 | PW-4 |
| 3. | Recovery memo Gas / Petro-max | Ext. Ka 3 | PW-3 |
| 4. | Sample of | Ext. Ka- | PW-3 |

| | Fard | 4 | |
|---|---|---|---|
| 5. | Site Plan, C.D. | Ext. Ka-5 | PW-3 |
| 6. | Chik F.I.R. | Ext. Ka-6 | PW-4 |
| 7. | Carbon copy of G.D. | Ext. Ka-7 | PW-4 |
| 8. | Post Mortem Report | Ext. Ka-8 | PW-5 |
| 9. | Charge sheet | Ext. Ka-9 | PW-6 |
| | | | |

11. Prosecution has also produced FSL reports which is on record, as paper no. 70 Ka and 20 ka. Which has been refereed by P.W.-6 S.H.O. Vinod Kumar Tiwari in his deposition.

12. Prosecution has also exhibited material evidence as under:-

| Sl. No | Particulars | Ext. Nos. | Proved by |
|---|---|---|---|
| i | ii | iii | iv |
| 1. | Bullet recovered from the dead body during PM | Ext.-1 | P.W.-6 |
| 2. | Plain earth | Ext.-2 | P.W.- 6 |
| 3. | Wrapper clothe | Ext.-3 | P.W. -6 |
| 4. | Blood stained earth | Ext.-4 | P.W.-6 |

13. After completion of the prosecution evidence accused were examined 313 Cr.P.C. who denied the statement of the prosecution witnesses and stated that they are false. He further stated that they are implicated on account of political and otherwise personal enmity.

14. The accused appellant did not adduce any oral evidence in defence. However in documentary evidence they have filed copy of NCR 65 Kha, orders of the consolidation court being etc. 66 -Kha/1 to 66 Kha-3,

15. The learned trial court, after examining the entire material on record, testimony of the prosecution witnesses and also evaluating the oral and documentary evidence, came to the conclusion that there is a complete chain of evidence showing the complicity of the accused appellant in the commission of said crime and the prosecution has proved its case beyond reasonable doubt, pointing towards the guilt against the accused persons and convicted accused under Section 302, 302/34 IPC and sentence accused Narendra Singh u/s 302 and sentenced to undergo R.I. for life and a fine of Rs. 10,000/- with default clause and accused Dharmendra Singh and Ramesh Yadav were sentenced u/s 302 read with 34 I.P.C. to undergo R.I. for life and fine of Rs.5,000/- each with default clause. Ld. counsel for the appellants assailed the conviction and sentence on various grounds and advanced several arguments in this behalf, which may be tested on the touchstone of the evidence adduced, undisputed facts and circumstances of the case.

16. In order to appreciate the submissions made by learned counsel for the appellant and learned A.G.A., it is imperative to discuss the evidence adduced by the prosecution.

17. PW-1 Ram Pukar Singh, is the complainant of the case, has deposed in his examination-in-chief that the house of Kapildev Singh is situated southwards adjoining to his house. On 07.12.2001,

Ramayan recital programme (Ramayan Path) was going on at the house of Kapildev Singh since 10.00 a.m. Vijay Bahadur Singh alias Agnu Singh who is his younger brother, was also a participant in Ramayan Path. They reached in the programme at around 5:30 pm. It was 10 minutes less in 6 o'clock, when Vijay Bahadur went to hand-pipe (nal) located in front of house of Kapil Dev, for washing hands and face. Seeing him, Narendra Singh, Dharmendra Singh and Ramesh Yadav reached at the hand pipe (nal). Dharmendra and Narendra Singh were having country made pistol in their hands. Pointing towards Vijay Bahadur, Dharmendra Singh said to Narendra Singh that "यह वही है, इसे जान से मार डालो।" At this Narendra Singh fired with country made pistol at Vijay Bahadur hitting him on his temporal region. He, Panchanand and Shivmurat Singh witnessed the incident. On account of gun-shot injury, Vijay Bahadur fell down and died on the spot. The aforesaid witnesses chased the accused persons, but they managed their escape good and ran away towards the south. This incident took place at 6.00 pm. On the day of incident itself, he had given written report (tehrir) at police station in between 9-10 o'clock. Seeing the written report which is on the record, the witness stated that it is the tehrir which is in his hand writing and it bears his signature. He proved it as Ext. ka-1. The I.O. recorded his statement regarding the incident.

18. P.W.2 Panchanand Singh reiterating the statement of the P.W.-1, and further deposed that the Ramayan Path was going on since 10 o' clock in the morning. He reached in the programme at about 05:00 PM. At that time gas was lighting and bonfire was illuminating at the west of the Kapildev's house and he sat there. Rampukar Singh, Shivmurat and his relatives, as well as three-four other villagers were present there. Agnu Singh alias Vijay Bahadur Singh who was also present there, was washing his hands at the hand pipe (nal) at about 6 o'clock. At that time, Narendra Singh, Dharmendra Singh and Ramesh Yadav, suddenly emerged there from south and surrounded Vijay Bahadur Singh. Ramesh Yadav and Dharmendra Singh challenged to kill Vijay Bahadur Singh. At this Narendra Singh fired with the country made pistol at the temporal region of Vijay Bahadur Singh, from the west. Thereafter these people ran away from west towards south, Dharmendra Singh, brandishing pistol, stating that if anyone comes forward, he too will be killed. Vijay Bahadur fell down near hand-pipe (nal) and was screaming "aaye aaye". After about 15-20 minutes, he died on the spot. On the next day at 6.00 O'clock in the morning, Investigating Officer reached at the place of occurrence.

19. Prosecution witness Panchanand further stated that Inquest proceedings of the dead body of Vijya Bahadur Singh was conducted in the presence of I.O., who appointed the witnesses. Inquest report (Ext. ka-2) was prepared, which bears signature of I.O. and Panchan Lal Bihari Yadav, Kedar Yadav, Vijay Shankar alias Bablu and Manoj. The witness identified his signatures on inquest report. He further stated that his statement was recorded after 20 days of the incident by the Police at his home. He proved inquest report as Ext. Ka- 2.

20. P.W-3 Yogendra Nath Singh the I.O. has deposed that on 08.12.2001 he was posted as Sub Inspector at police station Ranipur. On that day, he started investigation of case crime no. 275 of 2001.

He recorded the statement of complainant Rampukar Singh and gathered blood stained and plain earth from the spot, prepared recovery memo of the same and obtained signatures of witnesses on it. One gas was also taken into custody, which was lighting and spreading illumination, by which accused persons were recognized. Recovery memo of the same was prepared by him on the spot. Later Gas was handover into custody of Ravindra Singh. The recovery memo Ext Ka-3. for the same was also prepared, which is on record. He sealed the recovered items and prepared the samples seal. He proved it as Ext. ka-4. He further stated that he conducted the spot inspection, prepared site-plan and proved it as Ext. Ka- 5. After that, hearsay evidences of Kapil Dev Singh, Ramdhari Singh and Ram Sakal Singh were recorded statement of witness Raj Kumar Singh and Hawaldar Yadav, Ravindra Singh were also recorded.

21. Prosecution witness, PW- 4 Subhash Verma, Head Constable, has averred in his examination that on 07.12.2001, he was posted as Head Moharir at police station Ranipur. On that day, on the basis of a tehrir of complainant Rampukar Singh, case crime no. 275 of 2001, under section 302 I.P.C. was registered against the accused persons Narendra Singh, Dharmendra Singh and Ramesh Yadav, at 9.15 PM. by him. Corresponding entry in G.D. report no. 31 at 21.15 pm on 07.12.2001 was written by him in his own hand writing and signature. He also prepared Carbon copy of the G.D., with original in the same process, which is on record. He also prepared chik FIR (Ext Ka-6). in his hand writing bearing his signature Thus the witness proved Kaimi G.D. as Ext Ka-7 as Chik FIR Ext Ka-6.

22. PW-5 Dr. Anand Kumar Srivastav, has stated in his examination that on 08.12.2001, he was posted in District Hospital, Azamgarh as Cardiologist Surgeon. On that day, at 4.00 p.m. he conducted the post-mortem of the dead body of Vijay Bahadur Singh alias Agnu Singh, brought by constable C.P. No.-03 Ramji Yadav and C.No. 224 Rambraksh Prasad. In the course of post-mortem the autopsy surgeon notice following facts, mentioned in PMR.

(i)- **External Examination**: According to doctor, the body of the deceased was of average height and built, eyes and mouth were closed. The blood ooze, behind the right ear, over the right side of the head, was clotted. Rigor mortis was present in his both hands and feet. Post-mortem staining was present on the back of the body. deceased was aged about 25 years and died about one day before the autopsy.

(ii)- **Internal Examination**:- Right temporal bone fractured. Membrane of brain and brain lacerated. Brain was also ruptured. Base of skull fractured. Metallic bullet found therein of which one part was blunt. Left chamber of heart was empty. Right chamber was full. Weight-180 gram. Stomach Empty.

(iii)- **Ante-mortem injuries:-**

Fire arm, wound of entry 1 cm x 1cm cavity deep on the right side of head 04 cm backwards from ear, margin of injury inverted. Blackening and charring present.

(iv)- **Cause of Death**:-

The death of the deceased was instantaneous,due to ante-mortem injuries.

(v) **Recovery from corpse**

During the course of autopsy Dr. found a metallic bullet yellow in colour, whose head was blunt, which has been recovered from the body of the deceased. It was Sealed and forwarded to S.P. Mau.

PW-5 Dr. Anand Kumar Srivastava further stated that Post-mortem report (PMR) was prepared by him in his hand-writing and signature, which has been proved by him as Ext. ka-08. Dr. witness opined that the aforesaid injuries are likely to be caused by country made pistol on 07.12.2001 at 06:00 pm. These injuries are sufficient to cause death of any person.

23. PW-6 Vinod Kumar Tiwari has stated that on 12.12.2001 he was posted at police station- Ranipur as Station House Officer and was entrusted the investigation of Case Crime No. 275 of 2001 u/s 302 IPC from sub-inspector Y.N. Singh. After perusal of the record of investigation conducted by his predecessor, he copied post-mortem and inquest reports in C.D on 14.12.2001. On 16.12.2001, the accused persons surrendered in the court, regarding which information was entered in the case diary. Accused Narendra Singh did not surrender, against whom he obtained non-bailable warrant from the Chief Judicial Magistrate. However on 24.12.2001, information regarding surrender of the accused Narendra Singh was received. Later he recorded statements of Dayanand Singh, Kedar Yadav, Vijay Shanker and Manoj Kumar Singh, who are witnesses of inquest report. Statements of accused persons, namely, Narendra Singh, Dharmendra Singh and Ramesh Yadav were recorded in district jail on 03.01.2002. On 19.01.2002, the articles relating to the case were sent to the Forensic Science Laboratory, Lucknow, for examination and analysis. After concluding investigation, he submitted charge-sheet against the accused persons Narendra Singh, Dharmendra Singh and Ramesh Yadav in the court of Chief Judicial Magistrate Mau, in his own hand writting and signature, he proved it as Ext. ka-09.

24. Chandrabhan Pandey (P.W.7) in his testimony stated that inquest proceeding of the deadbody of the deceased Vijay Bahadur Singh alias Anganu Singh was conducted by him in the presence of the other witnesses. He prepared inquest report in his hand writing and signature. Proved it as Ext. ka-2. He also deposed that he prepared request Letter to CMO to conduct post mortem of the dead body of the deceased, in his own handwriting, which bears his signature. He proved it as Ext. ka-10. The witness said that Form-13 too was prepared at the time of preparing the inquest report in his hand-writing and signature. He proved it as Ext. ka-11. He further stated that he prepared photo of dead body Ext Ka-12. He also wrote letter to R.I. paper no.-14ka/01, in his own hand-writing and signature. He proved it as Ext. ka-13.

25. The above stated witnesses were put to detailed cross examination which is proposed to refer during discussion and scrutinizing and evaluation of arguments.

26. Learned counsel for the appellants has odiously argued that the

conviction of the appellants is wholly erroneous and unjustified as the findings of the guilt recorded by the Trial Court is not based on correct appreciation of the evidence on record. The learned Trial Judge has lost sight of the fact that there are major contradictions and omissions in the statements of eye witnesses, who are close relatives and have fabricated a false story to implicate the appellants in the case. It is further contended that appellants has been falsely roped in the present case on account of political and otherwise personal enmity. Learned A.G.A. refuted the contentions.

27. It is common knowledge that enmity is a double edged weapon. On one side it may be a cause to falsely implicate the accused, where as it may be the real cause of the incident, on the other hand. So, benefit of enmity may go either side depending upon the facts and the circumstances of the case. In the present case as per FIR there was an old enmity between the deceased and the accused. They have threatened him at the time of occurrence and earlier occasions too, to kill him. At an other place he has stated Complainant P.W.-1 Ram Puakr Singh, has also admitted that about twenty days ago appellants father was abusing the deceased, then he had given a blow to their father. Thus, complainant Ram Puakr Singh, who is the real brother of the deceased Vijay Kumar Singh alias Angnu, though has deposed that there was no enmity of any person with the deceased in the village, is not believable. It follows appellants has no motive or have very weak kind of motive to commit the crime.

28. Learned counsel for the appellant vehemently argued that witnesses produced by the prosecution are partisan and inimical to the appellants interested witnesses and not independent witness. They are unreliable witnesses and as such no credence can be attached to their testimony and their deposition is therefore liable to be discarded. Learned A.G.A. refuted the contention of the learned counsel for the appellants. He submitted that ordinarily a close relative would not spare the real culprit who has caused the death and implicate an innocent person. It will be beneficial to discuss law on the interested witnesses and evaluation of their evidence.

29. The above submission was thoroughly considered by the Hon'ble Apex Court in case of **Daleep Singh Vs. State of Punjab AIR 1953 SC 364** and enunciated the following principles:-

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

30. In a three Judges Bench of the Supreme Court of India in **Hari Obula**

**Reddy Vs. State of A.P. (1981) 3 SCC 675** observed as under:-

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

31. Again in **S. Sudershan Reddy and others Vs. State of A.P (2006) 10 SCC 16**3, 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."

32. 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.

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

> "22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial

and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence,the persons involved, as well as the sequence of it. Such a version should have co- relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

34. It is germane to point out here that prosecution in the present case has examined as many as 07 witnesses in support of its version. While there are 15 witnesses mentioned in charge sheet, Ext. Ka- 9. Out of these, prosecution has produced only two witnesses of facts and rest are formal witnesses. PW- 1 Ram Pukar Singh, complainant, is the elder brother of the deceased Vijay Bahadur alias Angnu, while PW- 2 Panchanand Singh is the cousin brother of the deceased. Thus, they are relative witnesses and therefore, as per discussion of legal scenario their evidence should be carefully scrutinized.

35. Elaborating his arguments, learned Counsel for the appellant has submitted that the incident has occurred on 7.12.2001 at about 6 PM and it was dark. As a matter of fact it is a case of hit and run and none has seen the accused person but on account of inimical terms, appellants have been falsely implicated. As stated in the FIR, accused exhorted to kill Kapil Singh but only one accused fired a shot. It has also been argued that programme of Ramayana was going inside the house of Kapil Deo Singh and the complainant and

his brother Vijay Bahadur (deceased), as narrated in the FIR were listening Ramayan and as such it is hard to believe that complainant has seen the assailants that too in the darkness of winter night. From the statement of witnesses, it is clear that improvement has been made by them to cover up the lacunae.

36. The present incident has occurred on 07.12.2001 at about 6.00 p.m. it was the month of December. There is no mention about the light on the place of occurrence in the FIR Ext. Ka-1. However, P.W.-1 in his cross- examination has stated that the Gas (petromax) material Ext. was litting and illuminating. Complainant and some other people were sitting around the fire due to cold. I.O. P.W.- 3 Yogendra Nath Singh has not shown the place where the Gas was put in the site plan Ext. Ka- 5. However, he stated that the petromax was given to one Ravindra Singh. It is also mentioned in the memo of supurdginama Ext. Ka- 3 but the same was not produced in the court while examining I.O. P.W.- 3. Thus, either there was no light or a dim light, while the witnesses were sitting in the light of fire. It cast doubt that these witnesses has seen the occurrence.

37. While referring to the statement of P.W.1-Ram Pukar Singh, learned Counsel has submitted that there are contradictions in his statement. At one place, he has stated that he and his brother were listening Ramayan and at the other place, he stated that when his brother reached at the tap for washing hands and face, Dharmendra Singh exhorted Narendra Singh to kill him and Narendra Singh fired shot on his brother. At an other place, this witness stated that both Dharmendra and Narendra were armed with weapon. In the FIR, the complainant had stated that accused persons were chased by them but in his deposition before the court this witness has stated that accused persons ran away towards the south.

38. As regard the testimony of P.W.2-Panchanand Singh is concerned, it has been urged that this witness introduced the story of light and bonfire was lighting. He was sitting there and alongwith him Ram Pukar Singh, Shiv Murat Singh and relatives of Kapil Deo Singh @ Vijay Bahadur including three to four other villagers were present. When at about 6 PM Agnu was washing his face and hands then all of a sudden Narendra Singh, Dharmendra Singh and Ramesh yadav came and surrounded Vijay Bahadur. Ramesh and Dharmendra exhorted to kill Vijay Bahadur and then Narendra Singh came on the west side and fired a shot on the temporal region and then ran away towards the south. Dharmendra was brandishing pistol and said that if any one will come forward, he would be killed. This witness further stated that police had come at the spot on the next day at about 6 AM in the morning and in his presence panchnama was written and was signed by him and also by Lal Bihari Yadav, Kedar Yadav, Vijay Shanker @ Bablu. Thus, the version given by him is altogether different than the version given by the Ram Pukar Singh (P.W.1)

39. It has also been contended that there are contradictions in the statement of P.W.Yogendra Nath, SI, P.W.6-Vinod Kumar, S.I. and Chandra Bhan Pandey, P.W.7. It has also been pointed out that the police witness had deposed before the Court that they reached at the spot in the night itself whereas the eye witness Panch Nand (P.W.2) has stated that the police had

reached at the spot next day in the morning at about 6 AM and statement was recorded.

40. Lastly, it has been urged that the learned Trial Court has erred in recording the finding of the guilt overlooking the fact that there are major contradictions in the statement of witnesses which were fatal for the prosecution. Even from the statement of the witnesses, the place of occurrence also becomes doubtful but this aspect of the matter has not been considered.

41. On the basis of evidence on record, learned A.G.A. has submitted that there is no contradiction in the statement of the prosecution witnesses and medical evidence supports the oral evidence and slight deviations in the statement of witnesses would be of no benefit to the prosecution as it would not demolish the entire prosecution version. Allegation of false implication is wholly baseless as the prosecution was successful in proving the motive of the accused persons to commit the murder of deceased-Vinay Bahadur Singh.

42. Elaborating his submissions, learned AGA has submitted that from the testimony of the eye witnesses, it is proved that the accused persons had reached at the spot with a common intention to commit the murder of Vijay Bahadur Singh with whom there was prior enmity. The medical evidence fully corroborates the prosecution version as the doctor has found gun shot injury in the post-mortem examination.

43. Here it is relevant to point out that in the FIR, the complainant has alleged that when his brother was washing hands at the Tap, Narendra Singh, Dharmendra Singh and Ramesh Yadav came from their houses and uttered that he should be killed and Narendra Singh fired a shot on his brother. The complainant, Panchanand Singh and Shiv Murat Singh ran towards the tap and saw that the accused persons are running away after killing his brother and they were chased, but they managed to escape but before the Court this witness stated that the accused persons ran away towards the southern side; accused Dharmendra and Narendra were having Katta in their hands. Surprisingly, the name of Ramesh Yadav, who has been assigned the role of exhortation in the FIR , has not been taken and role of exhortation has been assigned only to Dhramendra Singh and Narendra Singh. Here, it is significant to point out that Shiv Murat Singh, who is said to be not only an eye witness but a material witness of the case has not been examined by the prosecution for the reasons best known to the prosecution

44. One more important contradiction in his statement is that in his examination in chief, Ram Pukar Singh witness had stated that he and his brother were listening Ramayan in the house of Kapil Deo Singh. However, in the cross examination this witness deposed that Ramayan was going on inside the room and five-six persons were reading and could be seen from the window and he has not gone inside the room. This witness further deposed that he and Vijay Bahadur were sitting at one place This witness further deposed that Shiv Murat Singh and Pancha Nand are his witness and belongs to his clan.

45. As regard the motive, this witness initially stated that regarding earlier quarrel no report was lodged but later on stated that there was no quarrel of his brother Vijay Bahadur Singh with any one

and also clarified that he also had no quarrel with any one. In his cross examination, this witness further stated that his brother were threatened to death twenty days ago at the Farm House in his presence but neither any report was lodged nor any application was given in this regard.

46. It is significant to mention that different versions have been given by the prosecution witnesses with regard to registration of the FIR of the incident and reaching of the police at the spot. The incident is said to have occurred on 7.12.2001 at about 6 PM and the FIR was lodged on the same day about 9.15 PM. The distance of the police station from the place of occurrence is said to be 9 Kilometer. Ram Pukar Singh (P.W.1), who is the complainant of the case has deposed before the court that he had reached to the police station at 8 PM alongwith Panchanand Singh and Brijesh Singh. He further deposed that he had carried the written report which he had written in his house and it took about 10-15 minutes. He further deposed that Inspector ( Daroga) had come to the place of occurrence on the next day in the morning in between 6-6.30 PM. The Inspector collected the plain earth and blood stained earth and carried the dead body to Azamgarh at about 8 AM in a jeep, which was a private one. The complainant further deposed that he also went in a private vehicle. On the other hand, Pancha Nand Singh (P.W.2) in his cross-examination stated that he had gone to the police station by cycle alongwith Ram Pukar Singh, Shiv Murat Singh and Vikresh Singh for giving information at the police station and reached at about 9.00 PM but Daroga ji was not present and the Constable gave him the paper. No Inspector had visited in the night and it was in the morning at about 6 AM Inspector (Daroga ji) alongwith other police personnel had come but his statement was not recorded on that day, which was recorded after twenty two days after the post-mortem. He also stated that dead body was lying as was left in the night. However, in cross examination, this witness stated that dead body was carried to Police Line, Azamgarh.

47. Contrary to the above statement, the first Investigating Officer of the case Head Constable Chandra Bhan Pandey stated in cross-examination that he reached at the place of occurrence at about 6 PM on the same day and when he reached there Constables of police out post were present ,who had given information to the police station through telephone and the entry in this regard was also made in the General Diary. The complainant was present at the spot and he remained there whole night and Inspector (Darogaji) had come next day in the morning at about 6-7 PM. Looking to the case diary, he stated that first 'Parcha' was written by him and first he had written the date '8.12.2001' and then after cutting '8' he had written '7'. During cross-examination, this witness took a somersault and stated that the dead body had reached to the police station in the night. The first Investigating Officer further deposed that when he reached at the spot, there was darkness and he examined the dead body in the torch light and after getting the dead body sealed, carried it in a jeep. Here, it is also relevant to point out that Yogendra Nath Singh, S.I.(P.W.3) deposed before the court that on 8.12.2001, he was posted at Sub Inspector and started investigation of case crime no.275 of 2001. He collected the plain earth and blood stained earth and prepared the memo. In cross-examination this witness admitted that earlier the investigation of the case was being conducted by Chandra Bhan Pandey, HCP.

48. Thus from the aforesaid facts, it is crystal clear that there are major contradictions and omissions not only in the statement of the eye witnesses but in the depositions of the Investigating Officers, which not only makes the entire prosecution version doubtful but also makes the presence of the eye witness and place of occurrence doubtful. It may be added that the eye witnesses, complainant and the deceased are all related to each other and belong to one clan.

49. As regard the enmity and motive, here it is relevant to point out, as averred above, that Ram Pukar Singh (P.W.1) has stated in his examination in chief that his brother ( deceased ) had no enmity with any person. Later on this witness stated that father of accused Narendra Singh had come at his Poultry Farm in a drunken state and started using expletive language for his family, then his brother after snatching his lathi assaulted Ram Singhasan. Since then Narendra Singh was annoyed and used to threat his brother. There is no whisper about the enmity with accused Ramesh Yadav and Dharmendra Singh. This witness further stated that as Ram Singhasan had admitted his guilt, a compromise was arrived at. On the other hand, Pancha Nand in his cross-examination stated that he knew Ram Surat Singh, Ram Singhasan and Harendra Singh, Harendra Singh is brother of accused Narendra Singh and Ram Surat Singh is uncle of accused Narendra Singh. This witness stated that he had a fight with Ram Sakal Singh, Ram Surat Singh, Harendra Singh and Ram Singhasan Singh and he had also received injuries. However, there was a compromise much earlier and discord has ended after the compromise and they were on talking terms but there was no affinity or closeness. Thus from the statement of the P.W.1 Ram Pukar Singh and P.W.2 Panchanand Singh it can easily be inferred that there was no real and strong motive for the appellants to commit the murder of the deceased and false implication cannot be ruled out.

50. Considering the evidence and other material on record in its entirety, we are of the view that the learned Trial Judge has erred in convicting the accused-appellants overlooking the fact that there are serious and major contradictions and omissions not only in the statement of eye witnesses but in the statement of police witnesses which makes the entire story doubtful and benefit thereof will go to the appellants.

51. For the reasons aforesaid, both the aforesaid appeals are **allowed**. The impugned judgment of conviction and sentence awarded to the appellants is set-aside and the appellants are acquitted of the charges levelled against them. Appellants are on bail, they need not to surrender. Their bail bonds are cancelled and sureties are discharged.

52. Registry is directed to send a copy of the judgement along-with Trial court record to the court concerned at the earliest for compliance.

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**(2024) 7 ILRA 1045**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 18.07.2024**

**BEFORE**

**THE HON'BLE ABDUL MOIN, J.**

Criminal Appeal No. 194 of 2024

**Faiyaz Abbas** **...Appellant**
**Versus**
**State of U.P. & Anr.** **...Respondents**

**Counsel for the Appellant:**
Mohd. Kumail Haider, Bal Keshwar Srivastava, Ravi Patel

**Counsel for the Respondents:**
G.A.

**(A) Criminal Law -Appeal - The Code of criminal procedure, 1973 - Section 82 - Proclamation for person absconding , Section 83 - Attachment of property of person absconding , Section 84 - Claims and objections to attachments , Indian Penal Code, 1860 - Sections 323, 328, 363, 376, 504 & 506 , The Protection of Children From Sexual Offences Act, 2012 – Section 3 & 4 - mere residence of a proclaimed person in rented premises does not allow authorities to seize or attach the property, as it does not belong to the proclaimed person - If a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (Para - 19,20,21,22)**

F.I.R. lodged against appellant, his son & wife – son not appearing before court - order was issued to attach property – son living in two rooms of appellants house - appellant filed objections - property belongs to him on basis of will - court ruled - order was passed to ensure the accused's appearance - ownership and possession cannot be ascertained - hence appeal. (Para - 12)

**HELD: -**Only property belonging to the proclaimed person can be attached. Order passed by POCSO Act and attachment order set aside. Authorities can proceed against the son of the appellant in accordance with the law. (Para - 17, 20,21,22)

**Criminal appeal allowed.** (E-7)

**List of Cases cited**:

1. Nazir Ahmad Vs King Emperor, 1936 SCC OnLine PC 41

2. Chandra Kishore Jha Vs Mahavir Prasad & ors., 10 1999 (8) SCC 266

3. Cherukuri Mani Vs Chief Secy., Govt. of A.P. & ors., 2015 (13) SCC 722

(Delivered by Hon'ble Abdul Moin, J.)

1. Rejoinder affidavit filed today is taken on record.

2. Heard Shri Bal Keshwar Srivastava, learned counsel for the appellant as well as Shri Angad Vishwakarma, learned A.G.A. for the State-respondent(s).

3. The instant criminal appeal has been filed under Section 86 of the Criminal Procedure Code (hereinafter referred to as "Code") challenging the order dated 12.07.2023, a copy of which is annexure 3 to the appeal, passed by learned Special Judge, POCSO Court No.2, Lucknow. By the said order, the application filed by the appellant under Section 84 of the Code has been rejected.

4. The short facts as urged by the learned counsel for the appellant is that an F.I.R. had been lodged by Saiyyad Ali Hasan against Faiyaz Abbas (the appellant herein), Faiz Abbas (the son of the appellant) and Smt. Guddo (the wife of the appellant). The F.I.R. was lodged on 28.11.2015 under the provisions of Section 3 & 4 of POCSO Act as well as under Sections 323, 328, 363, 376, 504 & 506 of I.P.C.

5. As the authorities were unable to ensure the appearance of Shri Faiz Abbas, the son of the appellant, consequently an order under Section 82 of the Code dated 12.01.2023, a copy of which is annexure 4 to the appeal, was passed. Subsequently, an order dated 06.02.2023, a copy of which is part of annexure 4 to the appeal, was also

passed under Section 83 of the Code whereby the property of the appellant herein was attached which is said to be the house of the appellant.

6. As the house belongs to appellant herein, namely, Shri Faiyaz Abbas, he filed his objections under Section 84 of the Code specifically pointing out that the appellant is the sole owner of the house by way of a will, and that his son namely Faiz Abbas has got nothing to do with the house and as the appellant is living in the house, consequently, the attachment order be set aside.

7. The learned court, vide order impugned dated 12.07.2023, after considering the objections filed by the appellant indicating the aforesaid, was of the view that while deciding the objections under the provisions of Section 84 of the Code, the court is not required to decide the dispute pertaining to the ownership of the house and that as the accused Faiz Abbas is only residing in two rooms of the entire house, consequently, the order of attachment under Section 83 of the Code has correctly been passed and therefore, the objections filed by the appellant have been rejected.

8. Being aggrieved, the instant appeal has been filed.

9. The argument of the learned counsel for the appellant is that the provision of Section 83 of the Code categorically provides that an attachment order can be passed for the property belonging to the proclaimed person who does not appear. Thus, the contention is that sine-qua-non to an order being passed under the provision of Section 83 of the Code is a finding, may be prima facie, to the effect that the property being attached belongs to the accused and without recording of such a finding in this regard, the property of a third person, may be in this case belonging to the father of the accused namely the appellant, could not have been attached. He also contends that despite the objections in this regard being filed, the learned court has patently erred in law in affirming the order of attachment passed under the provisions of Section 83 of the Code solely on the ground that the accused is residing in two rooms of the entire house and as such, it was within the power of the authority concerned, while issuing the order under Section 83 of the Code, to have directed for attachment of the property. He thus contends that the order impugned merits to be set aside.

10. On the other hand, learned A.G.A. on the basis of averments contained in the counter affidavit argues that the F.I.R. has been lodged in the year 2015 against the accused Faiz Abbas, the appellant herein and the wife of appellant and thus there is no illegality and infirmity which has been committed by the competent court while passing the order under Section 83 of the Code in attaching the property of the accused and further, no perversity emerges from the order dated 12.07.2023 whereby the objections filed by the appellant against the order under Section 83 of the Code have been rejected. He thus contends that the instant appeal merits to be dismissed.

11. Heard the learned counsel for the parties and perused the record.

12. From a perusal of record, it emerges that admittedly, an F.I.R. had been lodged in the year 2015 against the

appellant namely Shri Faiyaz Abbas (the appellant), Faiz Abbas (the son of the appellant) and Smt. Guddo (the wife of the appellant). As the son of the appellant namely Shri Faiz Abbas was not appearing, consequently, an order under Section 82 of the Code was initially issued on 12.01.2023 and thereafter, the order under Section 83 of the Code dated 06.02.2023 was passed whereby the property in question was attached. As the property belongs to the appellant on the basis of a will, the appellant filed his objections under Section 84 of the Code whereby this fact of the property belonging to him, on the basis of a will, was specifically urged before the court. The court, vide order impugned dated 12.07.2023 has been of the view that the said attachment order has been passed in order to ensure the appearance of the accused Faiz Abbas and as the accused was residing in two rooms of the property in question, consequently, there is no error in the attachment order. The learned court had gone to the extent of also saying that while passing of an order under the provision of Section 84 of the Code, the ownership and possession of the property is not be ascertained.

13. From the perusal of the aforesaid facts, it thus emerges that the orders under Section 82 & 83 of the Code have been passed in order to ensure the appearance of the son of the appellant. Section 83 of the Code on reproduction reads as under:

> ***"Section 83. Attachment of property of person absconding:***
>
> *(1) The Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, **belonging** to the proclaimed person.*
>
> *Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued, ?*
>
> *(a) Is about to dispose of the whole or any part of his property, or*
>
> *(b) Is about to remove the whole or any part of his property from the local jurisdiction of the Court, it may order the attachment simultaneously with the issue of the proclamation.*
>
> *(2) Such order shall authorize the attachment of any property belonging to such person within the district in which it is made; and it shall authorize the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.*
>
> *(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made?*
>
> *(a) By seizure; or*
>
> *(b) By the appointment of a receiver; or*
>
> *(c) By an order in writing prohibiting the delivery of such property to the proclaimed person or to anyone on his behalf; or*
>
> *(d) By all or any two of such methods, as the Court thinks fit.*
>
> *(4) If the property ordered to be attached is immovable, the*

*attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases?*

*(a) By taking possession; or*

*(b) By the appointment of a receiver; or*

*(c) By an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or*

*(d) By all or any two of such methods, as the Court thinks fit.*

*(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide by the order of the Court.*

*(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908."*

14. From the perusal of the provisions of Subsections (1) & (2) of Section 83 of the Code, it clearly emerges that the court while issuing a proclamation under Section 82 of the Code may, for reasons to be recorded in writing, at any time after issue of the proclamation, order of the attachment of any property movable or immovable, or both, **belonging** to the proclaimed person.

15. Thus from perusal of subsections (1) & (2) of Section 83 of the Code, it is apparent that it is the property which belongs to the proclaimed person which is to be attached.

16. From the objections as were raised by the appellant before the concerned court, it clearly emerges that the property in fact belongs to the appellant and not his son Faiz Abbas, the proclaimed person, consequently, it was in the fitness of things that this aspect of the matter should have been considered by the concerned court instead of rejecting the application on the ground that while deciding the application, the ownership or possession of the property is not required to be seen.

17. The aforesaid finding and reasoning is found patently perverse, more particularly, considering subsections (1) & (2) of Section 83 of the Code which clearly stipulates that it is only the property belonging to the proclaimed person which can be attached. Thus, the sine-qua-non to an order being passed under the provisions of Section 83 of the Code would be of a finding, may be prima facie, that the property for which the attachment order is being passed belongs to the accused person and consequently, without such finding, obviously, no such order could have been passed under the provision of Section 83 of the Code which in turn has been affirmed with the dismissal of the objections filed by the appellant.

18. It was also meaningless for the concerned court to have indicated that it was not the entire property which has been attached rather only two rooms were attached in which the accused was residing. Once, as already indicated above, it is only

the property belonging to the proclaimed person which can be attached, consequently, there cannot be any occasion of attachment of the property in which the accused may be residing.

19. To elaborate this fallacious reasoning of the concerned court, an example may be taken where a proclaimed person may be residing in rented premises. Mere residence of the proclaimed person in rented premises by no stretch of imagination or by operation of law can empower the concerned authority to seize or attach the rented property as the said rented property would not **belong to the proclaimed person.**

20. Here it would be pertinent to indicate as to what the Hon'ble Privy Council has laid down more than 8 decades ago in the case of **Nazir Ahmad Vs. King Emperor 1936 SCC OnLine PC 41** wherein the Privy Council has held as under:-

> *"that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."*

21. A three Judge Bench of the Hon'ble Supreme Court in the judgment reported as **Chandra Kishore Jha v. Mahavir Prasad & Ors. 10 1999 (8) SCC 266**, held as under:-

> *"17....................It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage: Nazir Ahmad v. King Emperor [(1935- 36) 63 IA 372 AIR 1936 PC 253 (II)], Rao Shiv Bahadur Singh v. State of V.P. [AIR 1954 SC 322 1954 SCR 1098], State of U.P. v. Singhara Singh [AIR 1964 SC 358: (1964) 1 SCWR 57]). An election petition under the rules could only have been presented in the open court up to 16-5- 1995 till 4.15 p.m. (working hours of the Court) in the manner prescribed by Rule 6 (supra) either to the Judge or the Bench as the case may be to save the period of limitation. That, however, was not done?"*

22. Similarly, the said principle as enunciated by the Privy Council in the case of Nazir Ahmad (supra) has been followed by the Hon'ble Supreme Court Court in **Cherukuri Mani Vs. Chief Secretary, Government of Andhra Pradesh & Ors. 2015 (13) SCC 722** wherein it was held as under:-

> *"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..........?"*

20. Keeping in view of the aforesaid discussion, the criminal appeal is **allowed**. The order dated 12.07.2023, a copy of which is annexure 3 to the appeal, as well as the attachment order dated 06.02.2023, a copy of which is part of annexure 4 to the appeal, are **set aside**.

21. Consequences to follow.

22. It is needless to mention that irrespective of the aforesaid order having been set aside, it would always be open for the authorities to proceed against the accused person namely Faiz Abbas in accordance with law.

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**(2024) 7 ILRA 1051**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 26.07.2024**

**BEFORE**

**THE HON'BLE SHAMIM AHMED, J.**

Criminal Appeal No. 985 of 2002

**Ikrar & Anr.** ...**Appellants**
**Versus**
**U.O.I.** ...**Respondent**

**Counsel for the Appellants:**
A.P. Mishra

**Counsel for the Respondent:**
Rakesh Kumar Awasthi, Sm Singh Royekwar

**NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES Act-Section 50-**Appellants convicted-Admittedly Appellants were not produced before the Gazetted Officer or Magistrate u/s 50 of the Act –no written consent of Appellants for his search -no evidence to show that the accused was communicated of his such right- breach of sec. 50 and sec. 43 of the Act-no independent eye witness of the alleged recovery-all witness are police personnel-case is based on circumstantial evidence -guilt not established beyond a reasonable doubt-impugned judgment set aside.

**Appeal allowed.** (E-9)

**List of Cases cited:**

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

2. St. of Rajasthan Vs Parmanand & anr., (2014) 2 SCC (Cri) 563

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

4. St. Of Punjab Vs Baldev Singh [1999 (6) SCC 172]

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

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

2. This criminal appeal Under Section 374 (2) Cr.P.C. against the judgement and order dated 29.7.2002 passed by Learned Special Judge, B.D.P.S.Act, Lucknow in criminal case no. 650 of 1991 Under Section 8/21/29 N.D.P.S. Act, challaned by C.B. Mohd. Ikrar and other Vs. Union of India by which the appellants have been convicted for 6 years R.I. and fine of Rs 25000/- each with stipulate default

3. Considering the report of the Chief Judicial Magistrate, Barabanki dated 05.03.2024, the appeal in respect of appellant No.1-Ikrar has already been abated vide order dated 03.07.2024. Thus, the present appeal is decided on merit in respect of appellant No.2-Sushail.

4. Heard Sri A.P.Mishra, learned counsel for the appellant No.2-Suhail as well as Sri S.M.Singh Royekwar, learned counsel for the Union of India.

5. The Brief fact of the prosecution, on 13.9.1991, Inspector received confidential information that two individuals, Baijnath and Vinod, residents of Motihari, Bihar, were staying at Anand

Hotel in Aminabad. They were expected to receive a consignment of heroin from Ikrar son of Moh. Anis and Suhail son of Nijju, residents of Tikra Baraki village. Based on this information a team was formed under the orders of Superintendent Radhe Raman, consisting of Inspector B.D. Pandey, S.I. Jayant, and other officers. On 14.9.91, the team surrounded Anand Hotel. Around 2 p.m., two suspicious individuals arrived on a motorcycle (Registration No. R.26/3439) and signaled towards the upper floor of the hotel. Subsequently, Baijnath and Vinod came out and engaged in conversation. During this exchange, a small packet was handed over to Vinod, who placed it in his bag. The team then apprehended Baijnath and Vinod.

6. On this allegation, Complainant had lodged a written report at Police Station- N.C.B, Lucknow District- Lucknow on 14.09.1991 Under Sections 8/21/29 N.D.P.S Act against appellants.

7. This case was entrusted to investigating officer who investigated this case and during investigation, he visited the place of occurrence and prepared the site plan ,recorded the statements of witnesses and after completing the investigation, investigating officer had submitted the charge sheet against the appellant and other accused persons.

8. That further after submission of charge-sheet before Court of learned Magistrate the said case was committed to Court of Session wherein it was registered as S.T. No. 650 of 1991 After committal, the trial court framed charges against the accused under Section 8/21/29 N.D.P.S Act. The accused-appellant denied the charges levelled against them and claimed to be tried.

9. That in order to substantiate its case, prosecution examined Seven witnesses namely PW-1 Inspector Radheraman lal , PW-2 Rama Shankar Prasad, PW-3 Inspector dina Nath Gupta, PW-4 Constable Shiv Shankar Singh, PW-5 Investigating Officer Mohd.Naseem, P.W-6 Constable Cheda Lal , P.W-7 B.D Panday.

10. The Appellant Ikrar, in his statement under Section 313 Cr.P.C., denied involvement in the incident. He claimed that he was not present at the scene and that his signatures were forcibly taken by Abhay Kumar at the D.N.C. office in Lucknow on 14.9.91. Suhel also denied the allegations, stating that no statement was taken from him and his signatures were obtained under duress.

11. The learned counsel for the appellant submitted that the trial court failed to properly consider the evidence adduced by the defense. The judgment and order were passed solely on the basis of the prosecution's evidence, which is not sustainable under the law. Thus, the conviction order is against the principles of justice.

12. The learned counsel further argued that the prosecution failed to produce any independent witnesses to corroborate their story. The explanation provided for not producing such witnesses is inadequate and not acceptable in the eyes of the law. This failure undermines the credibility of the prosecution's case.

13. The learned counsel further submitted that Section 50 of the N.D.P.S. Act is a mandatory provision. The arresting officer has not complied with that provision. As such, the recovery is illegal which vitiates the trial. Learned counsel

further submitted that the alleged place of recovery is public place but no effort to invite the public witness at the time of recovery was made by the police party. Learned trial Court without proper appreciation of the evidence available on record has illegally convicted the appellant vide impugned judgment and order which is liable to be set aside as the prosecution has miserably failed to prove its case beyond reasonable doubt. In support of his argument learned counsel for the appellant has placed reliance on law laid down by Hon'ble Supreme Court in ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2010 (2) EFR 755 and State of Rajasthan Vs. Parmanand and another, (2014) 2 SCC (Cri) 563.***

14. The learned counsel further submitted that the individuals from whom narcotics were allegedly recovered have been acquitted in the same case. However, the present appellants, from whom nothing was recovered, have been convicted. This inconsistency is unjust and against the law.

15. The learned counsel further submitted that The prosecution has failed to prove its case beyond a reasonable doubt. The learned trial court overlooked significant legal aspects and evidence presented by the defense, leading to an erroneous judgment and order of conviction. The prosecution's case was based on conjecture and insufficient evidence.

16. The learned counsel for Union of India for the respondent submitted that the trial court's judgment and order dated 29.7.2002, convicting the appellants under various provisions of the Narcotic Drugs and Psychotropic Substances (N.D.P.S.) Act, 1985, were well-founded and based on substantial evidence. The primary arguments made by the learned counsel for the Union of India are summarized as follows:

17. The learned counsel for Union of India further submitted that The prosecution presented a coherent and consistent narrative supported by the testimonies of investigating officers and other material evidence. The trial court duly considered all evidence on record before passing the judgment of conviction.

18. The learned counsel for Union of India further submitted that The acquittal of other individuals involved in the case does not undermine the evidence against the appellants. Each accused's case was evaluated on its own merits, and the evidence specifically incriminated the appellants in the possession and distribution of narcotics.

19. The learned counsel for Union of India further submitted that The prosecution successfully discharged its burden of proving the appellants' guilt beyond a reasonable doubt. The evidence on record, including the recovery of narcotics and the appellants' involvement in the transaction, was sufficient to establish the charges against them.

20. After considering the argument advanced by learned counsel for the parties, this Court finds that the prosecution's case rests heavily on the testimonies of the investigating officers and lacks corroboration from independent witnesses. Moreover, the failure to fulfil the requirements of Section 50 of the N.D.P.S. Act, and also the prosecution's failure to produce independent witnesses to corroborate the testimonies of the

investigating officers is a significant lapse. Independent witnesses play a crucial role in lending credibility to the prosecution's case, especially in matters involving serious allegations under the N.D.P.S. Act. The absence of such witnesses, without a satisfactory explanation, undermines the reliability of the prosecution's evidence.

21. Severe punishment has been provided in the N.D.P.S. Act to check the misuse of this Act by the police personnel or officers and certain safeguards particularly Section 50 of N.D.P.S. Act has been incorporated in this Act that search of the suspected person must be done before the Magistrate or Gazetted Officer. Similarly Section 55 and 57 of N.D.P.S. Act provides that seized contraband article be kept by Station House Officer in safe custody and report of arrest and seizure be sent immediately to immediate Superior Officer within 48 hours.

**Section -50 of N.D.P.S ACT, 1986 is reproduced here-as-under:**

**Conditions under which search of persons shall be conducted.**

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

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

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

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

*"In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would*

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

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

25. It is a matter of fact that the Investigating Officer acted on prior information as deposed by him below Exhibit-18 as PW . In view of such position, PW-1 , complainant-IO while acting on prior information and before making search of a person, it is imperative for him to inform the respondent-accused about his right to sub-section (1) of Section 50 of the NDPS Act for being taken to the nearest Gazetted Officer or the Magistrate for making search in their presence. It also appears that neither such procedure is followed; nor any note to the said effect is made in the Panchnama drawn while making search of the person of the respondent-accused.

As laid down in the case of **State Of Punjab vs Baldev Singh [1999 (6) SCC 172]**,

*18. A three-Judge Bench in Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat [(1995) 3 SCC 610 : 1995 SCC (Cri) 564] upheld the view taken in Balbir Singh case [(1994) 3 SCC 299 : 1994 SCC (Cri) 634] on the point of duty of the empowered officer to inform the suspect about his right to be searched before a gazetted officer or a Magistrate. It considered the*

*provisions of Section 50 and opined: (SCC p. 615, para 8)*

*"8. We are unable to share the High Court's view that in cases under the NDPS Act it is the duty of the court to raise a presumption, when the officer concerned has not deposed that he had followed the procedure mandated by Section 50, that he had in fact done so. When the officer concerned has not deposed that he had followed the procedure mandated by Section 50, the court is duty-bound to conclude that the accused had not had the benefit of the protection that Section 50 affords; that, therefore, his possession of articles which are illicit under the NDPS Act is not established; that the precondition for his having satisfactorily accounted for such possession has not been met; and to acquit the accused."*

*19. In State of H.P. v. Pirthi Chand [(1996) 2 SCC 37 : 1996 SCC (Cri) 210] the Bench agreed with the view in Balbir Singh case [(1994) 3 SCC 299 : 1994 SCC (Cri) 634] regarding the duty to inform the suspect of his right as emanating from Section 50 of the NDPS Act. The Court opined: (SCC p. 41, para 3)*

*"Compliance of the safeguards in Section 50 is mandatory obliging the officer concerned to inform the person to be searched of his right to demand that search could be conducted in the presence of a gazetted officer or a Magistrate. The possession of illicit articles has to be satisfactorily established before the court. The officer who conducts search must state in his evidence that he had informed the accused of his right to demand, while he is searched, in the presence of a gazetted officer or a Magistrate and that the accused had not chosen to so demand. If no evidence to that effect is given, the court must presume that the person searched was not informed of the protection the law gives him and must find that possession of illicit articles was not established. The presumption under Article 114 Illustration (e) of the Evidence Act, that the official duty was properly performed, therefore, does not apply."*

*20. In State of Punjab v. Labh Singh [(1996) 5 SCC 520 : 1996 SCC (Cri) 1036] again it was reiterated that the accused has been provided with a protection of being informed of his right to be searched in the presence of a gazetted officer or a Magistrate and failure to give an opportunity to the person concerned to avail of the protection would render the prosecution case unsustainable.*

*21. In State of Punjab v. Jasbir Singh [(1996) 1 SCC 288 : 1996 SCC (Cri) 1] it was opined: (SCC p. 289, para 2)*

*"2. Having considered the evidence we find it difficult to set aside the order of acquittal recorded by the Additional Sessions Judge. Though the offence involved is of a considerable magnitude of 70 bags containing 34 kgs of poppy husk, each without any permit/licence, this Court is constrained to confirm the acquittal for the reasons that the mandatory*

*requirements of Section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 has not been complied with. Protection given by Section 50 is a valuable right to the offender and compliance thereof intended to be mandatory. In case the police officers had prior knowledge that illegal transport of the contraband is in movement and persons are in unlawful possession and intends to intercept it, conduct search and consequentially to seize the contraband, they are required to inform the offender that he has the right that the search will be conducted in the presence of a gazetted officer or a Magistrate. Thereafter on their agreeing to be searched by the police officers, the search and seizure of the contraband from their unlawful possession would become legal and valid. However, the evidence collected in breach of mandatory requirement does not become inadmissible. It is settled law that evidence collected during investigation in violation of the statutory provisions does not become inadmissible and the trial on the basis thereof does not get vitiated. Each case is to be considered on its own backdrop."*

*22. In Ali Mustaffa Abdul Rahman Moosa v. State of Kerala [(1994) 6 SCC 569 : 1995 SCC (Cri) 32] a two-Judge Bench of this Court (to which one of us, C.J., was a party) it had been found that the appellant had not been given any choice as to whether he desired to be searched in the presence of a gazetted officer or a Magistrate as envisaged under Section 50 of the NDPS Act. The argument raised in that case to the effect that Section 50 of the Act could not be said to have been violated because the appellant did not "require" to have himself searched before a gazetted officer or a Magistrate was rejected following the law laid down in Balbir Singh case [(1994) 3 SCC 299 : 1994 SCC (Cri) 634] . The Court opined that to enable the person concerned to require that his search be carried out in the presence of a gazetted officer or a Magistrate makes, it is obligatory on the part of the empowered officer to inform the person concerned that he has a right to require his search to be conducted in the presence of a gazetted officer or a Magistrate.*

*23. In Mohinder Kumar v. State, Panaji, Goa [(1998) 8 SCC 655] a three-Judge Bench (to which one of us, Sujata V. Manohar, J., was a party) once again considered the requirements of Sections 42 and 50 of the Act. In that case the police officer "accidentally" reached the house while on patrol duty and had it not been for the conduct of the accused persons in trying to run into the house on seeing the police party, he would perhaps not have had any occasion to enter the house and effect search. But when the conduct of the accused persons raised a suspicion, he went into the house and effected the search, seized the illicit material and caused the arrest. The Court opined that in the facts and circumstances of the case, when the investigating officer accidentally stumbled upon the offending*

*articles and himself not being the empowered officer, then on coming to know that the accused persons were in possession of illicit articles, then from that stage onwards he was under an obligation to proceed further in the matter only in accordance with the provisions of the Act. On facts it was found that the investigating officer did not record the grounds of his belief at any stage of the investigation, subsequent to his realising that the accused persons were in possession of charas and since he had made no record, he did not forward a copy of the grounds to his superior officer nor did he comply with the provisions of Section 50 of the Act, inasmuch as he did not inform the person to be searched that if he required, his search could be conducted before a gazetted officer or a Magistrate. The Bench held that for failure to comply with the provisions of Sections 42 and 50, the accused was entitled to an order of acquittal and consequently the appeal was allowed and the order of conviction and sentence against the accused was set aside.*

*24. It would, thus, be seen that none of the decisions of the Supreme Court after Balbir Singh case [(1994) 3 SCC 299 : 1994 SCC (Cri) 634] have departed from that opinion. At least none has been brought to our notice. There is, thus, unanimity of judicial pronouncements to the effect that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a Magistrate and that the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would also render the search illegal and the conviction and sentence of the accused bad.*

*25. To be searched before a gazetted officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a gazetted officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the person concerned of the*

*existence of his right to have his search conducted before a gazetted officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the person concerned orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the person concerned of his right of being searched in the presence of a Magistrate or a gazetted officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with.*

*26. The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. We have already noticed that severe punishments have been provided under the Act for mere possession of illicit drugs and narcotic substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right under Section 50 because after Maneka Gandhi v. Union of India [(1978) 1 SCC 248] it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not "reasonable, fair and just" and when a statute itself provides for a "just" procedure, it must be honoured. Conducting a search under Section 50, without intimating to the suspect that he has a right to be searched before a gazetted officer or a Magistrate, would be violative of the "reasonable, fair and just procedure" and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be a "fair", just or reasonable procedure. We are not persuaded to agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched*

*in the presence of a gazetted officer or a Magistrate, if he so requires, would place any premium on ignorance of the law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a "reasonable, fair and just procedure".*

*27. Requirement to inform has been read in by this Court in other circumstances also, where the statute did not explicitly provide for such a requirement. While considering the scope of Article 22(5) of the Constitution of India and various other provisions of the COFEPOSA Act and the NDPS Act as amended in 1988, a Constitution Bench of this Court in Kamleshkumar Ishwardas Patel v. Union of India [(1995) 4 SCC 51 : 1995 SCC (Cri) 643] concluded: (SCC p. 59, para 14)*

*"14. Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation."*

26. Thus, there is breach or violation of Section 50 of the NDPS Act on behalf of the prosecution, because it is a statutory requirement of writing down or conveying information to Superior Officer.

In the case on hand, neither such intimation is sent to Superior Officer; nor any entry is made in the station diary. the respondent-accused must be made aware of his right for being search to be carried out in presence of a Gazetted Officer or a Magistrate. Learned Public Prosecutor could not point out any evidence or document showing that respondent-accused was made aware of his right before the Magistrate or Gazetted Officer. On perusal of deposition of PW, the complainant, no evidence has been adduced to show that respondent-accused was communicated of his such right and thus there is a noncompliance of provisions of Section 50 read with Section 43 of the NDPS Act.

27. Section 50 of the N.D.P.S. Act mandates that the accused must be informed of their right to be searched in the presence of a Gazetted Officer or a Magistrate. This is a crucial safeguard to ensure the fairness of the search process and to protect the rights of the accused. In this case, there is clear non-compliance with this mandatory provision, rendering the search and subsequent seizure legally flawed. The prosecution's failure to adhere to this statutory requirement further weakens its case.

28. Admittedly, the prosecution has not produced other independent eye-

witnesses of the alleged recovery and even no explanation has been offered by the prosecution for their non-production. All the witnesses are police personnel. Non-production of independent eye witness is serious lacuna which has made the prosecution case very doubtful.

29. The defense has raised serious allegations regarding the manner in which the investigation was conducted. Accused Ikrar stated that his signatures were forcibly obtained at the D.N.C. office in Lucknow, and Suhail denied giving any statement voluntarily, claiming that his signatures were obtained under duress. These allegations cast doubt on the integrity of the investigation process and were not adequately addressed by the trial court.

30. The handling and examination of the recovered narcotic substances did not comply with the prescribed legal protocols, raising doubts about the integrity and reliability of the evidence. Proper chain of custody and forensic examination are critical in cases involving narcotics to ensure that the evidence has not been tampered with or contaminated.

31. The prosecution's case is primarily based on circumstantial evidence, with no direct evidence linking the appellants to the possession and distribution of the narcotics. In the absence of direct evidence, the prosecution has failed to establish the guilt of the appellants beyond a reasonable doubt.

32. It is noteworthy that the individuals from whom the narcotics were allegedly recovered have been acquitted, while the appellants, from whom no recovery was made, have been convicted. This inconsistency highlights the arbitrary and unjust nature of the trial court decision.

33. Therefore, based on the analysis of the evidence and the legal precedents cited, this Court concludes that the prosecution has failed to establish its case beyond a reasonable doubt. The non-compliance with Section 50 of the NDPS Act, coupled with procedural irregularities and discrepancies in the evidence, casts serious doubt on the guilt of the accused. Consequently, the accused is entitled to the benefit of doubt, Therefore, unable to uphold the conviction and sentence of the appellant. The appellant is entitled to be acquitted. The impugned judgment and order is liable to be set aside and accordingly, appeal is liable to be allowed.

34. Therefore, the appeal is **allowed**, and the judgment and order dated 29.7.2002, passed by the trial court in Criminal Case No. 650 of 1991, Ikrar and others vs. Union of India is hereby **set aside and reversed.** The appellant, **Suhail**, is acquitted of all charges levelled against him. The appellant is on bail. Their personal bond and surety bonds are canceled and sureties are discharged.

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

36. No order as to the costs.

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**(2024) 7 ILRA 1062**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 23.07.2024**

**BEFORE**

**THE HON'BLE SAURABH LAVANIA, J.**

Criminal Appeal No. 1146 of 2019

**Sajeb Ali @ Shakeel ...Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Soniya Mishra, Anjali, Ashok Kumar, Azmi Yousuf, Chandra Prakash, Neeraj Kumar Rastogi, Rajiv Mishra

**Counsel for the Respondent:**
Govt. Advocate

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 374(2) - Appeals from conviction, Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 8/20, Section 52A - Disposal of seized narcotic drugs and psychotropic substances , Section 52A (2), (3) and (4) - procedure and manner of seizing, preparing the inventory of the seized material, forwarding the seized material and getting inventory certified by the Magistrate concerned - Section 53 - Powers of officers and authorities - Non-compliance with mandatory provisions of Section 52A NDPS Act and failure to lead primary evidence render the prosecution case unsustainable.(Para -39,41,42)**

Seizure and sampling - Charas recovered from appellant's bag - Sample drawn for chemical test - Non-compliance with Section 52A of NDPS Act - sample from the seized substance was drawn by the police team not in the presence of the Magistrate – not certified by Magistrate's - Seizure and sampling procedure not followed - No primary evidence led by prosecution. **(Para - 36 ,37,41 )**

**HELD: -** Appellant acquitted due to non-compliance with mandatory provisions of Section 52A of NDPS Act. conviction of appellant/accused set-aside. **(Para -37 to 43)**

**Criminal appeal allowed.** (E-7)

**<u>List of Cases cited</u>:**

1. St. of Kerala & ors. Vs Kurian Abraham (P) Ltd., (2008) 3 SCC 582

2. U.O.I. Vs Azadi Bachao Andolan, (2004) 10 SCC 1

3. Noor Aga Vs St. of Punj., (2008) 16 SCC 417

4. U.O.I. Vs Mohanlal & ors. (2016) 3 SCC 379

5. Gaunter Dewin Kircher Vs St. of Goa, (1993) 3 SCC 145

6. Yusuf @ Asif Vs St. of U.P., 2023 SCC OnLine SC 1328

7. Simarnjit Singh Vs St. of Punj., 2023 SCC OnLine SC 906

8. U.O.I. Vs Mohan Lal & anr., 2016 (3) SCC 379

9. Mangilal Vs St. of M.P., 2023 SCC OnLine 862

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Ms. Azmi Yousuf, learned counsel for the appellant and Shri Ajay Kumar Srivastava, learned A.G.A. for the State.

2. The instant appeal under Section 374(2) has been filed challenging the judgment dated 13.08.2018 passed by learned IIIrd Additional Sessions Judge, Lakhimpur Kheri in Session Trial No. 08 of 2015 arising out of Case Crime No. 219 of 2014 under Section 8/20 of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "Act") Police Station - Gaurifanta, District - Lakhimpur Kheri whereby the appellant has been convicted and sentenced for a period of twenty years along with the fine of Rs. 1,00,000/- and in default of fine to undergo additional six months' imprisonment.

3. It is to be noted that the appellant was apprehended/arrested on 22.11.2014 and he was never enlarged on bail. In this view of the matter, he has already gone sentence of nine years and six months.

4. The case of prosecution, as per material available on record, is to the effect

that on 22.11.2014, the accused/appellant was apprehended by Amresh Vishwas on an information received from the police informant at about 16:45 hours and thereafter the accused/appellant was searched and from his possession 9 kg and 800 gram of charas was recovered. This charas was recovered from the bag which the accused was carrying at relevant point of time, and thereafter, recovery memo was prepared.

5. After completion of necessary formalities, the charge sheet was submitted in Case Crime No. 219 of 2014 under Section 8/20 of the Act which was registered after preparation and submission of report by the concerned Police Officer of the Police present at the site of the crime.

6. Taking note of the material available on record, the trial Court on 15.04.2015 framed charge against the appellant under Section 8/20 of the Act and the said charge was read over and exlained to the accused/appellant, who thereafter, denied and upon denial, the appellant was put to trial.

7. To prove it case, the prosecution examined Amresh Viswas/PW-1, Krishna Murari Sharma/PW-2, A.S.I. Ashok Kumar/PW-3, Constable Dev Narain Singh/PW-4 and also placed on record the Fard Baramadgi (Ex. Ka.1), Site Plan (Ex.Ka.2), Charge Sheet (Ex. Ka.3), FSL Report (Ex. Ka.4), Packet(s) found in bag (Ex. Nos. 1 to 5), Plastic Packets(Ex. Ka-7), which were proved by the witnesses named above.

8. In response to the question(s) put to the accused/appellant in terms of Section 313 Cr.P.C., the accused/appellant denied the case of prosecution.

9. Thereafter, the trial court after due consideration of the submissions advanced by the learned counsel for the parties and evidence available on record passed the judgment of conviction, which has been assailed in the present appeal.

10. Impeaching the judgment under appeal, learned counsel for the accused/appellant stated that the prosecution before the trial court failed to prove its case as required under the law. The provisions of the Act and the law on the subject including the mode and the manner prescribed under Standing Order No.1/88 and the Standing Order No.1/89 as also Section 52A of the Act, as explained by various pronouncements, should be followed and any lacunae/variation in the procedure prescribed which was/is mandatory in nature, would be fatal to the case of prosecution. The prosecution was/is under obligation to follow the same for establishing its case beyond doubt.

11. It is also stated that the evidence particularly the samples produced before the trial court along with FSL Report ought not to have been considered by the trial court in absence of sample prepared and report obtained in terms of Standing Orders and Section 52A of the Act.

12. It is stated that as per Standing Orders on the subject and Section 52A of the Act, the samples were not taken. In this case, five packets were recovered from the bag of the accused/appellant, as per the case of prosecution, and from the said given packets, one sample of 100 gms. was drawn. From the recovery memo, it is not clear that as to whether from all five packets, charas was taken and thereafter one sample was drawn or only from one packet the sample was taken and it is also

not clear that as to whether sample was taken in duplicate or not.

13. It is further stated that in the instant case, as per prosecution, the charas was recovered from the possession of the accused/appellant and accordingly in terms of Standing Order No.1/88 and Standing Order No. 1/89 particularly Clause 1.6 and Clause 2.3, respectively, from all/each alleged packet(s) recovered minimum 24 gms. charas ought to have been taken as sample (in duplicate) for chemical test or packet(s) recovered should have been mixed to make homogeneous and representative before the sample (in duplicate )is drawn.

14. In this case, from recovery memo, it is apparent that the process as indicated in Standing Order No. 1/88 and 1/89 was not adopted. In clarification, appellant's counsel also stated that one view which is possible that from one packet, 100 gms. was taken as sample and as such, in these circumstances, the procedure as required was not followed. Thus, entire case of prosecution against the accused-appellant has no force.

15. It is also stated that the sample was not drawn in terms of procedure prescribed under Section 52A of the Act and despite the same the trial Court treated the sample as an evidence based upon the FSL Report for passing the judgment of conviction. Thus, the trial Court erred in doing so.

16. In support of the aforesaid contention, learned counsel for the accused/appellant placed before this Court various pronouncements and Standing Order No. 1/88 as also Standing Order No.1/89 and based upon the same, she submitted that the appeal is liable to be allowed and the judgment under appeal be set aside and the accused/appellant be set free.

17. Per contra, Sri Ajay Kumar Srivastava, learned AGA says that main witness of prosecution namely Amresh Vishwas/P.W.1, who apprehended the appellant and who was responsible for search and seizure and was present at the relevant point of time before the trial court specifically stated that from all the packets, charas was taken and thereafter sample of 100 gms. charas was drawn. He further submitted that a conjoint reading of recovery memo, FSL Report, which finds favour of prosecution story and the statement of P.W.1 would show that before the trial Court the prosecution proved its case. The appeal is liable to be dismissed. However, he could not dispute that prosecution failed to comply with the provisions of Section 52A (2) of the Act.

18. Considered the submissions advanced by the learned counsel for the parties and perused the record, which is available before this Court.

19. Having considered the aforesaid, this Court finds that the issue in the instant appeal relates to the seizure and sampling and if the seizure and sampling is not carried out in terms of the settled proposition of law which includes Section 52A of the Act, Standing Order No(s). 1/88 and 1/89 and the principles settled by the Hon'ble Apex Court in this regard then what would be the effect of the same?

20. In order to decide the aforesaid, this Court finds it appropriate to first take note of relevant provisions on the

issue as also the principles settled by the Hon'ble Apex Court.

21. On the aforesaid, the Central Government issued Standing Orders way back in the year 1988 and issued certain directions for drawing a sample of the contraband substance.

22. Section 52A of the N.D.P.S. Act was introduced by way of an amendment by the Central Government in the year 1989 and the matter relating to sampling is governed by the said Section of the law and the various instructions issued by the Govt. of India from time to time.

*"Section 52A of the NDPS Act reads as hereunder provided:*

*[52A. Disposal of seized narcotic drugs and psychotropic substances.*

*—*

*(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances 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 drug or psychotropic substance 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 or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances 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 or psychotropic substances 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 such drugs or substances and certifying such photographs as true; or*

*(c) allowing to draw representative samples of such drugs or substances, in then 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 1872) or the Code of Criminal Procedure,*

*1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence]."*

23. After insertion of Section 52A of the Act, the Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. The said Order of 1989 succeeds the previous Standing Order No.1 of 1988. Again, two subsequent standing orders, one dated 10-5-2007 and the other dated 16-1-2015, deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing orders that prescribe the procedure for conducting seizures.

24. The manner of drawing a sample of narcotics as laid down in Standing Order 1/88 dated 15.03.1988 issued by the Narcotics Control Bureau can be deduced from the following paragraphs of the said Standing Order:

*"1.4. If the drugs seized are found in packages/containers the same should be serially numbered for purposes of identification. In case the drugs are found in loose form the same should be arranged to be packed in unit containers of uniform size and serial number should be assigned to each package/container. Besides the serial number, the gross and net weight, particular of the drug and date of seizure should invariable be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a Card Board label, should be affixed with a seal of the seizing officer and on this Card Board label, the above details should be recorded.*

*1.5 Place and time of drawal of sample. - Samples from the Narcotic Drugs and Psychotropic Substances seized, must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug is recovered, and mention to this effect should invariably be made in the panchnama drawn on the spot.*

*1.6 Quantity of different drugs required in the sample*

*- The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.*

*1.7 Number of samples to be drawn in each seizure case-*

*(a) In the case of seizure of single package/container one sample in duplicate is to be drawn. Normally it is advisable to draw one sample in duplicate from each package/container in case of*

*seizure of more than one package/container.*

*(b) However, when the package/container seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/the packages/container may be carefully bunched in lots of 10 packages/containers may be bunched in lots of 40 such packages such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn.*

*(c) Where after making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remains, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.*

*(d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containers.*

*(e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot."*

*1.8. Numbering of packages/containers- Subject to the detailed procedure of identification of packages/containers, as indicated in Para 1.4 each package/container should be securely sealed and in identification slip pasted/attached on each one of them at such place and in such manner as will avoid easy obliteration of the marks and numbers on the slip. When more than one sample is drawn, each sample should also be serially numbered and marked as S-1, S-2, S-3 and so on, both original and duplicate sample. It should carry the serial number of the packages and marked as P-1, 2, 3, 4 and so on.*

*1.9. It needs no emphasis that all samples must be drawn and sealed in presence of the accused, Panchanama witnesses and seizing officer and all of them shall be required to put their signature on each sample. The official seal of the seizing officer should also be affixed. If the person from whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the duplicate of each of the samples.*

*1.10. Packing and sealing of samples: The sample in duplicate should be kept in heat-sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the S.No. of the package(s)/container(s) from which*

*the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "Secret - Drug sample/Test memo", to be sent to the chemical laboratory concerned.*

*1.13. Mode and Time limit for dispatch of sample to Laboratory: The samples should be sent either by insured post or through special messenger duly authorized for the purpose. Despatch of samples by registered post or ordinary mail should not be resorted to. Samples must be dispatched to the Laboratory within 72 hours of seizure to avoid any legal objection.*

*1.21. Custody of duplicate sample: Duplicate sample of all seized narcotic drugs and psychotropic substances must be preserved and kept safely in the custody of the investigating officer along with the case property. Normally duplicate sample may not be used but in case of loss of original sample in transit or otherwise or on account of trial court passing an order for a second test, the duplicate sample will be utilized."*

25. Standing Order No.1/89 dated 13.06.1989 issued under sub section (1) of Section 52A of NDPS Act by the Department of Revenue, Ministry of Finance, Government of India. Section (II) of the said Order of 1989 provides for the general procedure for sampling, storage, which reads as under:-

*"2.1. All drugs shall be properly classified, carefully weighed and sampled on the spot of seizure.*

*2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.*

*2.3. The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.*

*2.4. In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of*

*seizure of more than one package/container.*

*2.5. However, when the packages/containers seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of ten packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (i n duplicate) may be drawn.*

*2.6. Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain and, in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.*

*2.7. If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.*

*2.8. While drawing one sample (in duplicate ) from a particular lot , it must be ensured that representative samples in equal quantity are taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.*

*2.9. The sample in duplicate should be kept in heat-sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "Secret - Drug sample/Test memo", to be sent to the chemical laboratory concerned.*

*3. The seizing officers of the Central Government Departments, viz., Customs, Central Excise, Central Bureau of Narcotics, Narcotic s Control Bureau, Directorate of Revenue Intelligence, etc. should despatch samples of the seized drugs to one of the laboratories of the Central Revenues Control Laboratory nearest to their offices depending upon the availability of test facilities . The other central agencies like BSF, CBI and other central police organizations may send such samples to the Director, Central Forensic Laboratory, New Delhi. All State enforcement agencies may send samples of seized drugs to the Director/Deputy Director/ Assistant Director of their respective State Forensic Science Laboratory.*

*3.1. After sampling, a detailed inventory of such packages/containers shall be prepared for enclosure with the panchnama. Original wrappers shall also be preserved for evidentiary purposes."*

26. In **State of Kerala and Ors. v. Kurian Abraham (P) Ltd., (2008) 3 SCC 582** following the earlier decision in **Union of India v. Azadi Bachao Andolan, (2004) 10 SCC 1**, it was held that the aforesaid statutory instructions are mandatory in nature.

27. Considering the Standing Order 1/89, the Hon'ble Apex Court in **Noor Aga v. State of Punjab (2008) 16 SCC 417**, held as under:-

*"91. 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 of 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."*

28. It would be apt to indicate that the conflict between the Standing Order No. 1/89 and Section 52A (2) (c) of the NDPS Act, related to sampling as Standing Order No. 1/89 provides for at the spot of seizure and sending the same to laboratory within 72 hours whereas Section 52A provides for sampling before a Magistrate, and this conflict has been dealt with by the Hon'ble Apex Court elaborately in Union of India (UOI) v. Mohanlal and Ors. (2016) 3 SCC 379. The relevant paragraphs of the said Judgment of the Hon'ble Apex Court are reproduced hereunder:

***"Seizure and sampling***

*12. Section 52A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10-5-2007 and the other dated 16-1-2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself. It reads:*

*"2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (panchas) and the person*

*from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."*

*13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.*

*14. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:*

*"52A.Disposal of seized narcotic drugs and psychotropic substances.—(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances 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 drug or psychotropic substance 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 or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances 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 or psychotropic substances 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 such drugs or substances and certifying such photographs as true; or*

*(b) taking, in the presence of such Magistrate, photographs of such drugs or substances 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) When 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 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, 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."*

*15. It is manifest from Section 52A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of*

*(a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.*

*16. Sub-section (3) of Section 52A 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 52A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52A 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.*

*19. Mr Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification, etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions."*

*xxxxxx*

*31. To sum up we direct as under:*

*31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.*

*31.2. The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized narcotic drugs and psychotropic and controlled substances and conveyances duly equipped with vaults and double-locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1 of 1989 to ensure proper security against theft, pilferage or replacement of the seized drugs.*

*31.3. The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.*

*31.4. Disposal of the seized drugs currently lying in the Police Malkhanas and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading "disposal of drugs".*

29. On the issue of sampling, the Hon'ble Apex Court in the case of **Gaunter Dewin Kircher vs. State of Goa** reported in **(1993) 3 SCC 145**, held as under:-

*"5. The next and most important submission of Shri Lalit Chari, the learned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gms. Of Charas. According to the learned counsel, only a small quantity i.e. less than 5 gms. has been sent for analysis and the evidence of P.W. 1, the Junior Scientific Officer would at the most establish that only that much of quantity which was less than 5 gms. Of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis cannot be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other intoxicating type which are*

*not covered by the Act. Therefore the submission of the learned counsel is that the quantity proved to have been in the possession of the accused would be small quantity as provided under S. 27 of the Act and the accused should have been given the benefit of that section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms. also was recovered from the possession of the accused and there was no need to send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas the necessary inference would be that the other piece also contained Charas and that at any rate since the accused has totally denied, he cannot get the benefit of S. 27 as he has not discharged the necessary burden as required under the said Section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W. 1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychol, tropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W. I it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms, was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not, practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law."*

30. The Hon'ble Apex Court passed in the case of **Yusuf @ Asif vs. State of U.P.,** reported in **2023 SCC OnLine SC 1328**, while dealing with the case in which 20 Kg. of heroine was recovered from the possession of accused/Usuf @ Asif, took note of Section 52A and observed that if a sample is not drawn in terms thereof, the sample drawn during the course of search is not liable to be treated as primary evidence and after observing the same, the Hon'ble Apex Court acquitted the appellant, who was

imprisoned for a period of 6 years. The relevant paragraphs of the report placed before this Court reads as under:-

> *"3. On the basis of the information received by the Intelligence Officer of Narcotics Control Bureau, a lorry parked near Puzhal Central Jail, Chennai, was intercepted by NCB on 28.03.2000 early in the morning. Four persons were found in the lorry and upon search, they were found in possession of commercial quantity i.e. 20 kgs of heroin kept in two jute bags. The samples were drawn from each of the packets i.e. 14 big and 12 small polythene packets kept in the two jute bags and they were seized under a seizure memo i.e. Mahazar. All the four persons were arrested after receiving the analyst report that the seized substance was nothing else but heroin.*
>
> *4. Consequently, the case crime No.113/2000 was registered. The trial court upon consideration of the evidence on record held all the four persons guilty under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 19852 and convicted them to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1 lakh each, in default of which a further imprisonment of one year was ordered.*
>
> *5. All the four accused persons preferred appeal before the High Court. During the pendency of the appeal, A4 (Ganesh Ram) died and the appeal was dismissed as abated against him vide order dated 15.07.2022. The High Court vide judgment and order dated 11.10.2022 dismissed the appeal holding that there is no error in the findings recorded by the trial court and, therefore, the accused persons were directed to serve the remaining sentence after adjusting the period of imprisonment already undergone.*
>
> *6. Aggrieved by his conviction and sentencing by the trial court and its affirmation by the High Court, A1 alone has preferred the present appeal assailing the judgment and order of the High Court dated 11.10.2022.*
>
> *7. It may be relevant to mention here that A1 is the owner of the contraband and the same was being transported from Madhya Pradesh to Chennai with the help of A2 to A4. A1 had reached the place of seizure of the contraband to receive it, once it had reached Chennai.*
>
> *8. We have heard learned Senior counsel for the appellant. The main plank of his argument is that the entire action of seizure and sampling is wholly illegal. It was done in violation of the mandatory provisions of Section 52A (2) of the NDPS Act as the procedure prescribed therein was not followed in drawing the samples and seizing the alleged narcotic substance. Further, there is a serious doubt about the correctness of samples sent for analysis as to whether they were actually the samples of the seized contraband.*
>
> *9. Learned counsel for the respondent on behalf of the State submitted that the search and seizure was based upon the prior*

*information received by the Intelligence Officer of NCB who has been examined as PW1. The accused persons were disclosed the identity of the officers and after obtaining their consent in writing, the search was carried out in the presence of Superintendent of Police, NCB (PW8) who was a gazetted officer.*

*After seizure, two samples from each packet were drawn and packed separately and were sealed. The NCB seal No.12 was affixed to it and the correct seal number was mentioned in the Mahazar and all other documents except in the godown receipt whereby inadvertently seal No.11 was mentioned. The Officers involved in the search, seizure and arrest operation had duly submitted their report as referred to under Section 57 of the NDPS Act.*

*10. In order to test the above submissions, it would be relevant to refer to the provisions of Section 52A (2), (3) and (4) of the NDPS Act. The aforesaid provisions provide for the procedure 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 the samples in connection thereof on being certified by the Magistrate shall be recognized as the primary evidence in connection with the offences alleged under the NDPS Act.*

*11. For the sake of convenience, relevant subsections of Section 52A of the NDPS Act are reproduced hereinbelow:*

***"52A. Disposal of seized narcotic drugs and psychotropic substances.-***

*(1) .......*

*( 2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officerincharge of the nearest police station or to the officer empowered under section 53, the officer referred to in subsection (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 subsection (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 [such drugs or 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 subsection (2), the Magistrate shall, as soon as may be, allow the application.*

*(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under subsection (2) and certified by the Magistrate, as primary evidence in respect of such offence."*

*12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, 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.*

*13. Notwithstanding the defence set up from the side of the respondent in the instant case, 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 that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.*

*14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not 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 of the list of samples so drawn.*

*15. In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officerincharge of the nearest police station or to the officer*

*empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.*

*16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.*

*17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with fine of Rs.1 lakh and in default of payment of fine to undergo further imprisonment of one year is hereby set aside.*

*18. The appellant has already undergone more than 6 years of imprisonment out of 10 years awarded to him. He is on bail and has been granted exemption from surrender by this Court. Therefore, his bail bonds, if any, stands cancelled.*

*19. The appeal is allowed with no order as to costs."*

31. In **Simarnjit Singh Vs. State of Punjab**, reported in **2023 SCC OnLine SC 906**, Hon'ble the Supreme Court while acquitting the accused relied upon **Union of India Vs. Mohan Lal and Another**, reported in **2016 (3) SCC 379** and held that mandate of Section 52A of the Act was not complied with, and made the following observations in para No. 10 and 11:-

"10. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of Mohanlal. This creates a serious doubt about the prosecution's case that substance recovered was a contraband.

11. Hence, the case of prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence."

32. The Hon'ble the Supreme Court in ***Mangilal Vs. State of Madhya Pradesh***, reported in ***2023 SCC OnLine 862***, while acquitting the accused, has observed that mandate of Section 52A of the Act has to be complied with by observing that:-

*"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 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 seriatim wise and keeping them in lots preceded by compliance of the procedure for drawing samples."*

33. For coming to the conclusion that sampling was carried out,in other words sample/samples was/were drawn, strictly in terms of law or not, this Court finds it appropriate to take note of the recovery memo which is extracted herein-under:

*"सेवा में,*

*श्रीमान् थाना प्रभारी महोदय कोतवाली गौरीफन्टा जनपद खीरी आज दिनांक 22/11/2014 को मैं INSP/GD अमरेश विश्वास मय हमराही बल सं० नं० 9062910 मु०आ० अशोक कुमार नं0 080070426 सा०/आ०-रनदेव प्रशान्त नं. 09060141 सा०/आ० मोहन कुमार साहु नं. 110662756 सा०/अ० उमेश कुमार गुप्ता नं0 110665676 सा०/आ० भवर योगेश व थाना गौरिफेन्टा से वास्ते संयुक्त चेंकिग हेतु उपस्थित आए आरक्षी नं० 968CP उदय राज पटेल व आरक्षी 586 CP सनवाय देवनारायण सिंह के सशस्त्र सीमा बल 39वीं वाहिनी "जी" समवाय गौरिफन्टा के नेपाल सीमा से भारत की तरफ आने वाले वाहनों आदि की चेंकिग अभियान डियुटी डिगनियां तिराहा के पास मामूर थे कि एक व्यक्ति जंगल के रास्ते होते हुए डिगनियां तिराहा के पास सड़क पर पहुंचा कि हम लोगों को देखकर ठीठका व पिछे मुड़कर वापस होना चाहा कि हम लोगों ने रोका व टोका तथा घेर कर पास पहुंचकर वापस होने का कारण पुछा तो उक्त व्यक्ति ने बताया की साहब हमारे पास नाजायज चरस है इस कारण आप लोगों के डर से वापस होने लगा था इस पर नाम पता पुछा गया तो उसने अपना नाम साजेब अली उर्फ शकील पुत्र अख्तर अली निवासी पुराना फुलवारी बस पार्क धनगड़ी थाना धनगड़ी जनपद कैलाली नेपाल राष्ट्र बताया चूंकि उक्त व्यक्ति अपने पास चरस होने की बात बताई जो 8/20 NDPS Act के अन्तर्गत दण्डनीय अपराध है उपरोक्त को उसके अधिकार से अवगत कराते हुए कि तुम्हारे पास चरस है अपनी जमा तलासी किसी राजपत्रित अधिकारी / मजिस्ट्रेट को दे सकते हो तलासी हेतु राजपत्रित अधिकारी अथवा मजिस्ट्रेट को बुलाया जाय इस पर उक्त व्यक्ति ने कहा की साहब जब आप लोग ने पकड़ लिया है तो आप लोग ही मेरी तलासी ले ले मजिस्ट्रेट अथवा राजपत्रित अधिकारी को बुलाने की आवश्यकता नहीं है इस पर मेरे द्वारा पकड़े गये पुरूष की समक्ष हमराही कर्मचारीगण जमा तलासी ली गई तो अपने पीठ पर लटकाये बैग जो ब्लैक हल्का ब्राऊन कलर का है बैग की तलासी बैग उत्तरवा कर ली गई बैग के अन्दर 5 पैकेट में पोलोथीन से लिपटी हुई वस्तु बरामद हुई जिसकी पोलोथीन खोलकर देखा गया सभी जमा तलासी से उसके पास से पांचो पैकेट चेक किये गये तो चरस बरामद हुई तथा जमा तलासी से उसके पास पहने पैन्ट से 600 रू० भारतीय मुद्रा व एक अदद मोबाइल Intex डबल सीम बरामद हुआ चुके उक्त व्यक्ति का यह कार्य 8/20 NDPS Act के अन्तर्गत दण्डनीय अपराध है अतः बाजाफ्ता कारण*

गिरफ्तारी बताते हुए 16.45 Pm पर हिरासत में लिया गया बरामद चरस का वजन कराने हेतु नं0 080070426 सा०/आरक्षी रनदेव प्रशान्त को कम्पनी मुख्यालय भेजकर इलेक्ट्रोनिक तराजु मंगाया गया और चरस का वजन किया गया तो 9 किलो 800 ग्राम पाया गया बरामद चरस से 100 ग्रा० अलग परीक्षण हेतु अलग से नमुना निकाला गया शेष चरस उसी बैग में रखकर एक कपड़े में रखकर सर्व मोहर किया गया नमुना मोहर तैयार किया गया तथा नमुना चरस को भी एक कपड़े में सर्व मोहर कर नमुना मोहर तैयार किया गया दौराने गिरफ्तारी बरामदगी मौके पर आए राहगीरों से गवाही हेतु कहा गया परन्तु कोई भलाई-बुराई के कारण तैयार नहीं हुआ फर्द मौके पर नं० 090541707 सा०/ आरक्षी अनिश कुमार से बोल बोल कर लिखाई गई हमराही कर्मचारीगणों को पढ़कर सुनाकर हस्ताक्षर बनवाये जा रहे हैं गिरफ्तारी व बरामदगी के समय माननीय सर्वोच्च न्यायालय व मानवाधिकारों के आयोग के आदेशों/निर्देशों का अच्छे से पालन किया गया आ०/स० अनिश कुमार तराजु के साथ कम्पनी से मौके पर आया था।"

34. To prove the above quoted recovery memo/arrest memo, Inspector Amresh Vishwas was produced as witness/P.W.1. The statement of this witness reads as under:

"अमरेश विश्वास इंस्पेक्टर एस०एस०बी० 39 बटालियन गौरीफन्टा वर्तमान 19 बटालियन ठाकुरगंज, जिला विशनगंज बिहार ने सशपथ बयान किया कि माह नवम्बर सन् 2014 में मैं सशस्त्र सीमा बल 39 वाहिनी G. समवाय गौरीफंटा में कार्यरत था। दिनांक 22.11.14 को मुख्य आरक्षी अशोक कुमार सामान्य आरक्षी रनदेव प्रशांत व सामान्य आरक्षी मोहन कुमार साहू व सा० आरक्षी दिनेश कुमार गुप्ता तथा सामान्य आरक्षी भंवर योगेश सहित गौरीफंटा थाने से संयुक्त चेकिंग के लिये थाने के आरक्षी उदय राज पटेल तथा आरक्षी देवनरायन सिंह के साथ नौपाल सीमा से भारत की तरफ आने वाले वाहनो की चेकिंग अभियान में डिगनिया तिराहे के पास मामूर थे कि एक व्यक्ति जंगल के रास्ते तिराहे के पास सड़क पार आया। और हम लोगों के देखते ही ठिठका और पीछे मुड़कर वापस होना चाहा शक होने पर हम लोगो ने उसे रोका व टोका तथा घेर कर पास पहुंचकर वापस होने का कारण पूछा तो उसने कहा कि साहब हमारे पास नाजायज चरस है जिसके डर के कारण मैं वापस हो रहा था। उसका नाम पता पूछा तो उसने अपना नाम साजेब अली @ शकील S/o अख्तर अली निवासी पुराना फुलवारी बस पार्क धनगढ़ी थाना धनगढ़ी जिला कैलाली नेपाल बताया।

उसके तथा अपने पास चरस होने की बात बताये जाने पर उससे मेरे द्वारा बताया गया कि तुम अपने पास नशीली बस्तु चरस होना बता रहे हो इसलिए तुम अपनी जामा तलाशी किसी राजपत्रित अधिकारी या मजिस्ट्रेट के समक्ष दे सकते हो यह तुम्हारा अधिकार है। यदि तुम कहो तो उन्हे यही बुला लिया जाय। तो उसने मौखिक सहमति देते हुए कहा कि अब और किसी को बुलाने की आवश्यकता नहीं है। अब आप लोगों ने पकड़ ही लिया है तो आप लोग ही मेरी जामा तलाशी ले लो। तलाशी से उसकी पीठ पर लटकाये बैग की तलाशी ली गयी तो उसके अन्दर पांच पैकेट में पालीथीन से लिपटी हुई वस्तु बरामद हुई। जिसकी पालीथीन खोल कर देखा गया व चेक किया गया तो वह पांचो पैकेट चरस थे। तथा पहने पैंट की जेब से मु० 600/- रूपया भारतीय तथा एक मोबाइल फोन इन्टेक्स कम्पनी का डबल सिम का बरामद हुआ। बरामद चरस को वजन करने के लिए आरक्षी रनदेव प्रशांत की कम्पनी मुख्यालय से इलेक्ट्रानिक व तराजू मंगाया गया। और वजन किया गया तो उसका वजन नौ किलो आठ सौ ग्राम पाया गया। जिसमें से सभी पैकटों से बतौर नमूना 100gm चरस लेकर अलग तथा शेष पैकेटों को उन्ही पैकटों में रखकर कर कपड़े में सील सर्व मुहर कर नमूना मुहर तैयार किया।

गिरफ्तारी व बरामदगी से संबंधी फर्द मौके पर ही मेरे द्वारा बोलने पर आरक्षी अनिश कुमार से लिखवाई। गिरफ्तारी व बरामदगी के संदर्भ आने जाने वाले जनता के लोगों से बतौर साक्षी हस्ताक्षर करने के लिए कहा गया। तो सभी बिना नाम बता बताये चले गये। फर्द को पढ़कर सभी को सुनाकर मैंने अपने हस्ताक्षर बनाये तथा हमराहियान ने भी उस पर हस्ताक्षर बनाये। फर्द की एक प्रति अभियुक्त को देकर सुनाकर उससे भी हस्ताक्षर करवाये। गिरफ्तारी के समक्ष मानवाधिकार व सर्वोच्च न्यायालय के निर्देशों का पालन करते हुए समस्त कार्यवाही की गई। तत्पश्चात् गिरफ्तारी शुदा मुल्जिम व बरामद शुदा माल थाने लाकर मेरे द्वारा अभियुक्त के विरूद्ध मुकदमा कायम कराया

*गया। अभियुक्त की गिरफ्तारी समय 16.45 pm पर की गई थी। फर्द पत्रावली पर उपलब्ध है जिस पर मेरे भी हस्ताक्षर है। जिस पर प्रदर्श क-1 डाला गया। घटना की बाबत विवेचक ने मुझसे पूंछताछ भी की थी।*

*X X X*

*By Defence Counsel*

*मैं कैम्प से गिरफ्तारी होने के आधा घंटे पहले चला था। शेष हमराहियान डिगनिया तिराहे पर मिले थे। डिगनिया तिराहे पर एक चाय की छोटी सी दुकान है। वहीं पर टूटा फूटा यात्री प्रतीक्षालय भी बना हुआ है। तिराहे के थोड़ा आगे बाबादास की झोपड़ी पड़ी है। यह मुझे याद नही है कि मैं डिगनिया तिराहे पर कितने बजे पहुंच गया था। अभियुका साजेब अली जंगल से मेन रोड पर आ रहा था। अभियुका रोड के नजदीक आने पर हम लोगों को देखकर मुड़ा था। आवाज देने पर रूक गया था। रोड से 30 मीटर की दूरी पर ही हम लोगों ने अभियुका को पकड़ लिया था। मैं नहीं बता पाऊंगा कि पलिया गौरी फंटा रोड पूरब पश्चिम को है या उत्तर दक्खिन की है।* ***अपठनीय*** *चौकी मार्ग बनकटी होकर जाता है लेकिन किस दिशा में जाता है राह मुझे याद नहीं है। काफी समय की बात है। डिगनियां तिराहा पर आवागमन रहता है। लेकिन शाम होते ही आवागमन बन्द हो जाता है। हम लोगों ने अभ्युिक्त को लगभग 4.45 PM पर गिरफ्तार किया था। गिरफ्तारी करने के बाद हम लोगों ने अभियुक्त की तलाशी ली थी। तलाशी में छः पैकेट बरामद नहीं हुए थे बल्कि पांच पैकेट बरामद हुए थे। यह पैकेट पालीथीन में लिपटे थे। पालीथीन का रंग मुझे याद नही है जिस बैग से चरस बरामद हुई थी वह शायद काले रंग का था। चरस की जानकारी मुझे अभियुक्त ने स्वयं दी थी। एवं मेरे साथ मौजूद पुलिस व अपने साथियों के बताने के अनुसार मैंने पाया था कि चरस है। फर्द बरामदगी मैंने मौके पर तैयार कराई थी। बरामद माल का नमूना अलग कपड़ों में सील किया गया था। नमूना की फर्द अलग से नहीं लिखी गई थी। फर्द बरामदगी में ही इंगित कर दिया गया था। अभियुक्त की तलाशी लेने व फर्द लिखने में लगभग एक घंटा बीस मिनट लग गया था। अभियुक्त के पहले हम लोग जिप्सी से लेकर अपने मुख्यालय पर आये। उसके बाद थाने ले गये थे। मुख्यालय पर लाने व विभागीय कार्यवाही व थाने तक ले जाने में लगभग 12 घंटे का समय लगा था। जिस समय गिरफ्तारी की गई थी उस समय कोई चौपहिया वाहन नहीं निकले थे एक दो बाइक निकली थी लेकिन उन लोगों द्वारा कोई गवाही के लिए तैयार नहीं था। तिराहे पर चाय की दुकान ज्यादातर बंद रहती है व बाबादास झोपड़ी में उस समय मौजूद नहीं थे। गिरफ्तारी के स्थान से बनकटी लगभग 12 से दो किमी पर होगा। मैंने किसी अपने हमराही को बनकटी से गवाह लाने के लिए नहीं भेजा था। नमूना मोहर की सील किसकी थी मुझे याद नही है। बरामद माल आज मेरे सामने न्यायालय में मौजूद नहीं है। गिरफ्तारी के समय मैंने अभियुक्त से किसी राजपत्रित अधिकारी को बुलाने के लिए कहा था। और उसे राजपत्रित अधिकारी के पास चलने के लिए भी कहा था। यदि फर्द में किसी राजपत्रित अधिकारी के पास ले चलने वाली बात अंकित न हो तो मैं इस सम्बन्ध में नहीं बता सकता। फर्द की नकल अभियुक्त को दी थी। थाने पर FIR लिखने में आधा एक घंटा लगा था। दरोगा जी ने मुझसे घटना की बाबत पूंछतांछ की थी। घटना स्थल पर लेकर दरोगा जी मुझे गये थे। फर्द बरामदगी अनेश कुमार ने लिखी थी। मेरे साथ गौरी फंटा थाने के जो पुलिस के कर्मचारी थे उसमें हस्ताक्षर मैंने फर्द पर कराया था।*

*यह कहना गलत है कि कोई बरामदगी अभियुक्त से न हुई हो।*

*यह भी कहना गलत है कि अभियुक्त को घर से पकड़कर लाकर झूठा चालान कर दिया गया है।*

*बयान मेरे बोलने पर रीडर द्वारा लिखा गया। सुनकर तस्दीक किया।*

*ह० अपठनीय*

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*II ASJ*

*10.8.17*

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*ह० अपठनीय"*

35. From a bare reading of recovery memo and the statements of witness namely Amresh Viswas it is evident that the sample was not taken/drawn in terms of Standing Order(s) on the subject and Section 52A of the Act. In this case, as per the case of prosecution, five packets were recovered from the bag of accused/appellant, as per the

case of prosecution, and from the said five packets, 9 kg and 800 gms. charas was recovered and thereafter, one sample of 100 gms. was drawn. In the Recovery Memo, it is not indicated that from all five packets, charas was taken and thereafter one sample was drawn. Recovery Memo does not indicate that charas of all the packets was mixed and therafter, 100 gms was taken for chemical examination and it also does not indicate that the sample was taken in duplicate. Improvement in this regard by the witness of prosecution namely Amresh Vishwas while making the statement before the Court during trial would be of no help to the prosecution.

36. In the instant case, as per prosecution, the charas was recovered from the possession of the accused/appellant and accordingly in terms of Standing Order No.1/88 and Standing Order No. 1/89 particularly Clause 1.6 and Clause 2.3, respectively, from all/each alleged packet(s) recovered minimum 24 gms. charas ought to have been taken as sample (in duplicate) for chemical test or packet(s) recovered should have been mixed to make homogeneous and representative before the sample (in duplicate )is drawn. It is apparent that the process as indicated in Standing Order No. 1/88 and 1/89 was not adopted.

37. Taking note of the aforesaid and principles/proposition settled on the subject in the pronouncements, referred above, this Court finds that the prosecution had not followed the procedure as prescribed while drawing the sample of recovered charas from the bag of the accused/appellant.

38. 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.

39. Section 52A (2), (3) and (4) of the NDPS Act provides for the procedure 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.

40. 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.

41. No evidence is 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 is 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 that the sample from the seized substance was drawn by the police team and not in the presence of the Magistrate. There is no evidence on record to prove that the Magistrate had certified the inventory of the substance seized or the list of samples so drawn. For non-compliance of mandatory provisions of Section 52A, the sample 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.

42. Accordingly, this Court is of the opinion that the failure of the police team which carried out the proceedings of interception and seizure failed to lead primary evidence in regard to seized contraband and sample.

43. In view of foregoing discussion the conviction of the appellant/accused deserves to be set-aside.

44. The impugned judgment passed and sentence awarded by trial court convicting the appellant Sajeb Ali @ Shakeel and sentencing them to undergo twenty years rigorous imprisonment and Rs.1,00,000/- fine with a default stipulation is hereby set-aside. Accordingly, the appeal stands **allowed**.

45. Consequently, the appellant stand acquitted of the aforesaid charge, as he is held in jail custody, the court concerned will issue a release order in compliance of this judgment, and if he is not wanted in other case, he shall be set at liberty forthwith.

46. The appellant will execute, a personal bond and two sureties each in the like amount to the satisfaction of the court concerned, within one week of his release from jail, in compliance of provision of Section 437 (A) Cr.P.C. read with Section 481 of Bhariya Nagrik Suraksha Sanhita, 2023 to the effect that he 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.

47. Office/Registry is directed to send the copy of this judgment for necessary compliance along with trial Court record to the court concerned forthwith.

48. The Court records the valuable assistance given by Ms. Urmish Shankar, Research Associate, attached with me in drafting this judgment and finding out case laws applicable in the present case.

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**(2024) 7 ILRA 1086**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 03.07.2024**

**BEFORE**

**THE HON'BLE SHAMIM AHMED, J.**

Criminal Appeal No. 1203 of 2023

**Babu Khan ...Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Satendra Nath Rai, Bajhul Quamar Siddiqui, Mohd. Arshad Khan, Satendra Nath Rai

**Counsel for the Respondent:**
G.A.

**U.P. Gangster and Anti Social (Prevention of Activities ) Act, 1986-Sectiosn 14, 16 & 18-**If property being made subject matter of an attachment u/s 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 has to enter into the question and record his own finding on the basis of the inquiry held by him u/s 16 of the Act. If 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 favor of the person in Possession.

**Appeal allowed.** (E-9)

**List of Cases cited:**

1. Smt. Maina Devi Vs St. of U.P., 2013(83) ACC 902

2. Smt. Shanti Devi wife of Sri Ram Vs St. of U.P. 2007(2) ALJ 483(All)

3. Rajbir Singh Tyagi Vs St. of U.P. & ors.2018 SCC Online AII 5986

4. Smt. Maina Devi Vs St. of U.P. 2013(83) ACC 902

5. Smt. Shanti Devi wife of Sri Ram Vs St. of U.P. 2007(2) ALJ 483 (All),

6. Rajbir Singh Tyagi Vs St. of U.P. & ors.2018 SCC Online AII 5986

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

1. Pleadings in the case have been exchanged between the parties.

2. Heard Sri Satendra Nath Rai, learned counsel for the appellant as well as Dr. V.K. Singh, learned Government Advocate alongwith Sri Ashok Kumar Singh, learned A.G.A.-1 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 appellant, namely, Babu Khan, with a prayer to set aside the judgment and order dated 03.03.2023 passed by the learned Addl. Sessions Judge/Special Judge (Gangster Act), Court No. 13, Lakhimpur Kheri, in Criminal Misc. Case Nos. 210 of 2022 and

218 of 2022, titled Babu Khan v. State of U.P., under section 16 of the U.P. Gangsters and Anti Social Activities (prevention) Act, 1986, Case Crime No. 0243 of 2022, under section 2/3 of the U.P. Gangsters and Anti Social Activities (prevention) Act, 1986, P.S. Pasgawan, District Lakhimpur Kheri. It has further been prayed that the attachment-order dated 08.06.2022 passed in Case No. 1158 of 2022 (Annexure-4 to the application) and order dated 27.06.2022 (Annexure-5 to the application) passed in Case No. 1349 of 2022 under Section 14(1) of the U.P. Gangsters and Anti Social Activities (prevention) Act, 1986, passed by the District Magistrate, Lakhimpur Kheri, whereby the District Magistrate attached the following property of the appellant including a house situated at Town Mohammadi, with the finding that the appellant has purchased the property- movable and immovable- from the income earned by involving in anti-social activities :

> "Case No.1158/22- 01 अदद मोटर साइकिल सेन्ट्रों रजि० नं०-यू०पी० 31 ए0डी0-0102 कीमत करीब 50,000/-रू०, कस्बा मोहम्मदी स्थित मकान कीमत करीब 12,93,000/-रू०, ग्राम बरैंची में अभियुक्त बाबू खां व उसकी पत्नी रुकसाना बेगम के नाम गाटा सं0 766क व 767 कुल 110 वर्गमी०, ग्राम बरैंची के नामित गाटा सं0 1044, 1197, 1090ख, 1091, 507 कुल 6 किता रकबा 4.647हे0 स्थित ग्राम सहजना व भूमि गाटा सं0 310 रकबा 0.628हे0 कीमत करीब 28,57,400/-रू0 तथा ग्राम बरैंची में गाटा सं0 766क व 767 कुल दो किता पर बनी दुकानों की कीमत 29,70,000/-रू०। उक्त चल व अचल की कुल कीमत करीब 71,70,400/-रू0 (इकहत्तर लाख सत्तर हजार चार सौ रू०).
>
> Case No. 1349/22- गाटा सं0 115/1.177 हे0 776 वर्गमी0 कीमत मु0 73,69,600/-रू० व मकान कीमत 21.73 लाख रू० व गाटा सं0 352 रकबा 1.619हे0 ग्राम कोटा कीमत 25,00,000/-रू०। उक्त अचल सम्पत्ति कुल कीमत मु० 1,31,59,600/-रु0 (01 करोड़ 31 लाख 59 हजार छः सौ रू०)."

4. In short, the facts of the case are that in case No. 1158 of 2022, action was started on report of the Inspector In-charge, Police Station Mohammadi, dated 01-06-2022, which was approved by the Circle Officer, Mohammadi, on 01-06-2022; by the Addl. Superintendent of Police on 04-06-2022 and was sent by the Superintendent of Police alongwith his recommendation on 06.06.2022. It was mentioned in the police report that Babu Khan S/o Irshad Khan, resident of village Barainchi, P.S. Pasgwan, District Kheri (appellant herein), who is an accused in FIR No. 243/2022 Section-2B/3, U.P. Gangster and Anti-Social Activities (Prevention) Act 1986, P.S. Pasgwan, has the criminal history as follows:-

> 1- Case Crime No. 1868/11 Section-147/504/506/420/467/468 IPC, Police Station Mohammadi, District Kheri;
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> 2- Case Crime No. 445/18 Section 447, IPC and 2/3, Prevention of Damage to Public Property, Police Station Pasgwan, District Kheri;
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> 3- Case Crime No. 214/22, Section-385/447/504/506 IPC, Police Station Pasagwan, District Kheri;
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> 4- Case Crime No. 215/22, Section-147/452/504/506 IPC, Police Station Pasagwan, District Kheri;
>
> 5- Case Crime No. 219/22 Section 447 IPC and

2/3, Prevention of Damage to Public Property, Police Station Pasgwan, District Kheri;

6- Case Crime No. 226/22 Section-447 IPC

7- Case Crime No. 243/22 Section-2B/3, UP Gangesters and Anti-Social Activities (Prevention) Act, Police Station Pasgwan, District Kheri.

5. It was mentioned in the police report/records that Mehboob Khan son of Shamshad Khan, resident of village Barainchi, Majra Sisaura Nasir, police station Pasgwan, district Kheri (gang leader), whose members are Babu Khan S/o Irshad Khan (Appellant), Dilshad Khan S/o Shamshad Khan, Sarwar Khan S/o Irshad Khan, Tufail Khan S/o Shamshad Khan, Munna Khan S/o Shamshad Khan, Ejaz Khan S/o Shamshad Khan, Shabban Khan S/o Irshad Khan and Shabbir S/o Irshad Khan, residents of village Barainchi, Majra Sisaura Nasir, police station Pasgwan, District Kheri, is an organized gang. The accused, along with gang leader Mahboob Khan and his associates, have committed crimes under Chapters 16, 17 and 22 of the Indian Penal Code to obtain financial, material and infrastructural benefits for their associates. Accused Babu Khan along with his associates had acquired the property- movable and immovable as stated in the report, amounting to Rs. 1,31,59,600/- (Rs 1 crore 31 lakh 59 thousand six hundred rupees) by committing crime, which is punishable under Section 14(1) U.P. Gangster and Anti-Social Activities (Prevention), which should be confiscated under Section 14(1) of the Act 1986. A similar report of the Incharge, P.S. Mohammadi, dated 21.06.2022 for attachment of the movable and immovable properties of the appellant worth Rs. 1,31,59,600.00 (1 crore, 31 lacs, 59 thousand and 600 rupees only) was also forwarded by the Superintendent of Police vide letter dated 25.06.2022. On these reports of the Superintendent of Police, Kheri, the District Magistrate, Lakhimpur-Kheri, passed the impugned orders dated 08.06.2022 and 27.06.2022 directing attachment of the aforesaid properties of the appellant.

6. Against these orders, the appellant preferred Appeals/Criminal Misc. Case Nos. 210 of 2022 and 218 of 2022, titled Babu Khan v. State of U.P., under section 16 of the U.P. Gangsters and Anti Social Activities (prevention) Act, 1986, before the learned Addl. Sessions Judge/Special Judge (Gangster Act), Court No. 13, Lakhimpur Kheri, but these cases have been dismissed by the learned Addl. Sessions Judge/Special Judge (Gangster Act), Court No. 13, Lakhimpur Kheri vide judgment and order dated 03.03.2023, hence this appeal.

7. Learned counsel for the appellant submits that the appellant is a very little educated person. He does agriculture work on his own land as well as on the land of others on contract. He has never been involved in any anti-social activity nor has acquired any property by involving in crimes. In early period of his life he used to do milk-business. Thereafter, in the year 2003 he purchased Gata No. 766 in Village Barainchi, Pargana Mohammadi, District Kheri, in the name of his wife Rukhsana, errected shops and house on this land and started living there. The learned counsel has further stated that the applicant has been implicated in the aforesaid cases due to enmity and the case under the Gangster Act was imposed upon the appellant in the year 2011, whereas the

property of the appellant which was attached vide orders dated 08.06.2022 and 27.06.2022 passed by the District Magistrate, Lahimpur Kheri, under section 14 (1) of U.P. Gangster Act, was acquired by the appellant much earlier to the imposition of Gangster Act upon him being ancestral property.

8. Elaborating the submissions, learned counsel for the appellant has submitted that the attached property, the reference of which is given above, was in fact ancestral and self-acquired property of the appellant, not built up from the earnings of the crime.

9. Learned Counsel of the appellant further submitted that in furtherance of the reports forwarded by the Superintendent of Police, Kheri, aforementioned, the District Magistrate, Lakhimpur Kheri proceeded to exercise its power under Section 14(1) of the Gangster Act and passed orders dated 08.06.2022 and 27.06.2022 for attaching the properties of the appellant.

10. Being aggrieved by the aforesaid attachment orders dated 08.06.2022 and 27.06.2022 passed by District Magistrate, Lakhimpur Kheri, representations dated 21.07.2022 and 04.08.2022 were preferred by the appellant before District Magistrate, Lakhimpur Kheri, under Section 15 (1) of the Gangster Act seeking release of the appellant's properties from attachment. However, the aforesaid representations were dismissed in a cursory manner by the District Magistrate, Lakhimpur Kheri, vide orders dated 08.06.2022 and 27.06.2022. While passing the impugned orders dated 08.06.2022 and 27.06.2022 the District Magistrate, Lakhimpur Kheri, referred the case to the learned Gangsters Court under Section 16 (1) of the Gangster Act in respect of properties which were not released by him; and, the learned Gangsters Court, thereafter, proceeded to pass the impugned orders.

11. Learned counsel for the appellant further submitted that the District Magistrate, Lakhimpur Kheri, has wrongly and incorrectly attached the movable and immovable property including the house of the appellant 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.

12. Clarifying the position, it has been urged by the learned counsel for the appellant that as a matter of fact the appellant in the earlier days of his life used to to the milk-work and agriculture work on his own land as well as on the land of others on contract. Thereafter, in the year 2003 he purchased Gata No. 766 in Village Barainchi, Pargana Mohammadi, District Kheri, in the name of his wife Rukhsana, errected shops and house on this land and started living there. Gata Nos. 20, 64, 206, 291; areas 0.3820, 0.0830, 0.4050, 1.2590 respectively in the name of the applicant’s father Irshad Khan S/o Ghoora Khan are situated in Village Sisora Nasir, Pargana and P.S. Pasgawan. The applicant’s father had purchased Tractor Swaraj-735 by which he used to cultivate his land and the land of others on contract. The applicant got a fertilizer-licence and used to sell fertilizer. To support the family, the applicant had taken loan of Rs. 14,02,684.00 from HDFC Bank, and Rs. 1,42,890.00 from Aryavrat Bank, total Rs.

15,45,574.00 much earlier even when no criminal case was registered against him and even before imposing the Gangster Act upon him. However, the concerned authorities without considering all these relevant facts and documentary evidence, passed the impugned orders on wrong premise with oblique motive.

13. Learned counsel for the appellant further submitted that the learned trial court while passing the impugned orders dated 03.03.2023, without properly perusing the contents of applications 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 the immovable property including the house which has been attached vide orders dated 08.06.2022 and 27.06.2022 by the District Magistrate, Lakhimpur Kheri.

14. Learned counsel for the appellant further submits that the impugned orders dated 08.06.2022 and 27.06.2022 passed by the District Magistrate, Lakhimpur Kheri do not reveal that the District Magistrate, Lakhimpur Kheri 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 the appellate court has also passed the orders dated 03.03.2023 in cursory manner without analysing the documents of the appellant. Thus both the impugned orders are not sustainable in the eye of law.

15. Per contra, Dr. V.K. Singh, Government Advocate has argued that the learned appellate court has correctly appreciated the material on record before passing the impugned order. The District Magistrate, Lakhimpur Kheri has passed the impugned orders dated 08.06.2022 and 27.06.2022 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, concerned and as such it is wrong to say that the impugned orders of attachment passed by the competent authority suffers from infirmities.

16. Learned Government Advocate 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 attached by the learned District Magistrate, Lakhimpur Kheri. Thus the learned courts below 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.

17. I have heard learned counsel for the appellant, learned Government

Advocate for the opposite party and gone through the impugned orders passed by the courts below.

18. 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".*

19. 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."*

20. 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 16 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.

21. 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.

22. 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 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.

23. 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.*
>
> *7. 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."*

24. 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."*

25. Further, another Coordinate Bench of this Court in the case of **Rajbir Singh Tyagi Vs State of U.P. and Others 2018 SCC Online All 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."*

26. 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 All 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 from his ancestors, 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 orders dated 08.06.2022 and 27.06.2022 passed by the District Magistrate, Lakhimpur Kheri, 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 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 business as well as at his native place, from which the appellant had acquired the properties 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 2011 and the impugned orders of attachment were passed in mechanical manner without application of mind and is arbitrary. Thus the impugned orders dated 08.06.2022 and 27.06.2022 passed by the District Magistrate, Lakhimpur Kheri, and the impugned order dated 03.03.2023 passed by the Additional Session Judge/Special Judge (Gangster Act), Court No. 13, Lakhimpur Kheri, are illegal and the same are liable to be quashed.

27. In view of above facts and circumstances of the case, the impugned orders passed by the trial courts 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.

28. Accordingly, the present appeal is **allowed**. The impugned order dated 08.06.2022 passed in Case No. 1158 of 2022 and order dated 27.06.2022 passed in Case No. 1349 of 2022 under Section 14(1) of the U.P. Gangsters and Anti Social Activities (prevention) Act, 1986, by the District Magistrate, Lakhimpur Kheri, and the impugned order 03.03.2023 passed by the learned Addl. Sessions Judge/Special Judge (Gangster Act), Court No. 13, Lakhimpur Kheri, in Criminal Misc. Case Nos. 210 of 2022 and 218 of 2022, titled Babu Khan v. State of U.P., under section 16 of the U.P. Gangsters and Anti Social Activities (prevention) Act, 1986, registered as Case Crime No. 0243 of 2022, under section 2/3 of the U.P. Gangsters and Anti Social Activities (prevention) Act, 1986, P.S. Pasgawan, District Lakhimpur Kheri, are hereby **quashed**.

29. The District Magistrate, Lakhimpur Kheri is directed to release all the properties of the appellant attached vide

impugned orders dated 08.06.2022 and 27.06.2022, aforesaid, in favour of appellant, **forthwith.**

30. No order as to costs.

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**(2024) 7 ILRA 1101**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 24.07.2024**

**BEFORE**

**THE HON'BLE SHAMIM AHMED, J.**

Criminal Appeal No. 1305 of 2006

**Mohd. Yusuf** ...**Appellant**
**Versus**
**The State of U.P.** ...**Respondent**

**Counsel for the Appellant:**
Atul Verma

**Counsel for the Respondent:**
G.A.

**Criminal Law - The Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8, 18 & 21-**Appellant has been convicted and sentenced for three months-admittedly, the prosecution has not produced independent eye-witnesses of the alleged recovery-no explanation has been offered by the prosecution for their non-production. All the witnesses are police personnel. Non-production of independent eye witness is serious lacuna- prior to Appellant's search-he was not produced before any Gazetted Officer or Magistrate-written consent of the appellant for his search not produced-as required by Section 50 of N.D.P.S. Act-prosecution case not wholly reliable, cannot be held as proved beyond reasonable doubt-impugned order set aside and reversed.

**Appeal allowed.** (E-9)

**List of Cases cited:**

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

2. St. of Raj. Vs Parmanand & anr., (2014) 2 SCC (Cri) 563

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

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

2. Heard learned counsel for the parties.

3. his appeal has been preferred against the judgment and order dated 13.07.2006 passed by learned Additional Sessions Judge, F.T.C.-VII, Lucknow in Sessions Trial No.176 of 2002, whereby the appellant has been convicted and sentenced for three months imprisonment for the offence under Section 8/18/21 of NDPS Act alongwith fine of Rs.2,000/-

4. The prosecution story, in brief, as disclosed in the first information report, is the Sub Inspector Arvind Kumar got an information from a reliable source that a man is selling smack near RPM Quarter Line, therefore, he alongwith some police personnel went to search him. The police party caught that man and on being asked his name, he told his name as Mohd.Yusuf. On being searched, 30 packets of smack were recovered from his possession. On the basis of aforesaid incident, Case Crime No.176 of 2002, under Sections 8/18/21 of N.D.P.S. Act was registered at Police Station Alambagh, District Lucknow.

5. Investigation was handed over to the Sub Inspector K.K. Yadav, who in turn got the sample chemically examined and received a report. He took the

statements of witnesses of recovery and prepared the site plan and on finding sufficient evidence, he filed charge sheet against the accused in the Court.

6. The accused-appellant was charged for offence u/s 8/18/21 N.D.P.S. Act; to which he pleaded not guilty and claimed for trial.

7. In support of the prosecution case, the prosecution examined S.I. Arvind Kumar as P.W.-1, Constable Hasan Afroz as P.W.-2, Sughar Singh as P.W.-3 and K.K. Yadav, S.I. as P.W.-4.

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

9. Appellant was examined under Section 313 of Code of Criminal Procedure, 1973, (in short 'Code') wherein he stated that he had been falsely implicated due to enmity.

10. Learned trial Court, after going through the evidence available on record as well as after due hearing the learned counsel for both the parties, convicted and sentenced the appellant for three months imprisonment for the offence under Section 8/18/21 of NDPS Act alongwith fine of Rs.2,000/-.

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

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

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

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

15. Severe punishment has been provided in the N.D.P.S. Act to check the

misuse of this Act by the police personnel or officers and certain safeguards particularly Section 50 of N.D.P.S. Act has been incorporated in this Act that search of the suspected person must be done before the Magistrate or Gazetted Officer. Similarly Section 55 and 57 of N.D.P.S. Act provides that seized contraband article be kept by Station House Officer in safe custody and report of arrest and seizure be sent immediately to immediate Superior Officer within 48 hours.

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

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

*or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."*

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

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

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

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

20. Further, it is also pertinent to note at this juncture that not only the

manner in which the appellant was searched, is doubtful, the prosecution has also not prosecuted the case seriously, knowing that severe punishment has been provided in N.D.P.S. Act. It produced only four witnesses i.e S.I. Arvind Kumar as P.W.-1, Constable Hasan Afroz as P.W.-2, Sughar Singh as P.W.-3 and K.K. Yadav, S.I. as P.W.-4 and withheld other witness without any justification.

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

22. Thus this Court is of the view that prosecution has miserably failed to prove its case beyond reasonable doubt against the appellant. The trial Court has not properly discussed the evidence produced by the prosecution and has passed the impugned judgment and order against the settled principle of law including provisions of N.D.P.S. Act. This Court, therefore, unable to uphold the conviction and sentence of the appellant. The appellant is entitled to be acquitted. The impugned judgment and order is liable to be set aside and accordingly, appeal is liable to be allowed.

23. In view of the above, impugned judgment and order dated 13.07.2006 passed by learned Additional Sessions Judge, F.T.C.-VII, Lucknow in Sessions Trial No.176 of 2002 arising out of Case Crime No.176 of 2002, under Sections 8/18/21 of N.D.P.S. Act, Police Station Alambagh, District Lucknow, is **set aside** and **reversed** and accused/appellant, namely, Mohd.Yusuf is acquitted of the charges levelled against him. Consequently, the appeal is **allowed**. His personal bond and surety bonds are canceled and sureties are discharged.

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

25. No order as to the costs.

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**(2024) 7 ILRA 1105**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 24.07.2024**

**BEFORE**

**THE HON'BLE SHAMIM AHMED, J.**

Criminal Appeal No. 1626 of 2024

**Amit Bajpai ...Appellant**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Appellant:**
Nadeem Murtaza, Harsh Vardhan Kediya, Vaibhav Pandey, Wali Nawaz Khan

**Counsel for the Respondents:**
G.A., Arvind Kumar Verma

**(A) Criminal Law - appeal - Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act - Sections 14-A (2) & 3(2)(V) - Indian Penal Code, 1860 - Sections 302, 324, 504, 506 & 307 - Bail Application - Grant of Bail - Appellant attacked and assaulted by multiple**

**individuals, including a police officer - No mens rea established - Case falls under Section 304 IPC, not Section 302 IPC - Application of Article 21 of Constitution and relevant Supreme Court precedents.(Para - 33)**

**(B) Criminal Law - Indian Penal Code, 1860 - Section 97 - Right of Private Defense - a right of private defence extends not only to the defence of one's own body against any offence affecting the human body but also to defend the body of any other person - Self-defense is justified when faced with imminent harm. (Para -22)**

Appellant suddenly attacked and assaulted by 3 persons, including police officer - suffered 6 grievous injuries - used small knife from keychain in self-defense - Allegations of misuse of power by police officer - Statements of eyewitnesses unreliable and tutored - trial Court rejected appellant's bail application. (Para -33)

**HELD: -** Self-defense established, no intent to murder. Prosecution failed to prove criminal intent (mens rea) for murder (Section 302 IPC). Case reclassified as culpable homicide (Section 304 IPC). Eyewitness accounts deemed unreliable and tutored. The trial court's bail rejection was erroneous. Appellant's detention unnecessary due to trial delays and lack of evidence tampering. Set aside the trial court's order. (Para - 33)

**Criminal Appeal allowed.** (E-7)

**List of Cases cited:**

1. Sukumaran Vs St. Represented by Inspector of Police, (2019) 15 SCC 117

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

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

1. Heard Sri Nadeem Murtaza alongwith Sri Wali Nawaz Khan, learned counsel for the appellant, Sri Ashok Kumar Singh, learned A.G.A.-I for the State Opposite Party No.1 and Sri Arvind Kumar Verma, learned counsel for the opposite party no.2 and 4 as well as perused the entire record.

2. This Criminal Appeal under Section 14-A (2) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act has been preferred against the impugned order dated 18.04.2024 passed by learned Special Judge, S.C./S.T. Act, Lucknow in Bail Application No.2573 of 2024, Case Crime No.173 of 2024, under Sections 302, 324, 504, 506, 307 I.P.C. and Section 3(2)(V) of S.C./S.T. Act, Police Station P.G.I., District Lucknow East (Commissionerate Lucknow), whereby the bail application of the appellant has been rejected.

3. Learned counsel for the appellant submits that as per the prosecution case the allegations so levelled by the informant are that allegedly on 25.03.2024 her husband (Baldev Singh) returned to his flat from Sector 16 after celebrating Holi with his family. Her husband parked his car and wished the appellant/accused (Amit Bajpai) 'Happy Holi'. In reply the appellant, who was in a drunken state, started abusing. When her husband objected to the abusive language, the appellant attacked him with a knife. It is further alleged that when the brother of the informant, namely Yash (the deceased), tried to save Baldev Singh, the appellant abused him with casteist slurs, threatened him with dire consequences and stabbed him multiple times on his chest and stomach. It has been further alleged that the appellant also abused another resident of the same apartment, namely Arvind Kumar, when he tried to save Baldev and Yash.

4. Learned counsel for the appellant submits that it is significant to

mention that approximately two hours prior to the registration of the instant FIR i.e. Case Crime No.173 of 2024, under Sections 302, 324, 504, 506, 307 I.P.C. and Section 3(2)(V) of S.C./S.T. Act, Police Station P.G.I., District Lucknow East (Commissionerate Lucknow), the appellant had lodged an FIR No. 172/2024 on 25.03.2024, under Sections 308, 323, 325, 504, 506 IPC, at Police Station P.G.I., District Lucknow, against the aforesaid persons, namely Arvind Kumar, Yash, and Baldev Singh Chauhan, bringing the true story to light, wherein he was attacked by the said persons.

5. He further submits that the correct facts, which have been narrated by the appellant in FIR No. 172/2024 on 25.03.2024, under Sections 308, 323, 325, 504, 506 IPC, at Police Station P.G.I., District Lucknow are that at around 4:00 PM, when the appellant was returning to his apartment after parking his vehicle, Baldev Singh Chauhan and his brother-in-law Yash along with Arvind, attacked the appellant with rod and balli. The appellant suffered grave head injuries. All the three persons threatened to kill the appellant and they again attacked when the appellant ran towards the lift to save his life. The appellant was saved by the people of the society and he was admitted in Apex Trauma Centre where the medical examination of the appellant revealed that he has sustained fracture in his head.

6. He further submits that the medical examination of Yash Chauhan was conducted on 25.03.2024 at Apex Trauma Centre wherein it has been stated that an unknown drunk person attacked with a sharp object at around 4:30 PM. The copy of the MLC dated 25.03.2024 is annexed herewith as Annexure no. 3 to the affidavit filed alongwith this appeal.

7. He further submits that during the course of investigation, the statement of the informant was recorded under Section 161 Cr.P.C. on 26.03.2024, wherein, in addition to reiterating the version of the FIR, she stated that her brother is in very critical situation and he is being treated on ventilator.

8. He further submits that during the course of investigation, the statement of the appellant was also recorded under section 161 Cr.P.C on 26.03.2024, wherein, he has stated that on 25.03.2024, on the day of Holi, he returned from temple and while parking his vehicle at Shiv Green Apartment he was attacked by Baldev Singh Chauhan, his brother-in-law Yash and Arvind with rod and balli due to which he suffered grave head injuries. It is further stated that all the three persons threatened to kill him and they again attacked when the appellant ran towards the lift to save his life. The appellant was saved by the people of the society.

9. He further submits that the statement of Baldev Singh Chauhan was recorded under Section 161 Cr.P.C on 26.03.2024, wherein, in addition to reiterating the version of the FIR and supporting the statement of his wife i.e. opposite party no.2, he has stated that the medical treatment of his brother-in- law is going on at Trauma Centre and he has been discharged by the doctor.

10. He further submits that the appellant was arrested at 12:35 PM on 26.03.2024 and his wife, the deponent, was duly informed. He further submits that it is also significant to bring on record that the keychain with the knife allegedly used by the appellant was recovered from the right pocket and the broken tip of the knife was

recovered from the other pocket of the appellant. He further submits that Baldev Singh and Arvind Kumar were also searched and the rod and balli used by them to attack the appellant were collected and seized.

11. He further submits that the injury report of Baldev Singh Chauhan (husband of the opposite party no. 2) was prepared on 26.03.2024 at 3:25 PM in relation and perusal of the same shows that he had sustained two stitched wounds. He further submits that the injury report of the appellant was also prepared on 26.03.2024 at 3:45 PM which shows that the appellant had sustained serious injuries, including a stitched wound.

12. He further submits that the statement of alleged eye-witness Yaar Mohammad was recorded under section 161 Cr.P.C on 27.03.2024, wherein, he has stated that he is the guard at Shiv Green Apartment, Sector 14 and on 25.03.2024 at 10:23 PM when he was doing night- shift, the appellant was highly drunk and got involved in a fight with Baldev Singh Chauhan, Yash Chauhan and Arvind Kumar in relation with parking of vehicle. Both the parties got injured and were admitted at Trauma Centre. He further submits that it is pertinent to note that it has been stated by Yaar Mohammad that Arvind Kumar works in police department and previously served as inspector-in-charge.

13. He further submits that during the course of investigation, the statement of alleged eye-witness Ratnakar Upadhyay was also recorded under section 161 Cr.P.C on 27.03.2024, wherein, he has stated that he resides in Shiv Green Apartment sector 14 and on 25.03.2024 at around 10:23 PM he was going out for some work on his vehicle when he saw the appellant, who was in a highly drunken state, involved in a fight with Baldev Singh Chauhan, Yash Chauhan and Arvind Kumar in relation with parking of vehicle. He further stated that when he tried to settle the matter, the appellant attacked on his car with knife, however, the mirrors were closed and he was saved. He further added that both the parties got injured in the fight and he later left in his vehicle.

14. He further submits that one of the injured persons, namely Yash Chauhan, passed away on 03.04.2024 at Trauma Centre P.G.I., where after the post mortem examination was conducted on the same date and a perusal of the same shows that the cause of death has been shown to be septicemia due to ante mortem injuries.

15. He further submits that it would be relevant to note that the deceased passed away after 8 days of the alleged incident and thereafter, Section 302 IPC was also added to the array of offences alleged in the instant case.

16. He further submits that the statement of alleged eye-witness Gaurav Sethi was recorded under section 161 Cr.P.C on 03.04.2024, wherein, he has stated Arvind Kumar and Baldev are his friends and on 25.03.2024 at 4:00 PM, on account of Holi he along with Sarvan Kumar Mishra went to Shiv Apartment Vindravan Colony where he saw the appellant in drunken state involved in an abusive fight with respect to vehicle parking. He further stated that the appellant attacked Yash Chauhan with a knife and when Baldev, Amit and others tried to save Yash, the appellant attacked them as well.

Additionally, he stated that all the three persons in self- defence had beaten the appellant with rod, lathi and danda.

17. He further submits that the statement of alleged eye-witness Sarvan Kumar Mishra was recorded under section 161 Cr.P.C on 03.04.2024, wherein, he has reiterated and supported the aforesaid statement of Gaurav Sethi.

18. He further submits that Arvind Kumar, being employed in police department and being an ex-inspector-in-charge of the area, is abusing his position to incriminate the innocent appellant by bringing false eye- witnesses and showing false recovery of murder weapon on record as the recovery of the alleged knife used in the incident, being planted, and the confession being given before the police officer have no value in the eyes of law.

19. He further submits that a bare perusal of the aforesaid statements would reveal that absolutely vague and absurd allegations have been made regarding the incident which raises serious doubts upon the credibility of the same as well as casts a shadow upon the prosecution case. As such, the said statements fail to inspire any confidence.

20. He further submits that significantly the opposite party no.3 Arvind Kumar is a police officer posted as Sub-Inspector at Police Line, Lucknow and he has been suspended by the Police Commissionerate, Lucknow for his key involvement in the incident. A Press Note dated 26.03.2023 was also released by the Police Commissionerate, Lucknow disclosing the suspension of Arvind Kumar, which also shows that the appellant was attacked first by the three persons.

21. He further submits that it is also clear from the CCTV footage (snapshots of which are annexed as Annexure No. 16 to the affidavit filed in support of this appeal) that three persons are attacking and assaulting the appellant with rods and balli. He further submits that it can also be seen that the appellant is trying to save himself in the best possible way and the scrutiny of the CCTV footage by the investigating officer himself shows that the appellant was assaulted first.

22. He further submits that the appellant in order to save himself from the sudden attack, used whatever he could find on him at the time, i.e. the small knife in his keychain to protect himself, however, there was no intention or motive on the part of the appellant to murder any person and he acted only to save his own life. In support of his argument, learned counsel for the appellant has relied upon a judgment rendered by Hon'ble the Supreme Court of India in the case of **Sukumaran Vs. State Represented by Inspector of Police, (2019) 15 SCC 117**, wherein in para 31 of the judgment, Hon'ble the Apex Court was pleased to observe as under:-

> *"31. Section 97 IPC provides that a right of private defence extends not only to the defence of one's own body against any offence affecting the human body but also to defend the body of any other person. The right also embraces the protection of property, whether one's own or another person's, against certain specified offences, namely, theft, robbery, mischief and criminal trespass. The limitations on this right and its scope are set out in the sections which follow. For one*

*thing, the right does not arise if there is time to have recourse to the protection of the public authorities, and for another, it does not extend to the infliction of more harm than is necessary for the purpose of defence. Another limitation is that when death is caused, the person exercising the right must be under reasonable apprehension of death, or grievous hurt, to himself or to those whom he is protecting; and in the case of property, the danger to it must be of the kinds specified in Section 103. The scope of the right is further explained in Sections 102 and 105 IPC. (See observations of Vivian Bose, J. in Amjad Khan v. State.)"*

23. He further submits that the appellant in the instant case was suddenly attacked with rods and balli by three persons which created a reasonable apprehension of death and grievous hurt in his mind. Thus, his actions in defending himself were not disproportionate to the attack he was facing. He further submits that no prudent person would believe that the appellant, being alone in the fight, could stand against three persons and could have assaulted three persons, single-handedly, who were armed with deadly weapons.

24. He further submits that it is notable that the appellant suffered six grievous injuries during the assault by the opposite parties. The medical examination of the appellant reveals multiple abrasion, conture swelling and stitched wound injury on the right side of the head.

25. He further submits that even the statements of so-called eye-witnesses, namely Yaar Mohammad and Ratnakar Upadhyay, place the time of the alleged incident at 10:23 PM i.e. a difference of about 6 hours from 04:30 PM, which is the time of the alleged incident as per the allegations levelled in the FIR by the informant herself and which is also what the prosecution story has been throughout. The said difference, coupled with the fact that the statements of Ratnakar Upadhyay and Yaar Mohammad are identical to one another and clearly tutored, render the same wholly unreliable.

26. He further submits that significantly around 14 residents of the society where the alleged incident took place, gave a written complaint to the Police Commissioner, Lucknow, highlighting the frequent and continued misbehaviour of Baldev Singh Chauhan and abuse of the position of police officer by Arvind Kumar. He further submits that it has also been highlighted in the complaint that Baldev Singh Chauhan and Arvind Kumar brutally assaulted the appellant and also tried to take his life which also lends support to the fact that the appellant was not the instigator of the alleged incident.

27. He further submits that it is evident that the appellant had no intention to commit the alleged offence as he merely acted in private defence with the help of what he had on his person to defend himself at the time as he acted in the spur of the moment which shows that he never planned to commit the alleged murder or had any intention to take life of anyone. Thus, there is no evidence that would show mens rea on the part of the appellant, which is a necessary ingredient for an offence punishable under Section 302 IPC. As such, even if the prosecution version is accepted uncontroverted, the present case cannot

travel beyond the ambit of Section 304 IPC.

28. He further submits that other than the instant case, the appellant has a criminal history of one case i.e. Case Crime No. 18 of 2021, under Sections 147, 308, 336, 427, 452, 323, 504, 506, 325 IPC and Sections 3(1)(r) and 3(1)(s) of the SC/ST Act, 1989, registered at Police Station Naka Hindola, District Lucknow, in which the appellant was granted bail by this Hon'ble Court vide order dated 20.07.2021 passed in Criminal Appeal No. 631 of 2021, a copy of the bail order is annexed as Annexure No. 18 to the affidavit filed alongwith this appeal.

29. Several other submissions in order to demonstrate the falsity of the allegations made against the appellant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the appellant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is in jail since 26.03.2024 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

30. On the other hand, learned counsel for the opposite party no.2 and 4 vehemently opposed the arguments as advanced by learned counsel for the appellant and submits that the appellant has committed a heinous offence and prima facie offence is made out against the appellant, as such, he is not entitled to be enlarged on bail. He further submits that the photographs of the C.C.T.V. footage and materials, available on record, clearly reveal that the appellant had attacked upon the deceased as well as the opposite parties no.3 and 4 with intention to commit their murder. The injury report and post mortem report of the deceased reveal that the appellant had caused several injuries to the deceased by knife, which itself shows that the appellant had attacked upon the deceased and injured persons with an intention to commit their murder.

31. He further submits that the independent eye witnesses namely Yaar Mohammad and Ratnakar Upadhyaya, both have fully supported the prosecution story in their statements, clearly stating that the appellant has committed the crime in question and the Ratnakar Upadhyaya has also stated in his statement that when he tried to intervene the matter then the appellant also attacked upon him to cause injuries by knife. He further submits that the independent eye witnesses namely Gaurav Sethi and Sarvan Kumar Mishra, both have also fully supported the prosecution story in their statements, clearly stating that the appellant has committed the crime in question.

32. Learned A.G.A.-I for the State has also made an agreement with the arguments as advanced by learned counsel for the opposite party nos.2 and 4.

33. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to

indicate the possibility of tampering with the evidence and considering the fact that the appellant has lodged an F.I.R. just two hours before the instant F.I.R. against the opposite parties, which itself indicates that it is a counter blast case; the opposite party no.3 Arvind Kumar is a police officer posted as Sub-Inspector at Police Line, Lucknow and he has been suspended by the Police Commissionerate, Lucknow for his key involvement in the incident; it is also clear from the CCTV footage that three persons are attacking and assaulting the appellant with rods and balli and the appellant in order to save himself from the sudden attack, used whatever he could find on him at the time, i.e. the small knife in his keychain to protect himself, however, there was no intention or motive on the part of the appellant to murder any person and he acted only to save his own life; the appellant in the instant case was suddenly attacked with rods and balli by three persons which created a reasonable apprehension of death and grievous hurt in his mind, thus, his actions in defending himself were not disproportionate to the attack he was facing; the appellant suffered six grievous injuries during the assault by the opposite parties and medical examination of the appellant reveals multiple abrasion, conture swelling and stitched wound injury on the right side of the head; the statements of so-called eye-witnesses, namely Yaar Mohammad and Ratnakar Upadhyay, place the time of the alleged incident at 10:23 PM i.e. a difference of about 6 hours from 04:30 PM, which is the time of the alleged incident as per the allegations levelled in the FIR by the informant herself and which is also what the prosecution story has been throughout and the said difference, coupled with the fact that the statements of Ratnakar Upadhyay and Yaar Mohammad are identical to one another and clearly tutored, render the same wholly unreliable; significantly around 14 residents of the society where the alleged incident took place, gave a written complaint to the Police Commissioner, Lucknow, highlighting the frequent and continued misbehaviour of Baldev Singh Chauhan and abuse of the position of police officer by Arvind Kumar; it has also been highlighted in the complaint that Baldev Singh Chauhan and Arvind Kumar brutally assaulted the appellant and also tried to take his life which also lends support to the fact that the appellant was not the instigator of the alleged incident; there is no evidence that would show mens rea on the part of the appellant, which is a necessary ingredient for an offence punishable under Section 302 IPC., as such, even if the prosecution version is accepted uncontroverted, the present case cannot travel beyond the ambit of Section 304 IPC and further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another**, reported in **(2018) 3 SCC 22** and Sukumaran (Supra), this Court is of the view that the learned trial court has failed to appreciate the material available on record. The order passed by the trial court is liable to be set aside.

34. Accordingly, the appeal is allowed. Consequently, the impugned judgment and order dated 18.04.2024 passed by learned Special Judge, S.C./S.T. Act, Lucknow in Bail Application No.2573 of 2024, Case Crime No.173 of 2024, under Sections 302, 324, 504, 506, 307 I.P.C. and Section 3(2)(V) of S.C./S.T. Act, Police Station P.G.I., District Lucknow East

(Commissionerate Lucknow), whereby the bail application of the appellant has been rejected is hereby set aside and reversed.

35. Let the appellant, **Amit Bajpai** be released on bail in the Case Crime No.173 of 2024, under Sections 302, 324, 504, 506, 307 I.P.C. and Section 3(2)(V) of S.C./S.T. Act, Police Station P.G.I., District Lucknow East (Commissionerate Lucknow) with the following conditions:-

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

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

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

(b) The appellant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

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

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

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

(vi) In case, the appellant misuses the liberty of bail during trial, in order to secure his presence, proclamation under section 82 Cr.P.C. is issued and the appellant 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.

(vii) The appellant shall remain present, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the appellant 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.

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

37. The trial court is also directed to expedite the trial of the aforesaid case by following the provisions of Section 309 Cr.P.C., strictly without granting any unnecessary adjournments to the parties, in case there is no other legal impediment.

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**(2024) 7 ILRA 1114**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 15.07.2024**

**BEFORE**

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

Criminal Appeal No. 3103 of 1982

**Krishna Kant & Ors. ...Appellants**
**Versus**
**State ...Respondent**

**Counsel for the Appellants:**
Jagdish Singh Sengar, Ajay Kumar Pandey, Anubhav Trivedi, Kunwar Mayank Singh, Ram Lakhan Deobanshi, Sheshadri Trivedi, Shyam Sunder Mishra, Vipin Chandra Pandey

**Counsel for the Respondent:**
A.G.A

**(A) Criminal Law - Conviction - The Code of criminal procedure, 1973 - Section 374 (2) - Appeals from conviction, Indian Penal Code, 1860 - Sections 147, 148, 307/149 and 302 r.w. 149 IPC - Plea of private defence is not applicable if the accused exceeds the limits of self-defence.(Para - 57)**

**(B) Evidence Law - evidence of eyewitness, if found truthful, cannot be discarded simply because the witnesses were relatives of the deceased - evidence of interested witnesses should be subjected to scrutiny and accepted with caution - testimony of a reliable witness must be of sterling quality on which implicit reliance can be placed for convicting the appellants. (Para - 45, 46)**

**(C) Evidence Law - dying declaration - dying declaration stood on the same footing as any other evidence - truth sits upon the lip of a dying man - merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected - merely because the dying declaration is a brief statement, it is not to be discarded - shortness of the statement itself guarantees truth. (Para - 52)**

Appeal was initially preferred by five appellants -three expired during appeal's pendency – abated - remaining appellants for judicial scrutiny - Appellants formed unlawful assembly with deadly weapons - Murder and attempted murder committed in execution of common object - Dying declaration reliable and trustworthy - Private defence plea rejected - Imprisonment and fine imposed.**(Para - 1, 54,55)**

**HELD: -** Prosecution proved its case beyond reasonable doubt. Conviction under Sections 147, 148, 302/149, 307/149 IPC affirmed. Sentence modified to include fine. Trial court correctly held that the appellants formed an unlawful assembly with deadly weapons, committing murder and attempted murder in execution of their common object. Appellants guilty of murder, attempted murder, and rioting.**(Para -55, 59)**

**Criminal appeal dismissed.** (E-7)

**List of Cases cited:**

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

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

3. Mohd. Muslim Vs St. of U.P. 2023 live law (SC) 489

4. Daleep Singh Vs St. of Punj. AIR 1953 SC 364

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

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

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

8. Bhayani Luhana Radhabi Vs St. of Guj., 1977 CAR 49(SC)

9. Kusa & ors. Vs St. of orisha 1980 C.A.R. 66 (SC).

10. St. of Maha. Vs Krishnamurthy Laxmipati Naidu (1980) Supp. SCC 455

11. Surajdeo Ojha Vs St. of Bihar 1980 Supp. SCC 769

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

1. At the very outset, for the sake of precision, it is pertinent to mention that, as the record transpires, initially the present appeal is preferred by five appellants. Out of these appellant no. (1)- Krishna Kant, (2)- Sheo Roop, (4) Anant Saran have expired, during the pendency of the appeal and as such, the appeal in relation to them, stood abated, vide orders dated 9.4.2014, 1.3.2017 and 31.8.2022, passed by this Court. Thus, the present appeal, in relation to surviving appellant no. (3) Farnesh Kumar Singh and no. (5) Ram Nath alias Bhola Lodh, is before us, for judicial scrutiny.

2. We have heard, Sri Sheshadri Trivedi, learned Counsel appearing on behalf of the appellant no.3 Farnesh Kumar Singh, and Sri Sheo Roop Yadav, Advocate holding brief of Sri Kunwar Mayank Singh, learned counsel appearing on behalf of appellant no.5 Ram Nath alias Bhola Lodh and Sri Jitendra Kumar Jaiswal, learned Additional Government Advocate, representing the State, in extenso and have been taken through the entire material on record.

3. The instant criminal appeal has been preferred invoking the powers of this Court u/s 374(2) Cr.PC. assailing the legality and validity of the judgment and order dated 13.12.1982 passed by the then, VIIth Additional Sessions Judge Fatehpur, while deciding Sessions Trial No. 191 of 1978 (State v/s Krishna Kant and others) and in sessions trial No. 136 of 1979 (State versus Ram Nath alias Bhola Lodh), whereby all the accused/ appellants were convicted under Sections 147, 148, 307/149 and 302 read with 149 IPC, and were sentenced for the offence (charge) under Section 147 for 18 months R.1., for Section 148 two years R.I., under Section 302/149 life imprisonment and under Section 307/149 IPC to undergo seven years R.L. All the sentences were directed to run concurrently.

4. In a short conspectus, the genesis of the prosecution case, as culled out from FIR, and undisputed facts, is that on 20.11.1977 at about 9.05 a.m., a report purported to have been lodged by Sant Kumar Upadhyay at Police Station Kotwali, District- Fatehpur with regard to an occurrence said to have happened on the same day at about 8.30 a.m., divulging therein that he had purchased half portion of plot no. 2103 from one Prem Shanker Shukla on 17.9.1977, through a registered sale deed. In pursuance of the sale deed, he had taken over possession of the purchased plot. The said plot is situated in front of the house of accused Krishna Kant Singh Gautam, abutting public road, known as Station Road, is running in between the house of the accused Krishna Kant Gautam

and the plot no. 2103, of which the complainant has become the owner. The complainant commenced construction of the boundary wall around the purchased plot. The complainant got erected boundary-wall in frontier portion of his plot during deewali holidays and the rest of the portion of the boundary was being erected on the fateful day, i.e. on 20.11.1977. He purchased bricks, cement etc. for the purpose. The complainant, accompanied with his uncle Nanku Prasad, cousin Ganga Prasad and his kith and kin Durga Krishna alias Babbu, and two masons with six labourers reached on the plot at about 8.30 a.m. and started erecting the boundary wall. At this accused persons namely Krishna Kant. Sheo Roop Singh, Farnesh Kumar Singh, Anant Saran and Ram Nath alias Bhola Lodh, became highly infuriated and enraged, came out from the house of Krishna Kant Singh Gautam. Accutsed Krinsha Kant, Sheo Roop Singh and Farnesh Kumar Singh were equipped with guns and two accused persons namely Ram Nath alias Bhola Lodh and Anant Kumar were armed with Lathi and dandas. All the accused persons started to demolish the boundary wall, erected by the complainant. The accused persons do not want complainant to raise constructions over the plot, for they were intending to purchase and grab the said plot. The complainant and his family members raised remonstration against demolition of the boundary wall. At this the accused persons lost their temper and consciousness and started to hurl abusive and vituperative words, undermining their image. The accused persons could not squeeze ire and irate and took ugly turn. Accused appellant Farnesh Kumar Singh shot at Nanku Prasad, which hit at his chest, with the intention of killing, as a result of which he fell down. Ganga Prasad and Durga Krishna, who were present on the spot rushed to help Nanku Prasad. The other two accused persons Krishna Kant Singh and Sheo Roop Singh also shot from their respective guns at Ganga Prasad and Durga Krishna, with the intention of eliminating them, as a result of which they sustained fatal gun shot injuries. Looking to the uproarious and horrendous scene and also having regard to the lamentation and shrieks, a number of the persons of the locality inclusive of Sada Sheo Pandey, Raj Narain Bajpayee, Babu Lal and Raj Kujmar gathered at the place of occurrence and witnessed the incident. The accused persons after unleashing an inflow of terror by making indiscriminate firing entered in the house of accused Krishna Kant Singh Gautam. The complainant was highly terrified and afraid because of precarious and serious conditions of injured persons. He brought three injured in two Rickshaws at his house and from there he took prompt step of informing the said incident at the police station concerned by taking them to the police station.

5. The complainant gave a tehrir (Ext. Ka-2) about the incident, at the police station concerned, at about 9.05 a.m. on the same day. On the basis of tehrir enteries were made in chik FIR, Ext. Ka- 14, and in kaimi G.D. Ext. Ka- 15 and Case Crime No. 712 of 1977, under Sections 147/148/149/307 IPC was registered against the accused Krishna Kant Singh Gautam, Sheo Roop Singh, Farnesh Kumar singh, Ram Nath alias Bhola Lodh and Anant Kumar.

6. Injured Nanku Prasad as well as other injured were immediately sent to the hospital, in a precarious condition for

medical examination and treatment, with majrubi chitthi.

7. Since the condition of injured Nanku Prasad was very precarious and critical, his dying declaration was recorded at the hospital by the Tehsildar B. C. Dixit (P.W.-9) at 10.40 a.m. on 20.11.1977. It was also certified by P.W.7 Dr. B. R.Bajpai that the mental condition of injured Nanku Prasad was fit to make statement and the injured Nanku Prasad was conscious and sensible during the period of recording of his statement. The certificates given by him on the dying declaration is marked as Ext. Ka.-19 and Ext. Ka- 20. Injured Nanku Prasad succumbed to injuries at 11.45 a.m. on the same day i.e. 20.11.1977. On the death of Nanku Prasad, the medical officer posted at the hospital sent a written information to the kotwali concerned. On receiving information with respect to death of Nanku Prasad, the case was converted in to u/s 302 IPC and an entry to this effect was made in the G.D. no. 28 at 12.15 p.m. The initial investigation was entrusted to Pw-10 S.I. Gadadhar Prasad Sharma.

8. Thus, investigating was set in to motion I.O. PW- 10 Gadadhar Prasad Sharma and raiding police personnel arrested five accused persons who had been present in the house of accused/appellant Krishna Kant Gautam. He also recovered one D.B.B.L. licensed Gun bearing no. 54891 along with 14 cartridges in one belt and nine cartridges in another belt. I.O. prepared the recovery memo, Ext. Ka-21 of recovered incriminating articles. I.O. also recorded the statement of all the accused persons and sent them to the Kotwali, in the vigil and supervision of S.I. Dost Mohammad. The accused persons were brought at the Kotwali at about 11.30 a.m. and a report to this effect was entered in G.D. no.22. S.I. Gajadhar Prasad Sharma, investigating officer in association with police personnel inspected the place of occurrence and prepared the site plan Ext. Ka- 22 etc. He found some pieces of bricks saturated with blood. He collected blood stained and plain pieces of bricks and soil from the place of occurrence. He kept these articles in a sealed bundle and prepared a memo of recovery Ext. Ka. 23. He also recovered four small pellets and two ticklies from the spot and prepared a memo of recovery Ext. Ka.24. He also collected five empty cartridges from the place of occurrence, which from their smell appeared to have been fired recently. He took them into possession and put in a sealed cover and prepared duly recovery memo Ext. Ka- 25. He also found three spades, three shallow-pan (taslas) (material Ext. 5, 6 & 7) and five buckets, material Exts. 8, 9, 10, 11 & 12. a lathi, material Ext. 16, were also recovered from the spot and recovery memo of the same, marked as Ext. Ka.26 was also duly prepared. He also collected five used cartridges near the place of occurrence and prepared a duly memo of recovery, Ext. Ka- 27 in this behalf also. He kept all these articles at the police station concerned on 21.11.77 at 6.35 a.m. duly entered in G.D. No.6.

9. Subsequent to the conversion of the case in to section 302 IPC, the investigation was taken up by Om Prakash Yadav, the Station House Officer. Inquest of the corpse of deceased Nanku Prasad was carried out on 20.11.1977 in the hospital between 12.30 p.m. to 1.30 p.m. in the presence of appointed witnesses and inquest report Ext Ka-10 was duly prepared by PW- 6 Guru Prasad.

10. The Station House Officer G.P. Yadav took up requisite steps for the

autopsy of Nanku Prasad (deceased), He prepared the Challani Report of corpse photo lash, relevant papers in the prescribe proforma which were duly marked as Ext.Ka 28 and Ext.Ka- 29.

11. Dr. Som Sharma (P.W.3), who was posted at District Hospital Fatehpur, received the requisite papers in respect to autopsy of deceased Nanku Prasad on 21.11.1977 and conducted the autopsy on the same day at 11.00 am. and prepared autopsy report Ext Ka-3.

12. During investigation cartridges recovered from the accused and the empty cartridges and pellets recovered from the place of occurrence were sent to FSL, for forensic examination to the Ballistic Expert, Lucknow along with D.B.B.L Gun no. 54891 recovered Krishna Kant Singh Gautam. B. D. Rai (P.W.-11) Ballistic Expert conducted the examination of these articles. He was of the opinion that some of the spent cartridges fired from some other gun besides the gun of this accused. He gave his report which was marked as Ext. Ka-35A. The blood saturated cloths of Nanku Prasad and also blood stained and ordinary pieces of bricks recovered from the place of occurrence were also sent for chemical examination to the Examiner at Agra and also government serologist. The report of the chemical examiner confirmed presence of human blood stains on the bricks and clothes.

13. After collecting sufficient materials and evidence, showing the complicity of accused persons 1.0. submitted the charge-sheet Ext. Ka- 34 against all the five accused persons under Section 147/148/149/307/302 IPC in the court of CJM, Fatehpur, who took the cognizance of the case. Finding the case being exclusively triable by the court of sessions, learned CJM committed it to the court of Sessions vide his order dated 26.07.1978, where it was registered as S.T. Nos. 191 of 1978 and 136 of 1979 and later transferred it to the court of VII-Additional Sessions Judge, Fatehpur for trial.

14. The learned trial Sessions Judge framed charges against the accused/ appellants under sections 147, 148, 149, 307, 302 IPC. The accused appellants abjured the charges. pleaded not guilty and claimed to be tried.

15. The prosecution, in order to bring charges home, against accused/ appellants, examined following witnesses in ocular evidence-

| Sl. no. | Name of witnesses | PW Nos. | Remarks |
|---|---|---|---|
| i | ii | iii | Iv |
| 1 | Sant Kumar Upadhyay | P.W.-1 | Nephew of the deceased/ Complainant of the case |
| 2 | Durga Krishna alias Babbu | P.W.-2 | Cusion of deceased (Eye Witness) |
| 3 | Dr. Som Sharma | P.W.-3 | Conducted Post Mortem |
| 4 | Sada Shiv | P.W.-4 | Witness |
| 5 | Dr. T.N. Bajpai surgeon | P.W.-5 | Doctor- X-rays |
| 6 | Guru Prasad | P.W.-6 | Eye Witness |
| 7 | Dr. B.R. Bajpai | P.W.-7 | Doctor |
| 8 | Jagdish Prasad Tiwari | P.W.-8 | Constable Moharrir |

| 9 | B.C Dixit | P.W.-9 | Tehsildar / Magistrate |
|---|---|---|---|
| 10 | S.I. G. P. Sharma | P.W.-10 | I.O. |
| 11 | B.D. Rai | P.W.-11 | Ballistic Expert |

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

| Sl. no. | Particulars of Documents | Proved by | Ext Nos. |
|---|---|---|---|
| i | ii | iii | iv |
| 1 | Sale Deed | P.W.-1 | Ext. Ka.-1 |
| 2 | Tehrir | P.W.-1 | Ext. Ka.-2 |
| 3 | FIR and Dying Declearation | P.W.-1 | Ext. Kha.-1 &Kha -1 |
| 4 | Post Mortem Report | P.W.-3 | Ext. Ka.-3 |
| 5 | X-Ray Reports Durga Krishna | P.W.-5 | Ext. Ka.-4 to Ka.-7 |
| 6 | X-Ray Report of Ganga Prasad | P.W.-5 | Ext. Ka.-8 to Ka.-9 |
| 7 | Inquest | P.W.-5 | Ext. Ka.-10 |
| 8 | Injury Report Nanku | P.W.-7 | Ext. Ka.-11 |
| 9 | Injury Report of Ganga Parsad | P.W.-7 | Ext. Ka.-12 |
| 10 | Injury Report of Durga Krishna | P.W.-7 | Ext. Ka.-13 |
| 11 | Chik FIR | P.W.-8 | Ext. Ka.-14 |
| 12 | G.D. Reports | P.W.-8 | Ext. Ka.-15 to Ka-18 |
| 13 | Dying Deceleration Certificate | P.W.-9 | Ext. Ka.-19 |
| 14 | Dying Deceleration | P.W.-9 | Ext. Ka.-20 |
| i | ii | iii | Iv |
| 15 | Recovery Memo Gun and Cartridges | P.W.-10 | Ext. Ka.-21 |
| 16 | SitePlan | P.W.-10 | Ext. Ka.-22 |
| 17 | Recovery Memo Blood Stained, plain earth | P.W.-10 | Ext. Ka.-23 |
| 18 | Recovery Memo Of Pellet &Tiklis | P.W.-10 | Ext. Ka.24 |
| 19 | Recovery Memo of Empties | P.W.-10 | Ext. Ka.-25 |
| 20 | Recovery Memo sand Spades etc. | P.W.-10 | Ext. Ka.-26 |
| 21 | Recovery Memo Empty Cartridge | P.W.-10 | Ext. Ka.-27 |
| 22 | Challani Report of Corpse | P.W.-10 | Ext. Ka.-28 |
| 23 | The Picture of Corpse Nanku | P.W.-10 | Ext. Ka.-29 |
| 24 | Recovery Memo Blood Stained | P.W.-10 | Ext. Ka.- |

| | | | |
|---|---|---|---|
| | cloths | | 31 |
| 25 | Recovery Memo Pellet &Tiklis | P.W.-10 | Ext. Ka.-33 |
| 26 | Charge sheet | P.W.-10 | Ext. Ka.-34 |
| 27 | FSL Report | P.W.-11 | Ext. Ka.35, Ka 35-A |
| 28 | Report of Chemical Examiner | P.W.-10 | Ext. Ka.-37 |
| 29 | Report of Chemical Serologist | P.W.-10 | Ext. Ka.-38 |
| 30 | Intekhab Plot No. 2104 banjar land | ------ | Ext. Ka.-39 |
| 31 | Intekhab Plot No. 2104 allottedto smt. kalpana | ------ | Ext. Ka.-40 |
| 32 | Intekhab Plot No 2103 allottedPrem shankar | ------ | Ext. Ka.-41 |
| 33 | Bricks PurchasedReceipts | P.W.-1 | Ext. -I to IV |

17. Apart from the above, the prosecution has also filed various revenue documents such as C.H. akarpatra Intekhab, and khasra pertaining to land in dispute plot nos. 2103, 2104, 2105 (Ext. Ka- 39 to Ext. Ka- 43).

18. Besides, prosecution has also exhibited material objects, collected as evidence during investigation, as follows-

| **Sl. No.** | **Exhibits** | **Proved by** | **Ext Nos.** |
|---|---|---|---|
| i | ii | iii | iv |
| 1 | 03 Scuttle(Taslas) | P.W.-1 | Ext 1 to 7 |
| 2 | 05 Buckets | P.W.-1 | Ext.-8,9.10.11 12 |
| 3 | 03 Spades (Fabras) | P.W-1 | Ext.-13, 14 &15 |
| 4 | Lathi | P.W-1 | Ext 16 |

19. After conclusion of the prosecution evidence accused/ appellants were afforded an opportunity under section 313 Cr.P.C. for offering explanation/ rebuttal of prosecution evidence/, charges against them. The appellant Fanesh Kumar Singh Gautam averred that they have been falsely implicated in the present case due to enmity, and personal grudge. He denied the prosecution allegations and charges that they had formed as unlawful assembly or had killed Nanku or injured two other persons namely Durga Krishna and Ganga Prasad. He averred the defence version that on 20.11.2017 complainant and the deceased nanku Prasad, along with their one relative Dr. Naval kishor and several Other person, themselves had come to the plot of the accused appellant Krishna Kant Gautam and started remonstration of the boundary wall which was constructed by appellants. They have also stated that only Krishna Kant Gautam had fired with his licensed Gun in self defence of his property, boundary wall and also to save their life and lives of other family members. They have lodged FIR against the complainant side of the incident. Present prosecution case is a counter blast / cross case against complainant side, to shield themselves against their cross case. He is innocent. Accused Appellants Farnesh Kumar has made a long statement narrating defence version. In his additional

statement under Section 313 Cr.P.C. as under:-

" मैं सन् 1964 से फतेहपुर कचेहरी मे वकालत करता हूँ और 1965 से मेरा निजी मकान मोहल्ला गौतम नगर शहर फतेहपुर मे है। मेरे मकान का सदर दरवाजा पूरब तरफ है और पूरब की ओर ही बरामदा है। बरामदा से उत्तर मिला हुआ कमरा है। बरामदे के बाद मेरा सहन है, जो बाउन्ड्री से घिरा हुआ है। सहन मे आम-जामुन के पेड़ खड़े है। मेरे उस मकान की बाउन्ड्री के पूरब तरफ मिली हुई सड़क है, जो सन् 1976 में बनी है। उसके पहले केवल रास्ता था। सड़क के पूरब तरफ मेरे खेत नं० 2105 व 2109 है। उनका रक्बा क्रमशः 2 बिस्वा व 14 बिस्वा है। मेरे प्लाट नं. 2105 के पूरब प्लाट नं. 2103 है जिसका रक्बा 11 बिस्वा है। नं. 2103 के पूरब प्लाट नं. 2111 है जिस पर आबादी है। प्लाट नं. 2103 के दक्षिण नं. 2110 व मेरा प्लाट नं 2109 है। उन दोनो प्लाट नं. 2103 से मिले हुए प्लाटों पर अब आबादी है। 2103 प्लाट नं. के उत्तर प्लाट नं. 2102 है जो कब्रिस्तान है। नं. 2103 के पश्चिम मेरा प्लाट नं. 2105 व प्लाट नं. 2104 है। यह नं. प्लाट 2104 ग्राम समाज का है, जो मेरे खेत के अन्दर है और उसका मौके पर कोई demarcation नही है। उन 2104 पर भी मैं कैबिज हूँ। सड़क के पूरब जो मेरा खेत है, उसमे प्लाट नं. 2105 व 2109 का जुज़ हिस्सा शामिल है। जिसके चारों तरफ घटना के बहुत पहले मैनें बाउन्ड्री की पक्की नींव डलवाई थी।

घटना के करीब 10 दिन पहले सन्त कुमार अपने बहुत से हथियारबन्द साथियों को लेकर मेरे प्लाट नं. 2105 पर कब्जा करने की कोशिश की, परन्तु कुछ वकीलों के अ ा जाने से और समझौता करवाने से सन्त कुमार कब्जा करने मे उस दिन सफल नही हुए और कब्जा नहीं कर पाए। उसके दो तीन दिन बाद मैनें प्लाट नं. 2105 वाले खेत में पूर्वी और उत्तरी बाउन्ड्री को उंचा करवा दिया जो करीब 5/ 5-1/2 फीट उंची थी। उस खेत में मेरे कमरे की नींव भी मैनें जब नींव डलवाई थी तब की बनी है। उसके अलावा करीब 15 साल पुराने आम-जामुन व केले के पेड़ थे तथा थाले बने हुए थे। केले के पेड इस समय मौके पर नही है।

सबूत का केस दि. 20.11.77 पूर्णतया असत्य व गलत है और महज क्रास केस से बचने के लिये, पुलिस से साठ गांठ करने के बाद बनाया है।

सही केस यह है कि 20.11.77 को करीब 8.30 बजे दिन में अपने परिवार, अनन्त शरण व नौकर भोला उर्फ रामनाथ के साथ अपने घर के उत्तरी-पूर्वी कमरें में चाय पानी कर रहा था कि उत्तर की तरफ से नवल किशोर के घर की ओर से सन्त कुमार उपाध्याय, ननकू व नवलकिशोर तथा 10 अन्य लोग, अनजान सूरत शिनाख्त, बन्दूक, तमंचा, रिवाल्वर लिये हुए आए और मेरे प्लाट नं. 2105 के खेत की पूर्वी बाउन्ड्री गिराने लगे। बाउन्ड्री गिराने की आवाज सुनकर मैं बाहर सहन में आया तो देखा कि उपरोक्त सब लोग मेरी बनाई हुई बाउन्ड्री को गिरा रहे है। मैनें मना किया, उपरोक्त लोग नहीं माने और गाली गलौज करने लगे। मेरे साथ के और लोग भी सहन में आ गए। मैनें भी उन लोगों ं को गाली दी और बाउन्ड्री गिराने से रोका। उनके न मानने पर मैनें ललकारा और मना किया कि अब बाऊन्ड्री गिराओगे तो ठीक नही होगा। इस पर ननकू ने हम लोगों की ओर फायर किया जो हमारे और ननकू के बीच में खडे हुए पेड़ में लगा। ननकू के साथ वाले लोगों ने भी फायर करना शुरू किया। फायर के कारण हम लोग दौड़ कर अपने मकान के उत्तरी- पूर्वी कमरे में घुस गए। इस पर भी ननकू आदि बराबर आगे बढ़ते रहे और ललकारते रहे और फायर करते रहे। अपनी तथा अपने परिवार की जान न बचते देखकर, क्योकि मुझे विश्वास हो गया था कि यह लोग फायर करते हुए आगे बढ़ रहे है और हम लोगों को जिन्दा नहीं छोड़गे, मैने भी सुरक्षा व आत्मरक्षा हेतु अपनी लाईसेंसी बन्दूक से तीन चार फायर किये। उस पर भी ननकू आदि बराबर ललकारते रहे, फायर करते रहे और मेरा घर घे ेर रहे। इन लोगों के फायर से छर्रे मेरे मकान के दरवाजो, खम्बों, दीवार, जंगलो तथा खडे हुए सहन के पेड़ो पर लगे। हम लोगों के आड़ में व कमरे में होने की वजह से चोट नही आई।

थोड़ी देर बाद पुलिस आ गई। पुलिस की जीप देखकर चुटहलों को छोड़कर, सन्त कुमार वगैरा सभी लोग मौके से भाग गये। पुलिस ने मौके पर सन्त कुमार की तरफ से ननकू व अन्य दो साथी घायलों को पकड़ लिया। पुलिस ने सन्त कुमार आदि की फायरिंग से मेरे मकान पर जो निशानात अ ाए थे, उनको देखा। मैनें रिपोर्ट के लिये कहा, तो उन्होनें कहा कि लिख कर

थाने में दो। पुलिस को मैनें वही पर बिला सील अपनी लाईसेंसी बन्दूक और कारतूस के दो पट्टे दे दिये। चूंकि ननकू की हालत बहुत ज्यादा खराब थी इसलिये हम लोगों को व चुटहलों को जीप पर बैठा कर सीधा अस्पताल ले गये और वहां ननकू व अन्य दो घायलों को छोड़ा और उसके बाद हम लोगों को कोतवाली ले गये। कोतवाली भेज कर मैनें अपनी रिपोर्ट दाखिल की। इसके काफी देर बाद सन्त कुमार व नवलकिशोर अपने बिरादरी के नेताओं और बहुत से वकीलों को लेकर कोतवाली आये। वहां इन्सपेक्टर ओम प्रकाश यादव से अलग कमरें में बात की और उसके बाद पुलिस वालों से हम लोगों के नाम मालूम करके, सलाह व मशविरे से हम लोगों के खिलाफ रिपोर्ट लिखवाई।

सन्त कुमार cross case में मुल्जिम है। ननकू उनके चाचा है। ननकू के लड़के को नवल किशोर (मुल्जिम क्रास केस) की बहन विवाही है। सदाशिव पांडे गवाह नवल किशोर का खास मेली है और बरहंवा गांव का रहने वाला है।

मैनें अाराजी नं. 2105, दो बिस्वा व 2109 चौदह बिस्वा तथा 3005, रक्बा डेढ़ बिस्वा का बैनामा रजिस्ट्री शुदा बाबू दयाल, शिव दयाल से सन् 1968 में कराया था। बैनामा की तारीख से उक्त आराजियात पर मेरा कब्जा है। बाबू लाल, शिवदयाल को यह आराजी चक बन्दी में मिली थी। उसके पहले इशताक खां व मसूद खां के नाम यह उपरोक्त नम्बरान थे। सन्त कुमार से इन आराजियत से कोई मतलब गरज नही था। प्लॉट नं. 2103 का कोई हिस्सा सड़क से मिला हुई नही है, बल्कि एक खेत बाद है। सरकारी कागजात में भी मेरे नाम का दाखिल खारिज 1968 के बाद हो गया है और खसरा खतौनी में मेरा नाम दर्ज है। आराजी नं. 2103 पर खसरा खतौनी या सरकारी कागज में सन्त कुमार का नाम आज तक नही है। प्रेमशंकर जिनसे खरीदना कहते है वह भी फर्जी व्यक्ति थे और कभी फतेहपुर में देखे नही गये। प्रेम शंकर के नाम की आराजी क्रास केस के मुल्जिम नवल किशोर ने अपने हिकमत अमली से कई लोगों को बेचली है। आराजी नं. 2102 को भी गल्त चौहद्दी दिखा कर नवल किशोर ने बेच लिया है, जिसका दीवानी में मुकदमा चल रहा है।

नवल किशोर असरदार व पैसे वाले आदमी है और घटना के पहले म्यूनिसपल बोर्ड के मेम्बर रह चुके हैं। उनका पुलिस से घटना के बहुत पहले से मेल जोल था।"

Accused Farnesh Kumar has further stated that the copies of revenue papers Ext. Ka- 39 to Ka- 43, furnished to him by the prosecution, are not correct. However, he refused to make any comment on these papers.

20. Accused/ appellant Ram Nath alias Bhola Lodh has stated that on the day of incident complainant Sant Kumar etc. equipped with gun and revolvers remonstrated the boundary-wall, made by Krishna Kant, regarding which they have lodged cross FIR. He also expressed his ignorance about the revenue papers Ext. Ka- 39 to Ka- 43 filed by the prosecution.

21. The accused / appellants did not adduced any oral evidence. However they adduced some judgment, copy of the GD, Intekhabat and Khsras etc. to depict ownership on some plot of land in the form of documentary evidence, to substantiate their defence.

22. The learned trial court, after examining the entire material on record, testimony of the prosecution witnesses and also evaluating the oral and documentary evidence, came to the conclusion that there is a complete chain of evidence showing the complicity of the accused appellant in the commission of said crime and the prosecution has proved its case beyond reasonable doubts, pointing the guilts against the accused persons and convicted, accused/ appellant Farnesh Kumar and Ram Nath alias Bhola Lodh under Sections 147, 148, 307/149 I.P.C, and 302/149 IPC and sentenced them for the charge u/s 147 for 18 months R.I., for charge u/s 148 2 years R.I., u/s 302/149 I.P.C. R.I. for life

and for charge u/s 307/149 for seven years R.I. All the sentences were directed to run concurrently. Ld. counsel for the appellants assailed the conviction and sentence passed in impugned judgement dated 13.12.1982, on various grounds and advanced several arguments in this behalf. Let us test, examine, scrutinize and analyze the contentions advanced by the learned counsels for the parties, on the touchstone of the evidence adduced, undisputed facts and circumstances of the case.

23. The prosecution had examined P.W.1 Sant Kumar Upadhya is the complainant, who had lodged the first information report. He had made his attempt to corroborate the prosecution version in the toe of first information report. In his statement it has come out that he had been a practicing lawyer at District Fatehpur for the last five to six years to the happening of said occurrence. He had been residing in a Mohalla Piranpur in District Fatehpur. The said village was situated at a distance of 50 kilometres from District Fatehpur. His father had died about 30 years back to the said occurrence. His real uncle Nanku Prasad (since deceased) was head of the family. It was also averred by him that Injured Ganga Prasad was his cousin and Durga Krishna alias Babbu was brother of wife of his cousin Jamuna Prasad. Whenever they used to come to Fatehpur, they were staying with him. On the fateful day of occurrence they were staying in his house. It was also stated by him that accused Krishna kant Singh Gautam used to have his seat in the Collectorate Kutchery at a distance of about 20 to 22 paces. He was well familiar with all the accused persons much earlier to the said incident. It was also stated by him that he had purchased half portion of plot no. 2103 by means of registered sale deed, Ext. Ka- 1 dated 17.9.77, from Prem Shanker Gupta. Since this land was situated in front of the house of Krishna Kant Gautam, he was in possession over it. After purchasing the said land, the complainant took over the possession of the said land. On account of purchasing of the said land, Krishna Kant Gautam used to nurture animus and grudge against him. When initially the complainant went to get the boundary wall erected on the said land, Krishna Kant Gautam unfolded that he had not done good, as he wanted to purchase it (plot no.2103). A public path of Nagar Palika Fatehpur towards west was carved out abutting to the said plot. The house of Krishna Kant Gautam is situated towards west, back to the said path. P.W.1 Sant Kumar Upadhyay had started to get his boundary wall constructed in a half portion of said plot 8 to 10 days prior to the said occurrence. He had purchased the bricks for constructing the boundary wall on the said land from the brick kiln of Babu Lal Rastogi. He further stated that the incident occurred on 20.11.1977. On 20.11.1977 at about 8.00 a.m. he in association with his uncle Nanku Prasad (since deceased), his cousin brothers Ganga Prasad and Durga Krishna alias Babbu, had reached at the said plot with the object of getting the boundary wall erected at upside. The accused persons appeared there armed with lathi, pistols and guns. They first began to pull down the boundary wall built by the complainant and subsequent thereto developed an uproarious and terrified scene hurling vituperative and hurtful words. The complainant and his associates tried to pacify the ire and anger of accused persons but the accused persons took ugly turn and Farnesh Kumar fired at Nanku Prasad from his gun which hit to his chest as a result of which he rolled down on the ground. Thereafter Krishna Kant Singh and Sheo

Roop Singh fired towards Ganga Prasad and Durga Krishna who also sustained injuries and stumbled down. The accused persons created horrific and dreadful scene while fleeing away from the place of occurrence and entering in the house of Krishna Kant Singh (accused). The witness had supported the prosecution case. Since the condition of injured Nanku Prasad was deteriorating rapidly on account of gun shot injury and the condition of other two injured who had also sustained gun shot injuries was also worsening, they were taken at the police station concerned and the first information report was lodged immediately. The statement of Nanku Prasad was recorded at the police station by the Station Officer and all the three injured were sent to the hospital for treatment. The statement of the complainant was also recorded at the police station concerned. The injured Nanku Prasad succumbed to injuries in the noon on the fateful day of occurrence. The complainant was put to a number of question during cross examination but nothing could be elicited belying the prosecution version.

24. In order to corroborate the prosecution case, P.W.2 Durga Krishna alias Babbu who is an eye witness of the incident, had supported the story in toto. It was averred by him that other injured Ganga Prasad is the real brother of Jamuna Prasad, to whom his sister was married. He had deposed that he had come at the house of the complainant in the evening, earlier to the date of incident and was stayed there at night. He had come to Fatehpur in association with Ganga Prasad for purchasing she-buffalo. He went to visit the place of occurrence next morning along with complainant, when the incident occurred. It is averred unfolded by him that accused persons began to pull down the boundary wall of the complainant. Three accused persons who were equipped with fire arms opened firing from their respective guns targetting to Nanku Prasad and other persons. The injured Nanku prasad, had sustained fatal gun shot injuries in the said incident caused by accused persons. He stated that he had sustained injuries in the said incident and was taken to the police station and subsequent thereto hospital for treatment. The P.W.2 Durga Krishna alias Babbu had fully supported to the prosecution version and nothing could be elicited to discredit his version from his testimony.

25. At this stage it seems pertinent to discuss the medical evidence on record. On receiving majrubi chitthi from the P.S. concerned injured were brought to the District Hospital. P.W.7 Dr. B.R.Bajpai, who was posted as Medical Officer there, on 20.11.1977 had medico legally examined the three injured persons on the letter handed over to him by the police personnel.

(i) The doctor examined injured **Nanku Prasad**, at about 9.15 a.m. He found following injuries on his person-

One gun shot wound of entry 1/10" x 1/10" x chest cavity deep on the left side of the chest upper part, 4" above nipple at 11 'O' clock position. Margins are inverted and lacerated. No blackening and tattooing present (bleeding).

The injury was kept under observation. Doctor has opined that the injury was caused by some fire-arm. The duration of injury was found to be fresh. He prepared the injury report, in his hand-writing

and signature and proved it as Ext. Ka- 11.

(ii)- During the course of medical examination of injured Ganga Prasad, at 10.15 a.m. the doctor found the following injuries on his person-

(i)- One gunshot wound of entry 1/10" x 1/10" x muscle deep on the middle of left temporal region (bleeding).

(ii)- One gunshot wound of entry 1/10" x 1/10" x muscle deep on the middle of left eye brow echymosis around the wound (bleeding).

(iii)- One gunshot wound of entry 1/10" x 1/10" x muscle deep on the right side chin (bleeding).

(iv)- One gunshot wound of entry 1/10" x 1/10" x muscle deep on the right side chest upper part 21/2"away from nipple at 1 O'clock position (Bleeding)

Doctor has averred that margins of all wounds were inverted and lacerated. No blackening and tattooing around these wounds were found. He kept injury no.1 and 4 under observation and found the rest injuries to be simple. All injuries were caused by some fire arm and the duration was fresh. He proved the injury report as Ext. Ka- 12.

(iii)- Pw-7 Dr. B.R. Bajpayee, also examined injured **Durga Krishna alias Babbu** on 21.11.1977 at about 9.45 a.m. and found following injuries on his body-

(i)- Multiple gunshot wound of entry in an area of 6" x 5" on the right side head 2" above ear each measuring 1/10" x 1/10" x muscle deep.

(ii)- Two One gunshot wound of entry 1.50" each measuring 1/10" x 1/10" x musele deep.

(iii)- Three gunshot wounds of entry in an area of 3" x 1" on the right side of chest upper part, each measuring 1/10 " x 1/10" x muscle deep.

(iv)- Three gunshot wound of entry in an area of 4" x 1" on the inner aspect of right arm, each measuring 1/10" x 1/10" x muscle deep.

(v)- Three gunshot wound of entry in an area of 3"x1.5" on the inner aspect of right arm each measuring 1/10" x 1/10" x muscle deep.

(vi)- Multiple gunshot wound of entry in an area of 12" x 4" prime prime on the right outer aspect of left arm and forearm each measuring 1 /10" x 1 /10" x muscle deep.

(vii)- One gunshot wound of entry 1/10" x 1/10" x muscle deep on the front and upper part of left side abdomen.

According to the Doctor B.R. Bajpayi injury no. 1, 3, 8 & 7 under observation and found the rest to have been simple. According to doctor, all the injuries were caused by some fire-arm. The injuries were fresh in duration. The margins of the injuries were inverted and lacerated. No blackening and tattooing was present around all these wounds. He also prepared and proved the injury report, Ext. ka- 13. The

doctor had deposed that the injuries sustained by the injured were gunshot wounds. He opined that these injuries could be caused by the gunshot pellets.

26. In his cross-examination doctor PW- 7 has deposed that Tehsildar B.C. Dixit recorded dying declaration of injured Nanku on 20.11.1977 at 10.40 A.M. in his presence. At that time Nanku was in a fit mental state and he remained fully conscious while his dying declaration was recorded. He further stated that he gave certificate in his own hand-writing and signature about mental fitness of the injured. The witness proved it as Ext. Ka-20.

27. PW- 3 Dr. Som Sharma has stated on oath that on 21.11.1977, he was posted as Medical Officer District Hospital Fatehpur. He had conducted the autopsy of the corpse Nanku Prasad on 21.11.1977. The corpse of Nanku Prasad was received on 20.11.1977 at 3.50 p.m. The requisite papers were received on 21.11.1977 at 10.00 a.m. In the course of postmortem, the doctor noticed the following facts:-

**Ante-mortem injuries:-** Doctor found the following ante mortem injuries on the person of the deceased Nanku Prasad-

(i) - One gun shot wound of entry 1/10" x 1/10" x chest cavity deep on the left side of the chest upper part 4" above nipple at 11 'O' clock position. Margins are inverted and lacerated. No blackening and tattooing present (bleeding).

The doctor also noticed that one small size gun shot 1/10" x 1/10" recovered from the body of Nanku Prasad (deceased) lying in the posterior pericardium On internal examination he found pericardium perforated and a big hematoma present above the pericardium. He also found the aorta perforated through and through and about 1'1/2 lb. of blood present in thoracio cavity.

**Cause of death:-** The doctor opined that the death of the deceased Nanku Prasad has been caused due to shock and hemorrhage, as a result of injury found on the chest. He prepared the post mortem report and proved it as Ext.Ka.3.

28. Since Durga Krishna and Ganga Prasad had also sustained injuries, their X-rays were also done by Dr. T. N. Bajpayi (P.W.5) on 21.11.1977. The aforesaid doctor took X-ray-photo graph of the abdomen, chest, skull, left arm elbow and forearm of Durga Krishna. In the X-ray of abdomen he found multiple homogeneous radio opaque shadows ranging ½ cm in diameter in the right pelvic region. One shadow of same diameter was present concerning to 11th rib of left side. He prepared the X-ray report exhibit Ka.-4 to Ka.- 9 for the same. In the X-ray of chest three homogeneous radio opaque shadows seen 0.5 cm in diameter concerning to medical end of right clavicle and twp near first rib of right side. He prepared the X-ray report Ext. Ka-6 of the same. The X-ray of left arm elbow and forearm, showed multiple circular homogeneous radio opaque shadow seen scattered in parietal and also in relation to mandible of right side. He prepared the X-ray report Ext., Ka.6 of the same. The X-ray of left arm elbow and forearm showed multiple circular homogeneous radio

opaque 0.5 cm in diameter both in relation to arm and forearm. No fracture or dislocation or any other radiological abnormality was seen. He prepared X-ray report Ex.Ka.7 of the same. In the X-ray of chest of Ganga Prasad did not find any traumatic pathology of bone cage and prepared X-ray report as Ex.Ka.8. In the X-ray of Ganga Prasad, he found three homogeneous radio opaque shadows 0.4 cm in diameter, one in left temporal region and one in left orbital region and third in right angle of mandible. In the lateral view of skull nearly circular homogeneous radio opaque shadows 0.4 cm diameter one orbital region and the other on temporal region. He prepared the report Ex.Ka.9 of it. He handed over to the police personnel blood saturated clothes of Ganga Prasad and Durga Krishna which were entered in the G.D. report no.15. the copy of which was marked as Ext. Ka.32. PW- 5 has deposed in his cross examination that there appears Radis opaque shadous in the injury of both the injured in X-rays. In his opinion they were of metallic substances which may include gun pellets also. The defence could not draw anything to disprove his validation.

29. The prosecution in order to buttress its stand examined PW-4 Sada Shiv. He deposed that he was well knowing to both the parties from much earlier, to this incident. He stated that he was going from Mohalla Amar Jai to his house at Ismailganj at about 8.30 a.m. and when passed through the station road near the house of Dr. Nawal Kishor, he saw the said incident. He proved that accused Krishna Kant Gautam, Sheo Roop Singh and Farnesh Kumar equipped with firearms and Bhola and Anant Saran having lathi, were pulling down the boundary-wall of Sant Kumar Upadhyay. Nanku Prasad, and Ganga Prasad and were obstructing. At this the accused persons were highly infuriated and enraged creating an ugly scene. Nanku Prasad (since deceased) raised objection on hurling abuses and filthy words, but accused paid no heed to his words, and open fire as a result of which Nanku Prasad, Durga Krishan alias Babbo and Ganga Prasad sustained fatal injuries. P.W.4 Sadashiv had supported the prosecution story and nothing could be drawn to cast any shadow on his veracity and verity in his cross.

30. The prosecution has also examined P.W.-6 C-Guru Prasad. He has proved that on 20.11.1977 the Panchayatnama of the corpse of Nanku Prasad was done before him. He unfolded that Ganga Prasad had old animosity on account of police case registered between him and Nanku Prasad. He is reeling under the influence and pressure of the accused persons, so he is retracting to narrate the correct facts.

31. The prosecution has also examined PW- 8 Constable Moharrir Jagdish Prasad Tiwari. He deposed that he was posted, as Constable Moharrir at Police Station Kotwali District Fatehpur, on the fateful day of occurrence. He had prepared the chik FIR and proved it as Ext. Ka.14. He also sent all the three injured to sadar hospital for treatment with majrubi chitthis. On the basis of contents of tehrir Ext. Ka-2, entries were made into in the chik FIR and kaimi G.D. The G.D. report was duly marked as Ext.Ka. 15. The information with respect to the death of Nanku Prasad was given on 20.11.1977 at 12.15 (noon), on the basis of which the case was converted to section 302 IPC. The said conversion of the case was entered in the G.D. by him.

32. In order to Further, substantiate prosecution version, the prosecution had examined PW.9 B.C. Dixit, Tehsildar / Magistrate Fatehpur. He deposed that he was posted at Tehsildar / Magistrate at Fatehpur on 20.11.1977. He testified that he had recorded the dying declaration of injured Nanku Prasad on 20.11.1977 at 10.40 am. Injured Nanku was in a conscious state of mind, as evident from the certificate marked as Ka- 19 to this effect, is given by the doctor. The dying declaration Ext. Ka- 19 was recorded in Sadar Hospital Fatehpur. The dying declaration of injured Nanku was authenticated by the Magistrate which has been made part of case diary by IO.

33. During the course of examination nothing could be elicited from P.W.-8. H.M. Jagdish Prasad Tiwari and PW- 9 B.C. Dixit to cast doubt about veracity and probity of prosecution version, rather the prosecution version stood fortified and strengthened by cross examination as the defence had balled to bring routh any material to throw the prosecution case overboard.

34. The prosecution examined P.W.- 10 S.1. Gadadhar Prasad Sharma. He deposed that on 20.11.1977, he was posted at Police Station Kotwali Fatehpur as Station House Officer. The present case was registered in his presence. The investigation of this case was entrusted to him. He proved that he had recorded the statement of Sant kumar (complainant), Injured Nanku Prasad, who later on succumbed to his injuries. The dying declaration of Nanku Prasad was duly entered in the case diary by him. The said statement was marked as Ext. Ka.-20. He had also recorded the statement of two other injured, he also visited the place of occurrence. On the way, he met Raj Kumar, whose statement was also recorded. On the tip off of police sympathizer, he raided the house of the accused persons and apprehended Krishna Kant, Sheo Ram, Farnesh Kumar, Ram Nath alias Bhola Lodh and Anant Saran. He had also recovered one D.B.B.L. gun bearing no. 54891 with a belt of fourteen cartridges and another belt of nine cartridges. He prepared the recovery memo which was duly signed by the witnesses and was marked as Ext.Ka.29. He had also recorded the statement of the accused persons. The accused persons were sent to Kotwali Fatehpur under the supervision and vigil of Dost Mohammad S.1. He prepared the site plan and collected plain and blood stained oil as well as piece of brick. He had also prepared the memo of of plain and blood stained earth and piece of brick which was marked as Ext.Ka.23. He had also recovered empty cartridges and pellets. He had also recovered the empty cartridges from the place of occurrence from which smell of recent firing was coming out. All the incriminating articles recovered from the place of occurrence, were duly identified by him. The defence could not elicit any deviation in his examination.

35. The prosecution has also examined P.W.-11 B.D.Rai, Ballistic Expert. He stated that the cartridges recovered from the place of occurrence and the D.B.B.L. gun recovered from the accused persons, did not tally. The cartridges recovered from the place of occurrence were fired by another gun, but it could not be elicited that the said cartridges were not used in that firing. It is clear from the oral evidence and FSL report Ext. Ka- 35 and chemical report of Serologist Ext. Ka- 38, and recovered pellets and tiklis of the cartridges, that more than one weapon

was used by different appellants. Even if weapon of assault has not been recovered, it does not adversely affect the prosecution case.

36. The prosecution had also brought on record revenue papers relating to plot no. 2103 and 2104 to depict that plot no. 2103 was previously entered in the name of Prem Shanker and was also in his possession in the year 1936 Fasli. The said land was purchased by the complainant Sant Kumar Upadhyay from Prem Shanker by means of a registered sale deed Ka-1. Simultaneously plot no. 2104 was recorded as barren land. The said plot was allotted to Smt Kalpana Shukla w/o Prem Shanker Shukla. In case of any dispute over the property in question, both the parties have option of approaching to the competent court which can take notice of all the papers and would decide the same on the basis of the documents produced by them. The criminal court does not have any jurisdiction to enter into the disputed question of properties, as the criminal court has different parameters for deciding the case.

37. Learned counsel for the appellants assailed the evidence of the prosecution on various grounds and advanced several arguments in this behalf. Learned counsel for the appellants submitted that the appellants have been falsely roped in the present case, on account of enmity, animus and grudge, as complainant wanted to purchase the disputed land. Learned AGA refuted the argument. He urged that complainant/ deceased had no enmity against the appellants, rather appellants grudge animosity against the complainant on account purchase of the disputed plot and raising construction over it. It is axiomatic that enmity is a double edged weapon. On the one hand it may be a cause to falsely implicate the accused, where as it may be the real cause of the incident, on the other hand too. So, benefit of enmity may go to either side, depending upon the facts and the circumstances of the case.

38. The learned counsel for the appellants submits that the FIR in this case is ante timed, delayed and is the result of embellishment, which is a creature of afterthought. It is pertinent to discuss, in brief, the legal scenario in this behalf.

39. A division Bench of Allahabad High Court in **Bhurey Singh Vs. State of U.P. 2008 (4) ALJ 772 Alld**. has referred the Apex Court in **Maharaj Singh Vs. State of U.P. (1994) 5 SCC 188** some checks about the ante timed FIR. One of the checks pointed out is regarding the receipt of the copy of FIR by the local Magistrate. If it is sent late it will give rise to an inference that FIR is not lodged within reasonable time. Further if sending FIR with the dead body, its inference in the inquest report will lead that FIR is in time. The absence of those details indicating the facts that the prosecution story was still in an embryo state and it has come to be recorded later on, after due deliberation and consultation. Maharaj Singh (Supra) has been followed by the Apex Court in Mohammad Muslim Vs. State of U.P. 2023 live law (SC) 489 also.

40. In the present case, it is contended by the learned counsel for the appellants that undisputedly the incident have occurred on 20.11.1977 at about 8.30 a.m. The distance of police station from the place of occurrence is about six furlongs. The first information report is lodged by complainant at about 9.05 a.m. During this

time span the possibility to break and twist the real facts of the case, cannot be ruled out. It is also argued that the registration of the first information report at about 9.05 a.m. itself creates doubt about the verity and veracity of the prosecution version. Learned A.G.A. refuted the argument and submitted that in view of the facts and circumstances of the case the FIR is promptly lodged, leaving no time and opportunity to twist the real facts in the FIR. It may be mentioned that in the present case admittedly three persons are alleged to have been caused injuries by accused appellants with guns and lathi and one of them scummed to his injuries. After the incident complainant (PW-1) took all the three injured on two rikshaws, to his house, situated at about three furlongs from the place of occurrence and on the way to police station. There he Scribed tehriri report, Ext. Ka- 2, managed some money and thereafter carried the injured to the police station on the same rikshaws, where he gave the scribe and got FIR lodged at 9.05 a.m. All this took about ten to twenty minutes and reaching police station. According to PW-8 Majrubi chitthi of all the three injured was prepared at the police station by the munshi under dictation of SI Dost Mohammad. Since the condition of the injured was serious and precarious, they were in need of prompt medical aid so in a hurry inadvertently crime no. and the sections could not be mentioned in these letter. It may also be added that after registration of the case injured reached the district hospital where medico legal was done and report in this regard was prepared mentioning the time of their examination (Ext Ka-11 to Ext Ka-13). On 20.11.1977 at 9.15 a.m. injured Nanku Prasad was examined, who’s injury report has been proved by PW-7 B. R. Bajpai as Ext Ka-11. Injured Ganga prasad was examined at 10.15 a.m. on 20.11.1977 by the doctor, who's injury report is Ext Ka-12 is on record. Similarly injured Durga Krishna was medico legally examined on 20.11.1977 at 09.45 a.m. by the doctor, his injury report is on record as Ext Ka- 13. Thus, it is clear that after registration of the case, mjrubi chitthi were prepared, and after receiving the same injured were brought to the hospital, where they were medically examined 9.15 a.m. to 10.15 a.m. In these circumstances not mentioning of the crime no on the majrubi chitthis does not mean that the FIR was not registered at 09.05 a.m. on the fateful day. Beside, crime no and other particulars are mentioned in the inquest report Ext ka-10, proved by PW-5. It is natural that all this process took sometime to lodge the FIR. It has been lodged within a period of half an hour as is evident from the chik FIR Ext. Ka- 14 and kaimi G.D. Ext. Ka- 15. This in itself indicates that FIR was lodged promptly and it was not ante timed, as there was no time to delibareted to twist the facts. He further argued that as a matter of fact complainant side itself came on the spot along with their aids and demolished the boundary-wall of the appellants made earlier in nearby plot no. 2005. Caused injuries to the appellants regarding which they have launched cross FIR at about 11.30 hours. It is thereafter the complainant after collecting some companions, including friend lawyers reached at P.S. and in defence, under pressure, lodged the present FIR. In the circumstances, FIR cannot be said to be delayed and afterthought providing time to twist and concealing the real facts, and arguments, putforth by the learned counsel for the appellant, is not tenable.

41. Learned counsel for the appellant audaciously argued that witnesses produced by the prosecution are partisan,

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

42. The above submission was thoroughly considered by the Hon'ble Apex Court in case of **Daleep Singh Vs. State of Punjab AIR 1953 SC 364** and enunciated the following principles:-

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

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

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

44. 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."

45. 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.

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

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co- relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any

corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

47. It is germane to point out here that prosecution in the present case has examined as many as 11 witnesses in support of its version. Out of which four are the witnesses of facts and rest are formal witnesses. PW- 1 Sant Kumar Upadhya is the complainant of the incident and nephew of the deceased Nanku. PW- 2 Durga Krishna alias Babbu, is the cousin of the deceased and are injured witness also. Thus, they appears to be relative of the injured. PW- 4 Sadashiv and PW- 6 Guru Prasad are eye witnesses. It may be reiterated that PW-1 Sant Kumar is the complainant, Appellants in their statement under Section 313 Cr.P.C. have themselves admitted his presence at the place of occurrence. PW- 2 Durga Krishna alias Babbu is the injured witness. While PW-4 Sadashiv is an independent eye witness, who has narrated the prosecution story is a very intrinsic and a natural way and nothing was elicited from his examination which could beneficial the appellants version of the deffence. Therefore, the presence of these witnesses on the place of occurrence cannot be doubted. PW-6 Guru Prasad is a formal witness of panchayatnama. As discussed above, a close scrutiny of testimonies of these witnesses reveal that they have narrated the entire incident in a very intrinsic and natural way. Therefore, their testimony cannot be discarded.

48. The learned counsel for the appellants urged that there is no independent public witness to support the prosecution version. Which creates serious doubt about the truthfulness and probity of the prosecution version. The accused appellants have been assigned specific role of causing injuries but the manner of assault shown by the prosecution indicates serious lacunae creating a dent of doubt. There is serious and material inconsistency and discrepancy in respect of the place of occurrence, weapon used and the blows inflicted upon the injured. The witnesses produced were already nurturing animus and grudge against the accused persons. The investigation has also been done in a pedantic and lackadaisical manner with the oblique motive of implicating the accused appellants There is no material from the side of the prosecution to evince that the accused persons had harbored vengeance on the issue of paltry boundary wall. Solitary material was elicited from the evidence of the prosecution witnesses in cross examination by which their testimony was found to be unbelievable and untrustworthy. The chain of evidence and circumstances is not complete to conclusively establish that the accused appellants are the only perpetrator of dreadful crime. The learned trial judge misread, misevaluated and appreciated the entire evidence in convicting and sentencing the accused appellants in the aforesaid crime. The circumstances from which the conclusion of guilt is to be drawn is not fully established. The prosecution has failed to show that in all human probability

the act must have been done by the accused appellants. The conviction and sentence awarded to the accused appellants by the learned trial court is not sustainable and the impugned order dated 13.12.1982 may be quashed and the accused appellants may be set at liberty. Learned A.G.A. refuted these arguments advanced by the learned counsel.

49. Learned counsel for the appellants has also argued that three persons had sustained injuries in such a nature that Nanku Prasad succumbed on account of his ante-mortem injuries, but complainant even did not receive any abrasion or contusion in the said tussle. In this regard it may be mentioned that appellants in their statement under section 313 Cr. P. C. has admitted the presence of the complainant Sant Kumar Upadhyay, at the place of occurrence, at the time of incident. Therefore, it could not be presumed that PW-1 was not present at the scene of occurrence and he has not witnessed the incident. It is next submitted by learned counsel for appellant that Ganga Prasad has been named as a injured witness, but he has not been the examined, for the reasons best known to prosecution. In this regard the statement of the PW-2 Durga Krishna is worth mentioning that Ganga Prasad is reeling under pressure of the appellants so he would not come to record the statement in the court. In such a situation if for the same of argument it is accepted that he would have deposed against the prosecution, it would have been an exercise in vein to examine him by the prosecution, however, it is established that he had received injuries in the incident by the deposition of other prosecution witnesses so he would have strengthened the prosecution version and would have explain the injuries sustained by him. However, his non examination did not adversely affect the prosecution case. It has been also argued by the learned counsel for the appellant that no independent witness has been produced by the prosecution while admittedly several persons were present at the occurrence during incident. In this behalf it may be mentioned that it is established cannon of law of evidence that it is quality not the quantity of evidence, which matters to prove a case. However, prosecution has examined PW-4 Sada Shiv who is an independent eye witness, who has supported the prosecution version. The motive delineated by the complainant also does not instill such feeling that the accused appellants will attack upon the victims to take away their life. In the facts and circumstances it is vividly clear that injured/ complainant had no animosity with the appellants, however, in view of the possession over the disputed plot and demolish the boundary-wall on it reveal that appellants had vengeance and grudge and enmity against the complainant side, which prompted them to commit the gruesome murder of Nanku Prasad.

50. Learned counsel for the appellants has urged that it is a case of day light occurrence. The incident has taken place in an open place, in the presence of injured witnesses who supported prosecution in their examination. A complete chain of evidence to demonstrate that injured person were inflicted serious injuries with respective weapon held by the accused appellants in execution of common objects to restrain complainant from raising of the boundary-wall. There is other material evidence on record also which corroborated the testimonies of the other prosecution witnesses.

51. According to prosecution case after the incident injured including Nanku Prasad were admitted in the district hospital

Nanku's condition was serious and precarious. So they called the Magistrate to record his Dying Declaration. Tehsildar/ Magistrate B. C. Dixit recorded his dying declaration on 20.11.1977 at 10.40 a.m. in the presence of PW-7 Dr. B.R. Bajpai. Injured Naku Prasad was in a fit mental state and fully conscious during the record of his dying declaration. Such a facts has been certified by PW-7 Dr. B.R. Bajpai which is in his hand writing and signature. He proved it as Ext Kha-1. PW-9 tehsildar/ Magistrate B.C. Dikshit has recorded dying declaration of injured Nanku Prasad in his own hand writing and signature on 20.11.1977 at 10.40 a.m. and obtained his signature on it. He proved the dying declaration as Ext Ka.19. Learned counsel for appellants has contended that in the dying declaration the only role of firing has been assigned to Krishna Kant Gautam with his son, brother and other persons has been assigned, the role of exhortation in chorus, nor they have not been assigned any role of assaulting any one.

52. Learned AGA has relied upon a judgment of Hon'ble Apex Court in **Bhayani Luhana Radhabi versus State of Gujrat** 1977 CAR 49(SC)where in Apex court in held that a dying declaration stood on the same footing as any other evidence and it was to be judged in the surrounding circumstances and with reference to the principles governing the weighing of evidence. The apex court has laid down certain circumstances which had to be kept in view while testing the reliability of a dying declaration. These circumstances include ability of the man to remember to the facts and whether the statement has been consistent thereabout. If he had several opportunities of making a dying declaration and whether the statement has been made at the earliest opportunity and not the result of the tutoring by interested persons. The present dying declaration is free from all such vices. In **Kusa and others versus State of orisha** 1980 C.A.R. 66 (SC). the Apex court held that the truth sits upon the lip of a dying man. In **State of Maharashtra versus Krishnamurthy Laxmipati Naidu (1980) Supp. SCC 455** it has been held that merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. Further reliance has also been placed upon the judgment of Hon'ble Apex Court in re **Surajdeo Ojha versus State of Bihar 1980 Supp. SCC 769** wherein it has been held that merely because the dying declaration is a brief statement, it is not to be discarded. On the contrary the shortness of the statement itself guarantees truth. Thus the dying declaration of Nanku Prasad (deceased) is to be acted upon with corroborative evidence.

53. In the present case dying declaration Ext Ka-19 is a brief statement of the injured Nanku, wherein he stated that all the accused including surviving appellants, were present on the scene of occurrence. He further stated that Krishna kant Gautam fired upon him. The ocular evidence, discussed herein above establishes that Farnesh Kumar, who opened fire which hit Nanku Prasad on the upper part of his chest. There were gunshot wound also sustained by Durga Krishan alias Babbu and Ganga Prasad. The medical evidence has fully supported the injuries. In these circumstances it may safely been inferred that these fires were made by more then one fire arm. It has occurred in evidence that after hit the Nanku Prasad rolled on the ground. It diminished the possibility that he was able to see as to who fired upon the injured persons. It may also be mentioned that it

was a case of indiscriminate firing, so the roll of hitting any injured to particular accused can not be assigned. Presence of the appellants Ram Nath Lodh alias Bhola Lodh is well established on the place of occurrence. He is set to be servant of Krishan Kant Gautam. The motive on the part of the accused is also well established. There was a dispute of the landed property between the complainant and the accused. Accused/appellants want to grab the land purchased by the complainant, of Khasra no. 2103 and was raising boundary wall on the fateful day. This land is situated in front of the house of the Krishna Kant Gautam and he wanted to purchase the said land. Accused prevented the complainant side and remonstrated to demolish the boundary-wall already raised earlier by the complainant side. Thus, the motive to commit the crime by the appellants is clear, and when complainant reached at the plot for raising for the boundary-wall, all the accused came out with guns and Lathies and started demolishing the wall in execution of common object.

54. Having regard to the overall facts and circumstances of the case and also from the aforesaid discussions of the evidence on record, there is no manner of doubt about the complicity of the accused appellants in inflicting fatal and grave injuries on Nanku Prasad (deceased) and two injured. Though the witnesses were cross examined by the defence but no contradiction could be elicited so as to discard the version regarding the involvement of the accused appellants in committing ghastly crime as a result of which Nanku Prasad died on the same day of incident. The medical evidence adduced by prosecution relating to injuries caused to Nanku Prasad (deceased) and other two injured stood fully proved. The prosecution story will not stand demolished for any fault of the investigating officer. The trial court had sifted and analysed the entire prosecution version and defence of the accused appellants on the yardstick of its reliability and trustworthiness and has rightly reached at the conclusion that it is the accused appellants who are the real perpetrator of the crime, inflicting fatal and blatant injuries to Nanku Prasad (deceased) and two others. The complainant Sant kumar Upadhayay (P.W.1) has supported the first information report and narrated the incident in vivid manner in his evidence before the trial court. P.W.2 Durga Krishna alias Babbu who has been eye witness of the incident has also supported the prosecution case in a natural manner. Dr. Som Sharma (P.W.3) who had conducted the post mortem has also certified the post mortem report and the injuries. P.W-4 Sada Shiv had been an eye witness of the said incident narrated the prosecution case in an explicit way depicting barbarous and gruesome manner of causing injuries to Nanku Prasad (deceased) and two others by the accused appellants. P.W.5 Dr. T.N. Bajpayee had proved the X.ray and photographs of the injured. P.W.6 Guru Prasad who had been a witness of Panchayatnama had also supported the prosecution case. P.W.7 Dr. B.R. Bajpai had authenticated the dying declaration of Nanku Prasad (deceased) recorded by Tehsildar Magistrate. P.W.8 Constable Moharrir Jagdish Prasad Tiwari had proved the various reports recorded and lodged at the police station concerned. P.W.9 B.C.Dixit Tehsildar Magistrate who had recorded the dying declaration of Nanku Prasad (injured) had proved vide Ext.Ka.19. P.W.10. It is canon of cardinal principle of law that truth sits upon the lip of a dying man. Gadadhar Prasad Sharma S.I. who had visited the place of occurrence

and arrested the accused persons and recovered the incriminating articles had certified the same. P.W.11 B.D.Rai Ballistic Expert had also given his opinion. The cumulative effect of entire evidence and circumstances shows that all links in the chain of the prosecution case are complete. The accused appellants had formed an unlawful assembly and had taken undue advantages of the deceased and injured by causing them fatal injuries with gun shot and lathi, danda. There is clear intent and knowledge to cause murder and severe bodily injuries. There is clear and categorical evidence to prove the accusations of causing serious injuries to Nanku Prasad who succumbed to his injuries, on the same day and two others namely, Ganga Prasad and Durga Krishna alias Babu were inflicted fatal grievous multiple gunshot injuries with the intent and knowledge that they might be lost their lives by the surviving appellants Farnesh Kumar Singh and Ram Nath alias Bhola. Thus surviving accused appellants cannot escape from the punishment for the offence committed by them.

55. In the light of prolix and verbose discussions made herein above and also regard being had to the entire facts and circumstances of the case and re-appreciation of the entire evidence, we are of the opinion that the prosecution has proved its allegations beyond reasonable doubts, pointing unerringly guilt of the accused including surviving appellants. The trial court has rightly held that the accused / appellants, formed unlawful assembly with arms and deadly weapons and committed murder of an innocent person and attempted to murder two other injured in execution of their common object. Thus, surviving appellants are also guilty for the offence punishable under section 147, 148, 307/149, 302/149 IPC. Consequentially, in our considered opinion, the accused appellants are guilty of the charges leveled against them, in execution of their common object. Thus, evidence adduce by the prosecution, motive of the incident coupled with the dying declaration establishes the prosecution case beyond doubts.

56. The Learned counsel for the appellant has submitted that the FIR in the present case is a counter blast of a case lodged by the accused side against the complainant. According to the defence version on 20.11.1977 at about 08.30 Complainant Krishna Kant Gautam was sitting in his room. His brother Shivroop Singh Son Farnesh Kumar Servent Ram Ntah alias Bhola Lodh and Anant Saran were also with him. Meanwhile Sant Kumar Upadhyay, Naval Kishor(since deceased) along with ten other persons armed with guns and pistols and came and started demolishing his boundary-wall constructed in plot no. 2105 on hearing the shrill and sherik Krishna Kant Gautam and his associates came out of his house and remonstrated them. These people were standing in court yard of the complainant Krishna Kant Gautam. Several trees were standing there. Some banana trees were also there. Seeing them accused started hurling abuses. When he asked them not to abuse them Nanku Prasad fired with his gun at them. However they escaped the fire, which missed. The fire did not hit any one of them and hit the bananas plant. At this complainant and his companions went in side the house. There after police came there and a criminal case against the accused persons (complainant of the present case) lodged an FIR against the Sant Kumar and Naval Kisore at about 09.05 a.m. under sections 148, 304/149, and 427 IPC and after due investigation the

charge sheet was filed by the IO against the Sant Kumar and Naval Kishor. Learned trial judge after scrutinizing the evidence on record acquitted all the accused by the impugned judgment dated 10.12.1982.

57. Learned Counsel for the appellants has contended that present is the cross case of the above stated case. Being a cross case complainant Sant Kumar Upadhyay and party is the aggressor as they were equipped with deadly weapons and attacked them. Appellants only acted in private self defence of their life and property. The learned AGA disputed the above defence case and argued that it was Krishan Kant and party who attacked Sant Kumar Upadhyay etc with deadly weapons and killed Nanku Prasad in execution of their common object and forming unlawful assembly with arms. It may be noted that no one has received any injury of any kind from the side of Krishna Kant Gautam if Sant Kumar Upadhyay etc were aggressor, they would have sustained injuries, particularly when accused were equipped with arms while Nanku Prasad killed from the side of Sant Kumar Upadhyay and two other persons were also received gun shot injuries. Thus, by no stretch of imagination the complainant Sant Kumar Upadhyay is the aggressor. So far right of private defence go, for the sake of arguements if it is accepted that Sant Kumar Upadhyay etc. were the aggressor, Krishna Kant Gautam etc. has exceeded the limits of private defence. Thus, the plea of aggressor and exercise of the private defence, can not be accepted.

58. Resultantly, this Court find no compelling and substantial reasons to interfere with the judgment with regard to conviction of the appellants Farnesh Kumar under Sections 148, 302/149, 307/149 I.P.C. and Ram Nath alias Bhola Lodh under Sections 147, 302/149, 307/149 I.P.C. The learned trial court has sentenced Furnish Kumar for the charge under Section 148 I.P.C. for R.I. of two years, for the charge under Section 302 read with 149 I.P.C. for the life imprisonment and for charge under Section 307 read with 149 I.P.C. for R.I. of seven years. The learned trial court has sentenced the accused appellants Ram Nath alias Bhola Lodh for the charge under Section 147 for a terms of 18 months R.I., for charge under Section 302/149 I.P.C. life imprisonment and for the charge under Section 307/149 I.P.C. for a term of seven years R.I.

59. Learned AGA has pointed out that with respect to sentence section 302 and 307 I.P.C. enjoin that apart from the imprisonment fine should also be imposed upon the convicts. The law of sentencing consider it mandatory and imposition of fine forms the integral component of punishment under these sections. However in this case learned trial court has not imposed any fine as punishment, for the offence under Sections 302 and 307 I.P.C. and it should be corrected. Learned counsel for the appellant did not disputed this legal position of sentencing. Keeping in view the aforesaid legal aspect of sentencing, it appears to be an inadvertent omission and error in the sentencing by the trial court. Therefore it deserves to be corrected and sentence be modified accordingly by addition of fine for the offence under section 302/ 149 and 307/ 149 IPC. The ends of justice will be served by adding a fine of Rs. 20000/- to the term of imprisonment already awarded to each surviving accused / appellants under section 302/ 149 IPC and in default both of them will under go to an additional imprisonment for six months. Each of the

surviving appellants is imposed fine of Rs 10000/- in addition to imprisonment already awarded under section 307/ 149 IPC and in case of default both of them will under go to an additional imprisonment for three months. The judgment and order dated 13.12.1982 passed by the trial court is affirmed accordingly. The appeal sans merit and is accordingly dismissed.

60. Copy of the judgment be sent to the trial court to ensure necessary compliance in one months. The compliance report be communicated to this court within two weeks thereafter.

61. Trial court record be sent back immediately.

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**(2024) 7 ILRA 1139**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 29.07.2024**

**BEFORE**

**THE HON'BLE SANJAY KUMAR SINGH, J.**

Criminal Appeal No. 5295 of 2023
Connected with
Government Appeal No. 198 of 2024
and
Criminal Revision No. 3535 of 2023

**Afjal Ansari ...Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Mr. G.S. Chaturvedi, Sr. Advocate, Mr. D.S. Mishra, Sr. Advocate, Mr. Upendra Upadhyay

**Counsel for the Respondent:**
Mr. P.C. Srivastava, AAG, Mr. J.K. Upadhyay, AGA
Mr. Sudist Kumar

**A. Criminal Law-Criminal Procedure Code, 1973-Section 374(2)-Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act. 1986-Sections 3(1) & 18-Challenge to-conviction-The conviction was based on the accused alleged involvement in a gang led by Mukhtar Ansari, primarily involved in the 2005 murder of MLA Krishna Nand Rai-The appellant acquittal in the murder case should act as estoppels against the application of the Gangster Act-the prosecution could not prove its case and charges under section 3(1) of the Gangster Act beyond reasonable doubt-The court held that he is liable to be acquitted in the light of Apex Court judgment in the matter of Farhana which has retrospective effect.(Para 1 to 102)**

**The appeal is allowed.** (E-6)

**List of Cases cited:**

1. Farhana Vs St. of U.P. & ors. (2024) SCC OnLine SC 159

2. Sangeetaben Mahendra Patel Vs St. of Guj. & anr.(2012) 7 SCC 621 Ashwani Kumar @ Ashu & anr. Vs St. of Punj. (2015) 6 SCC 308

3. Kharkan & ors. Vs St. of U.P. (1965) AIR (SC) 83

4. Tahsidar Singh Vs St. of U.P. (1959) AIR (SC) 1012

5. Ashok Kumar Dixit Vs St. of U.P. (1987) AIR All 235

6. Pappu @ Dhani Ram Vs St. of U.P. 2024 (0) Supreme (All) 258

7. Selvamani Vs The St. Rep. by the Insp. of Police (2024) SCC Online SC 873

8. Smt. Alka Rai & Anr Vs U.O.I. & ors. (2006) 5 199 DB

9. Harendra Rai Vs St. of Bih. & ors. (2023) SCC OnLine SC 1023

10. Sumer Singh Vs Surajbhan Singh & ors. (2014) 7 SCC 323

11. Suryakant Baburao @ Ramrao Phad Vs St. of Mah. & ors.

12. Tahsidar Singh Vs St. of U.P. (1959) AIR (SC) 1012

13. V.K Mishra & anr Vs St. of U.K. & anr (2015) AIR SC 3043

14. P.V. George Vs St. of Ker.(2007) 3 SCC 557

15. Manoj Parihar & ors. Vs St. of J & K & ors. (2022) :Live Law (SC) 560

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

1- Criminal Appeal No. 5295 of 2023 under Section 18 of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 read with Section 374 (2) of Criminal Procedure Code has been filed by appellant Afjal Ansari against the judgement and order dated 29.04.2023 passed by the learned Additional Sessions Judge/Special Judge, M.P./M.L.A Court, Ghazipur in Special Session Trial No. 980 of 2012 arising out of Case Crime No. 1052 of 2007, under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986, (hereinafter referred to as "the Gangsters Act") police station Mohammadabad, district Ghazipur, whereby the learned Trial Court convicted and sentenced the appellant to four years' simple imprisonment and a fine of Rs. 1,00,000/- (rupees one lac ) and in case of default in payment of fine, the appellant was further directed to undergo six months' rigorous imprisonment.

2- A Government Appeal No. 198 of 2024 under Section 377 of Criminal Procedure Code has been filed by the State against the judgement and order dated 29.04.2023 passed by the Additional Sessions Judge/Special Judge, M.P./M.L.A Court, Ghazipur in Special Session Trial No. 980 of 2012 arising out of Case Crime No. 1052 of 2007, under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986, police station Mohammadabad, district Ghazipur for enhancement of sentence awarded to the appellant.

3- One Piyush Kumar Rai, son of late Krishna Nand Rai (one of the deceased) of case crime No. 589 of 2005, under Sections 147, 148, 149, 302, 404, 120-B IPC and 7 Criminal Law Amendment Act, police station Bhawarkol, district Ghazipur has also filed Criminal Revision No. 3535 of 2023 Under Section 397/401 Cr.P.C. against the aforesaid judgement and order dated 29.04.2023 for enhancement of sentence awarded to the appellant.

4- After the conviction of the appellant by the Trial Court, when this appeal (Criminal Appeal No. 5295 of 2023) was filed, a Coordinate Bench of this Court vide order dated 24.07.2023 has suspended the sentence of the appellant and he was directed to be released on bail, but prayer to stay the conviction of the appellant was rejected.

5- The State of U.P. did not challenge the above order dated 24.07.2023, whereby this Court while suspending the sentence, granted bail to the appellant before the Hon'ble Supreme Court, but the appellant being aggrieved and dissatisfied with the part of above order of this Court dated 24.07.2023 refusing to stay the conviction of the appellant, has filed Criminal Appeal No. 3838 of 2023 before the Hon'ble Supreme Court, which has been disposed of suspending the

conviction of the appellant vide order dated 14.12.2023 **[Afjal Ansari Vs. State of Uttar Pradesh, (2024)2 SCC 187]** with certain directions, which are as under:-

> *"24. We, thus, deem it appropriate to partially allow this appeal and suspend the conviction awarded to the Appellant in Special Sessions Trial No. 980/2012 subject to the following conditions, clarifications and directions:*
>
> *i. The Ghazipur Parliamentary Constituency shall not be notified for bye-election, in terms of Section 151 of the RPA, till the decision of the Appellant's criminal appeal by the High Court;*
>
> *ii. The Appellant shall, however, not be entitled to participate in the proceedings of the House. He shall also not have the right to cast his vote in the House or to draw any perks or monetary benefits;*
>
> *iii. The continuance of MP led welfare schemes in the Ghazipur Parliamentary Constituency without the Appellant being associated for the release of grants for such schemes, is not an irrevocable consequence as all such Schemes can be given effect, even in the absence of the local parliamentary representative;*
>
> *iv. The Appellant shall not be disqualified to contest future election(s) during the pendency of his criminal appeal before the High Court and if he is elected, such election will be subject to outcome of the First Criminal Appeal; and*
>
> *v. The High Court shall make an endeavour to decide the Appellant's criminal appeal expeditiously and before 30.06.2024."*

6- Thereafter, on being nominated by Hon'ble the Chief Justice, this Criminal appeal along with above mentioned connected matters was placed before this Bench for hearing.

**<u>Brief facts</u>**

7- The facts that formed the bedrock of the present Criminal Appeal No. 5295 of 2023 are that a first information report was got lodged by Shri Ram Darash Yadav, the then Inspector, police station Kotwali, Mohammadabad, district Ghazipur alleging inter-alia that on 19.11.2007 he along with Constable Amit Kumar Rai, Ramashray Yadav, Akhilesh Yadav left the police station at about 09.30 hours by Government Jeep No. UP61B 2408 for patrolling and in search of wanted criminal. During patrolling, he came to know that in town Mohammadabad Yusufpur one notorious criminal Mukhtar Ansari, son of Subhan Ullah Ansari, resident of Mohammadabad Yusufpur, police station Mohammadabad, district Ghazipur is running an illegal gang of Mafias, who individually or collectively with the assistance of members of the gang, for the material and monetary benefit, are indulged in murder, loot, abduction, extortion and other serious offences, whereby they amassed and are acquiring immense wealth. The gang is being run by Mukhtar Ansari himself from jail by issuing orders. He has a long criminal history and due to his terror, nobody could muster courage to lodge FIR or to depose either against him or against members of his gang. Recently on 29.11.2005 at about 2:45 PM, they have committed the murder of Krishna Nand Rai, MLA

Mohammadabad, for their political benefit as a result thereof, law and orders were disturbed. Report of the murder of Krishna Nand Rai was lodged by the informant Ram Narayan, which was registered at case crime No. 589 of 2005, under Sections 147, 148, 149, 302, 404, 120-B IPC and 7 Criminal Law Amendment Act, police station Bhawarkol, district Ghazipur against Mukhtar Ansari, Afjal Ansari, Aejazul Haq, Munna Bajrangi alias Prem Prakash Singh, Ataur Rehman @ Babu, Firdaus alias Javed, in which after culmination of investigation, charge sheet Nos. 06 of 2006 dated 21.02.2006 and 06A of 2006 dated 15.03.2006 were submitted. Similarly, on 22.1.1997 at about 17:45 PM one Nand Kishore Rugta alias Nandu Babu was abducted in a Maruti car by four persons. The report of the said case was got registered by Mahavir Prasad Rugta against some unknown persons including Vijay Singh. During investigation by C.B.I., the name of Mukhtar Ansari, Shahabuddin, Ataur Rehman @ Babu, Barvindar, Gurmeet Singh, Jasveer Singh, Laxmi Yadav and Jitendra surfaced and charge sheet has been submitted in the said case crime No. 19/1997 under Section 364A, 365 IPC (converted under Section 364A, 365, 302,120B,34 IPC), Police Station, Bhelu Pur District Varanasi. Taking cognizance of said cases, the gang chart has been approved by the District Magistrate, Ghazipur on 19.11.2007 qua Mukhtar Ansari, Afjal Ansari and Aejazul Haq with the allegation that they with the help of their associates for pecuniary, material, political and temporal gain, committed offence under chapter XVI, XVII and XXII of IPC, therefore, it is necessary to lodge FIR against them under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986.

8- On the basis of the aforesaid first information report dated 19.11.2007, three cases being case crime No. 1051 of 2007 against Mukhtar Ansari, case crime No. 1052 of 2007 against Afjal Ansari (appellant) and case crime No. 1053 of 2007 against Aejaz alias Aejazul Haq under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 were separately registered at police station Mohammadabad, district Ghazipur. Charge sheet was also separately filed against each of them and they have also been tried separately. Details of the same are as under:-

(i) Special Session Trial No. 90 of 2012 arising out of case crime No. 1051 of 2007 against Mukhtar Ansari, in which vide judgment and order dated 29.04.2023 of the trial Court, he was convicted and sentenced under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 to ten years, against which he preferred Criminal Appeal no. 6029 of 2023 before the High Court, but during pendency of said Criminal Appeal, Mukhtar Ansari died on 28.03.2024.

(ii) Special Session Trial No. 980 of 2012 arising out of case crime No. 1052 of 2007 against Afjal Ansari (appellant), in which vide judgment and order dated 29.04.2023 of the trial Court, he has been convicted and sentenced under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 to four years' simple imprisonment against which he preferred present Criminal Appeal No. 5295 of 2023.

(iii) Special Session Trial No. 8 of 2012 arising out of case crime No. 1053 of 2007 against Aejaz alias Aejazul Haq, but he also died during pendency of his trial.

9- In the gang chart prepared against the appellant-Afjal Ansari, only one case being Case Crime No. 589 of 2005, under Sections 147, 148, 149, 302, 307, 404, 120-B IPC and 7 Criminal Law Amendment Act, police station Bhawarkol, district Ghazipur has been cited.

10- In the present case arising out of case crime No. 1052 of 2007, under Section 3(1) of the Gangsters Act, after culmination of investigation, the charge sheet No. 100/2010 dated 02.09.2010 was filed against the appellant-Afjal Ansari, on which the learned Special Judge, Gangsters Act, Varanasi took cognizance of offence on 15.9.2010.

11- After twelve years from the date of taking cognizance, on 23.9.2022 charges were framed against appellant-Afjal Ansari.

12- In order to prove its case beyond the hilt, the prosecution has examined as many as following seven witnesses :-

PW-1, Shri Ram Darash Yadav,
PW-2, Shri Surya Prakash Yadav,
PW-3, Head Constable Ram Dular Yadav,
PW-4, Shri Narendra Pratap Singh,
PW-5, Om Prakash Singh,
PW-6, Ram Narayan Rai
PW-7, Om Prakash Singh.

13- Out of the aforesaid prosecution witnesses, only PW-6, Ram Narayan Rai has been examined as a witness of fact to prove that the appellant is a Gangster and is member of a gang of Mukhtar Ansari. Rest of the witnesses are formal one. It would also be worthwhile to refer the statement of prosecution witnesses.

14- PW-1, Ram Darash Yadav in his examination-in-chief, which was recorded on 12.1.2023, has stated that on 19.11.2007 he was posted as Inspector of police station Kotwali, Mohammadabad, Ghazipur. On that date while he was on patrolling and in search of criminal, he got information from the people that there is a gang of Mukhtar Ansari, which is involved in anti-social activities and criminal activities, like murder and extortion etc. for his political benefit. Due to the aforesaid act of the gang, there is an atmosphere of fear and terror in the vicinity as a result thereof people do not report the matter in the police station or depose against them. On the aforesaid information and keeping in view the past criminal history, gang chart was prepared and was got approved by the higher authorities on 19.11.2007 at 22:30 hours and thereafter three separate cases were registered against Mukhtar Ansari, Afjal Ansari and Aejaz alias Aejazul Haq at case crime No. 1051 of 2007, 1052 of 2007 and 1053 of 2007 respectively under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986.

15- He further deposed that as per gang chart, Afjal Ansari is named in the murder case of Krishna Nand Rai along with Mukhtar Ansari, Aejaz alias Aejazul

Haq and Munna Bajrangi alias Prem Prakash in case crime No. 589 of 2005, under Sections 147, 148, 149, 302, 504, 120-B IPC and Section 7 Criminal Law Amendment Act.

16- He also deposed that when the aforesaid incident was occurred, he was posted in the Narcotic Cell of CBCID Headquarters, Lucknow as Inspector. In Ghazipur, he was posted on 08.07.2007 as In-charge Inspector, Mohammadabad. During patrolling of his area, there was general discussion among the public about the atmosphere of fear and terror, which persists for about 3-4 months, thereafter gradually the atmosphere became normal.

17- This witness further deposed in his examination-in-chief that as per his knowledge, the leader of the gang was Mukhtar Ansari, who was having a criminal history of 32 cases. Against the present appellant Afjal Ansari, who was a member of the gang, there is only one case being case crime No. 589 of 2005. Against Aejazul Haq also there is only one case.

18- He has also proved his first information report, which is available on record at paper No. 102B/3 and 102B/4, the original copies whereof are available in SST No. 90 of 2012. He also proved the certified copies and marked as Ext. Ka-1. He also deposed that on the basis of one first information report, three cases have been registered, in which after investigation, separate charge sheet has been submitted.

19- This witness also proved his signature on the certified copy of the gang chart. He also deposed that original copy of the gang chart is available in SST No. 90 of 2012. He also deposed that first information report is in his writing and he put his signature thereon and proved his signature, which has been marked as Ext. Ka-2.

20- There is signature of Ritu Maheshwari, the then District Magistrate on the gang chart. This witness has also stated that as per his knowledge, the modus operandi and purpose of this gang was to gain political, economic and social benefit. His statement under Section 161 Cr.P.C. was also recorded by the investigating officer during investigation.

21- PW-2, Inspector Surya Prakash Yadav, son of Ram Navmi Yadav, in his examination-in-chief, which was recorded on 19.1.2023, has stated that on 16.04.2008, he was posted at police station Bhawarkol as Station House Officer. Case Crime Nos. 1051 of 2007, 1052 of 2007 and 1053 of 2007, under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 were registered at police station Mohammadabad, district Ghazipur, which were initially investigated by Ram Swaroop Verma. On 16.04.2007, he has also gone through the earlier papers written by the previous investigating officer and recorded the statement of writer of the FIR Ram Dular Yadav, writer of FIR of case crime No. 589 of 2005, Head Muharrir Om Prakash Singh and investigating officer Shri Om Prakash Singh of case crime No. 589 of 2005, under Sections 147, 148, 149, 302, 307 and 120-B IPC as well as the complainant of that case Ram Narayan Rai in the case diary. Thereafter, he was transferred and investigation was done by Paltu Ram, S.O. Bhawarkol.

22- PW-3, Head Constable Ram Dular Yadav, in his examination-in-chief

dated 19.1.2023, has deposed that on 19.11.2007, he was posted at police station Mohammadabad as Constable-Muharrir. On that date, on the basis of written information of In-charge Inspector Ram Darash Yadav, he lodged cases at case crime No. 1051 of 2007, 1052 of 2007 and 1053 of 2007, under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 at police station Mohammadabad, district Ghazipur against Mukhtar Ansari, Afjal Ansari and Aejazul Haq respectively. He has also proved the copy of Chik FIR at paper Nos. 102B/1 and 102B/2, the original whereof is available in the record of Session Trial No. 90 of 2012. He has proved his writing and signature on the original copy of the FIR by stating that original copy of FIR is in my writing and signature. After matching the photocopy of the FIR with the original one, he also certified it, which has been marked as Ext. Ka-3. He has also proved GD No. 34 of 22:30 O'clock, the certified copy whereof is paper No. 6A, carbon copy of the same is available in Session Trial No. 90 of 2012.

23- He also deposed that GD has been destroyed as per rule and the copy of the report thereof has been proved by him and marked as Ext. Ka-4. Copy of GD has been marked as Ext. Ka-5. His statement was also recorded by the investigating officer.

24- PW-4, Narendra Pratap Singh, son of late Gareeb Das Singh presently posted as Superintendent of Police (Legal), Headquarters Director General of Police, Lucknow, in his examination-in-chief dated 25.01.2023, deposed that in the year 2006, he was posted as Station House Officer, Kasimabad, Ghazipur. He investigated case crime No. 589 of 2005, under Sections 147, 148, 149, 307, 302, 404, 120-B IPC and 7 Criminal Law Amendment Act, police station Bhawarkol, district Ghazipur, which was related to the murder of the then M.L.A Krishna Nand Rai and six others.

25- He further deposed that he filed the charge sheet against three persons. Second charge sheet was filed against Aejazul Haq, Afjal Ansari and Mukhtar Ansari. He proved the charge sheet filed against Afjal Ansari and Aejazul Haq, which was marked as Ext. Ka-6. This case was mentioned in the gang chart and concerned investigating officer has recorded his statement.

26- PW-5, Om Prakash Singh, retired Inspector, son of Jeet Bahadur Singh, in his examination-in-chief dated 25.01.2023, deposed that in the year 2005, he was posted as In-charge Inspector of police station Bhawarkol. He had initially investigated case crime No. 589 of 2005 (State Vs. Mukhtar Ansari and others), under Sections 302, 147, 148, 149, 120-B IPC, police station Bhawarkol, district Ghazipur, in which Afjal Ansari was also accused.

27- He further deposed that during initial investigation he filled two papers for investigation, but on the same day, he was suspended. Thereafter, the investigation of the case was transferred to SI Kasimabad. In this incident the then MLA and 6-7 other persons have been assassinated. There was anguish in the public over this incident and law and order situation was badly disturbed. After his removal from the investigation, he does not have any information about the investigation. During his suspension period, he was transferred to Ballia. His statement was also recorded by the investigating officer.

28- PW-6, Ram Narayan Rai, son of late Jagannath Rai, in his examination-in-chief, which was recorded on 04.02.2023, deposed that he has come to depose in the case related to Gangsters Act. This case has been registered for the criminal conspiracy in the murder case of his brother Krishna Nand Rai, who was murdered on 29.11.2005. When Krishna Nand Rai was assassinated, he was with him. In the murder of his brother, 6-7 persons were involved. Munna Bajrangi and Jeeva etc. were involved. Murder was committed at 2:45 PM in village Basniya and the persons who committed the murder was armed with heavy weapons. After this incident, there was an atmosphere of fear among the people.

29- This witness further deposed that as per his knowledge, Afjal Ansari was conspirator. Afjal Ansari and Mukhtar Ansari etc. were having a gang consisting of 50-60 persons. He also stated that leader of the gang is Afjal Ansari against whom 5-6 cases are registered. In addition thereto about 50-60 cases are registered against Mukhtar Ansari. The main aim of this gang is to murder people and to grab the land by putting the people in fear. In the murder case of his brother Krishna Nand Rai, six people were also assassinated. An atmosphere of fear continued for five-six months after this incident.

30- He also deposed that in the murder case of his brother accused were acquitted. He cannot say why accused were acquitted in that case. He got the case registered at police station Bhawarkol relating to murder case of his brother. His statement was also recorded by the investigating officer.

31- After the statement of PW-6, Ram Narayan, on an application under Section 311 Cr.P.C., PW-2, Inspector Surya Prakash Yadav, son of Ram Navmi Yadav was recalled for cross-examination. He, in his cross-examination dated 14.02.2023 deposed that the statement given by the informant Ram Narayan Rai in paragraph No. 3 of his examination-in-chief that *" as per his knowledge, Afjal Ansari was conspirator. Afjal Ansari and Mukhtar Ansari were have a gang having 50-60 persons. He also stated that leader of the gang is Afjal Ansari against whom 5-6 cases are registered. In addition thereto about 50-60 cases are registered against Mukhtar Ansari. The main object of this gang is to murder the person and to grab the land by putting the people in fear"* has not been told to him, but he has only stated that accused persons are vicious criminals, who have a gang.

32- PW-7, SI Om Prakash Singh, son of Daya Shanker Singh, in his examination-in-chief dated 04.02.2023, deposed that on 29.11.2005, he was posted at police station Bhawarkol as Head Muharrir. On that date, on the written information of Ram Narayan Rai he has registered a case at case crime No. 589 of 2005, under Sections 147, 148, 149, 302, 307, 120-B and 404 IPC and 7 Criminal Law Amendment Act against Munna Bajrangi, Mukhtar Ansari, Afjal Ansari, Aejazul Haq. He proved the photocopy of the Chik FIR and marked it as Ext. Ka-7.

33- This witness further deposed that the investigation of the case was conducted by SO Paltu Ram and SHO of Bhawarkol Daya Shanker Pandey. The charge sheet was filed by Daya Shanker Pandey in the year 2010. When he was posted at police station Bhawarkol, district Ghazipur, he was familiar with his writing and signature. He verified the writing and signature of Daya Shanker Pandey. As such

he proved the charge sheet, which was marked as Ext. Ka-8.

34- SO Paltu Ram and SHO Bhawarkol Daya Shanker Pandey have died and their death reports are on record.

35- After the closure of prosecution evidence, the statement of the accused, Afjal Ansari, son of late Subhanullah Ansari under Section 313 Cr.P.C. was recorded in question-answer form, translated version whereof are reproduced herein-under:

> Question No. 1: As per prosecution, you have a gang, of which your are a leader. What do you have to say in this regard?
>
> Answer: Statement of the prosecution is absolutely wrong. Neither have I any gang nor am I a member of any gang.
>
> Question No. 2: The prosecution has stated that you along with other members have formed an organized gang for their economic and material gain, who are in the habit of committing offence mentioned under Chapter 16, 17 and 22 IPC. What do you want to say in this regard?
>
> Answer: The statement of the prosecution is completely false and baseless.
>
> Question No. 3: In the gang chart related to this case, a case has been registered against you, being case crime No. 589 of 2005, under Sections 302, 307, 147, 148, 149, 120-B IPC and 7 Criminal Law Amendment Act. What do you have to say in this regard?
>
> Answer: The complainant of that case Ram Narayan Rai, due to political reason, has made allegation of criminal conspiracy against me. The trial of that case was conducted by the Special CBI Court/MP/MLA in New Delhi, in which he has been acquitted. He had nothing to do with that incident. The certified copy of order of the Court has been produced before the Court.
>
> Question No. 4: Where were you at the time of death of Krishna Nand Rai, the deceased of case crime No. 589 of 2005, under Sections 302, 307, 147, 148, 149, 120B IPC and Section 7 Criminal Law Amendment Act, PS Bhawarkol, district Ghazipur?
>
> Answer: On the date of alleged incident, I was in Delhi and was attending the Lok Sabha Session, which was going on that day. As per the report of the complainant, role of hatching conspiracy has been attributed to me and as per prosecution story I have hatched conspiracy before the incident on 25th October, 2005 in Ghazipur Court, whereas the fact is that on 24th and 25th of October, I was in Lucknow and on 26th October, I met His Excellency the President of India along with a delegation in Delhi, which clearly goes to show that on 25th October, 2005 I cannot hatched any conspiracy in Ghazipur.
>
> Question No. 5: Apart from you, the names of 06 other accused persons are mentioned in the gang chart. What do you want to say in this regard?
>
> Answer: In respect of incident, which took place on 29th November, 2005, the persons, who

have been made accused and charge sheeted, and whose names also find place in the gang chart, he has also been made co-accused in the said gang chart. In that case judgment of the Court has come. He does not have any other criminal history with other people named in gang chart. Out of the persons whose names are mentioned in the gang chart, Aejazul Haq, who is my brother-in-law is 90% disabled, Mukhtar Ansari is my younger brother and rest are not known to him.

Question No. 6: According to the prosecution, your alleged gang has been assigned number IS 191. What do you want to say in this regard?

Answer: During the entire trial, no such fact has come on record that I am a member of any IS 191 gang. I am not aware of any such fact.

Question No. 7: What do you want to say in respect of evidence of PW-1 Shri Ram Darash Yadav.

Answer: As a complainant of this case, Shri Ram Darash Yadav under the influence of his higher officers, has lodged the FIR against me on false and baseless allegation only on hearsay and on the basis of previously registered case crime No. 589 of 2005.

Question No. 8: What do you want to say in respect of FIR (Ext. Ka-1) and Gang Chart (Ext-Ka-2), proved by PW-1.

Answer: In this regard I had raised an objection at that stage that on the basis of one first information report, three cases have been registered against three different persons and separate charge sheet has been filed. There is only one FIR, which bears the signature of the complainant. The gang chart, which has been prepared for this case is also only one, which bears the signature of the complainant and as per convenience two cases have been registered after getting it photocopied, which is against the rule. The gang chart was also forwarded and approved on the same day by all the officers, for which no plausible reason has been tendered, which is also against the rule. The gang chart was also prepared wrongly under the pressure of the higher officers.

Question No. 9: What do you have to say regarding the evidence of PW-2 Surya Prakash Yadav?

Answer: In the capacity of investigating officer, Shri Surya Prakash Yadav has not investigated the case fairly. The investigation has been conducted in an arbitrary manner.

Question No. 10: PW-3 HC Shri Ram Dular Yadav has proved the first information report and GD etc. What do you want to say?

Answer: The case has been registered ante-timed at the behest of higher officers.

Question No. 11: What do you have to say in respect of evidence of PW-4, Shri Narendra Pratap Singh?

Answer: There is nothing to say in this regard.

Question No. 12: What do you want to say in respect of

evidence of PW-5 Om Prakash Singh?

Answer: I have nothing to say as he has not given any evidence against me.

Question No. 13: It has been alleged by PW-6, Ram Narayan Rai that you have been a conspirator in the murder of his brother. What do you have to say in this regard?

Answer: The allegations are absolutely false and has been levelled due to political malice.

Question No. 14: PW-7 SI Om Prakash Singh has proved Ext. Ka-7 and Ka-8. What do you have to say in this regard?

Answer: Since, he has not given any evidence against me, therefore, I have nothing to say.

Question No. 15: Do you want to say anything more?

Answer: I will file my brief written statement.

Question No. 16: Do you want to give defence evidence.

Answer: Yes

36- After the statement of the accused-Afjal Ansari under Section 313 Cr.P.C. is over, in support of his case, the accused-appellant has also produced following three defence witnesses.

DW-1, retired Honorary Captain Heera Lal Singh Yadav,
DW-2, Shanker Dayal Rai
DW-3 Baliram Patel.

37- DW-1, retired Honorary Captain Heera Lal Singh Yadav, son of Shri Ramjas Yadav in his examination-in-chief dated 21.2.2023 has deposed that his residence falls within the constituency of Ballia and Shri Afjal Ansari is Member of Parliament from Ghazipur. He knows Afjal Ansari since 2001. After his retirement from army, he is doing agriculture, animal husbandry as well social work. On account of social work, he used to come and go to the public representatives. Popularity of Afjal Ansari was not only confined to Ghazipur, but in whole of eastern region. His reputation and his working is very good. He does not discriminate amongst the public.

38- There are certain political opponent of Afjal Ansari and in spite of his opposition, his reputation is good. His Ancestor late Usman Ali was in the Indian Army and he was martyred. Ghazipur is known for its Army. Family of Afjal Ansari is also having history and with confidence I can say that neither he has any gang nor a member thereof.

39- Grand father of Afjal Ansari late Mukhtar Ahmad Ansari also participated in the freedom movement and Afjal Ansari also has great respect for the work done by his ancestor. Afjal Ansari also helps poor, downtrodden and neglected people as per their demand.

40- DW-2, Shanker Dayal Rai, son of late Vashishth Narain Rai in his examination-in-chief, which was recorded on 23.2.2023 has deposed that he had been a teacher in Mohammadabad Inter College and retired from the said school as Principal in the year 2014. Thereafter, he started agriculture and social work. He knows Afjal Ansari for the last about 40 years. He is very popular for his public service and public welfare. His reputation in the society is to help the poor and downtrodden.

41- He further deposed that his residence comes within the constituency of Mohammadabad. Due to his popularity,

Afjal Ansari was the Member of Legislative Assembly for five consecutive terms and at present he is Member of Parliament from Ghazipur constituency. Prior to this from 2004-2009 also he was elected member from Ghazipur constituency. He is a member of reputed Ansari's family. His ancestor has also sacrificed for the freedom movement. In the society, his reputation is of a popular public representative. He has neither any illegal gang in society nor he has been a member of any such gang. He does not ready to do any illegal work at anyone's request and also refused to do such work. He has firm belief in the Constitution of India.

42- This witness also deposed that although the unsuccessful and depressed political opponent used to make false accusation against him, but they did not get success in it and no aspersion is cast on the reputation of Afjal Ansari and he gets full public support.

43- DW-3, Shri Baliram Patel, son of Kishun Patel, in his examination-in-chief, which was recorded on 23.2.2023 has deposed that he had been Gram Pradhan for two terms, his wife and uncle were also Gram Pradhan. His family hold the post of Gram Pradhan for four terms. He does agricultural and animal husbandry work. In addition thereto he also has interest in social work. He knows Afjal Ansari for the last 40 years. Afjal Ansari belongs to a reputed family and he also helps the poor for which he is very popular in the society.

44- He further deposed that due to his popularity, he was elected Member of Legislative Assembly for the five terms and Member of Parliament for two terms. At present, he is Member of Parliament from Ghazipur constituency. He is a symbol of communal harmony. His door is always open for the poor, downtrodden and neglected section of the society and he helps every one. A fist of person advertise against him for their political gain, but the general public are in his support. Due to his work and reputation in the society, he is very popular and has good hold in the society.

45- This witness also deposed that Afjal Ansari is neither having any illegal gang nor is a member of any gang. He always opposed the persons indulged in illegal activities.

46- Learned Additional Sessions Judge/Special Judge, M.P./M.L.A Court, Ghazipur after having heard the learned counsel for the parties and scrutinizing the evidence, convicted and sentenced the accused-appellant as mentioned in paragraph No.1. Hence the aforesaid two Criminal Appeals and one Criminal Revision have been preferred. They are being dealt with and decided together. Firstly this Court proceeds to deal Criminal Appeal No. 5295 of 2024.

**<u>Submissions on behalf of the appellant in Appeal</u>**

47- Shri Gopal Swaroop Chaturvedi, learned Senior Counsel appearing on behalf of the appellant has placed the following submissions:

47.1- Armed with the decision of Hon'ble Supreme Court in the case of **Farhana Vs. State of U.P. and others** 2024 SCC OnLine SC 159, Shri Chaturvedi submits that if the single base case on the basis whereof, the Gangsters Act has been imposed, has ended in acquittal, the case

under the Gangsters Act cannot be sustained, hence impugned judgment and order of conviction and sentence of Appellant-Afjal Ansari is liable to be set-aside.

47.2- Relying upon the judgment of the Hon'ble Apex Court in the case of **Sangeetaben Mahendrabhai Patel Vs. State of Gujarat and another** (2012) 7 SCC 621 and **Ashwani Kumar @ Ashu & another Vs. State of Punjab** (2015) 6 SCC 308, it is next submitted that findings of acquittal recorded in favour of the appellant-Afjal Ansari by the Trial Court at Delhi while acquitting him by judgment and order dated dated 03.07.2019 in base case being FIR No. 46/2005 dated 29.11.2005 (case crime No. 589 of 2005) would constitute as estoppel against the prosecution in the present case, hence the same cannot be doubted taking any adverse inference that acquittal was undeserved or unwarranted.

47.3- Relying upon the judgment of the Hon'ble Apex Court in the case of **Kharkan and others Vs. State of U.P.** (1965) AIR (SC) 83, it is submitted that in view of provisions of Section 40 to 43 of Evidence Act, whatever observations regarding the witnesses being hostile have been made by the trial Court in the judgment and order of acquittal dated 03.07.2019 of the appellant in base case, are not admissible in the present case for the purpose of relying upon the appreciation of the evidence. The said judgment is admissible only to show the parties and the decision.

47.4- The evidence cannot be led to rebut a finding recorded between the same party in previous trial.

47.5- PW-6 Ram Narayan Rai is the only witness of fact of this case and he is also informant /complainant of base case crime No. 589 of 2005 claiming himself to be one of the eye witnesses of the incident dated 29.11.2005 and was examined as PW-35 in that case, but presence of Ram Narayan Rai on the spot in the incident dated 29.11.2005 of base case, has been disbelieved by the Trial Court at Delhi, therefore he is wholly unreliable witness and his testimony cannot be taken into consideration in the present case.

47.6- It is also pointed out that each and every ingredients of offence under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 are lacking in the statement under Section 161 Cr.P.C. of PW-6.

47.7- Referring to the judgment of the Hon'ble Apex Court in the case of **Tahsildar Singh Vs. State of U.P.** (1959) AIR (SC) 1012, it is submitted that there are several omissions in the statement under Section 161 Cr.P.C. of PW-6, which amounts to material contradictions and will hit by Section 162 Cr.P.C. Mr. Chaturvedi in order to strengthen his submission, while referring the para 3 and 6 to 11 of the statement of Ram Narayan Rai (PW-6) further submitted that the omissions are with regard to existence of gang of the appellant-Afjal Ansari as well as object and antisocial activities of his gang.

47.8- Mr. G.S. Chaturvedi, summarizing his submissions, further argued that PW-6 Ram Narayan Rai in his statement under Section 161 Cr.P.C. has not disclosed the material ingredients of gang, gangster and act of extortion, etc. relating to appellant-Afjal Ansari, hence the material ingredients to constitute an offence punishable under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social

Activities (Prevention) Act, 1986 are lacking in the present case. The facts which have been stated by the prosecution witnesses for the first time before the trial Court can neither be relied upon nor can form the basis for conviction of the appellant.

47.9- The testimony of PW-4, 5 and 7 are not relevant with regard to offence under the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act.

47.10- Referring the statement of defence witnesses, it is submitted that they have given the evidence of good character of the appellant under Section 53 of the Indian Evidence Act, which has not been rebutted by the prosecution in accordance with Section 54 of the Indian Evidence Act.

47.11- There are ample animosity between the family of PW-6 and family of appellant-Afjal Ansari, who is a social worker and politician, therefore he has been falsely implicated in this case because he happens to be brother of Mukhtar Ansari.

47.12- Mr. Chaturvedi, also submits that case of present appellant Afjal Ansari is distinguishable from that of Mukhtar Ansari, who was not tried along with the appellant and no material evidence against Mukhtar Ansari was brought on record by the prosecution in the trial of the appellant, hence the criminal history of Mukhtar Ansari cannot be made basis of conviction of the appellant.

48- On the basis of above submissions, Mr. Chaturvedi implored the Court to set aside the impugned judgment and order of conviction of the appellant.

49- Stretching the submissions, Mr Daya Shanker Mishra, learned Senior Counsel, who also appears on behalf of the appellant-Afjal Ansari, argued that :-

49.1- PW-1 Ram Darash Yadav, the then Inspector, police station Mohammadabad, district Ghazipur who lodged F.I.R. has not disclosed that who had given information to him regarding the gang of Mukhtar Ansari and anti-social activities as well as heinous crimes being committed by the said gang. In cross-examination he has stated that at present, he does not know that place of Mohammadabad police station area, where people had told him about Mukhtar Ansari's gang. He does not remember the name and address of the people at this time who told him about the gang and it's activities. PW-1 further admitted that in F.I.R. and in the statement under Section 161 Cr.P.C. of PW-1, it is not mentioned that Afjal Ansari is member of gang of Mukhtar Ansari. For the first time PW-1 before the trial Court has stated that Afjal Ansari was member of Mukhtar Ansari's gang, which is an omission and amounts to contradiction.

49.2- PW-1 in his cross-examination has stated that since July 2007 to January 2009, he was posted as in-charge Inspector, at police station, Mohammadabad, District Ghazipur and during his posting in police station Mohammadabad, no one had made any oral or written complaint against Afjal Ansari regarding any criminal act and no facts came to light against Afjal Ansari in relation to the offences committed under chapter 16, 17 and 22 of IPC.

49.3- F.I.R. was registered by PW-1 on hearsay basis and on the basis of one case only, which is not sustainable.

49.4- Much emphasis has been given by stating that name of seven persons were mentioned in the gang-chart dated 19.11.2007, but on the instruction of higher officers, the inspector, police station Kotwali, Mohammadabad/PW-1 submitted proposal for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act only against three persons namely Mukhtar Ansari, Afjal Ansari (appellant) and Aejaz alias Aejazul-Haq. The said gang chart was further forwarded to District Magistrate through circle officer and Additional Superintendent of Police concerned with their recommendations for approval against above three persons only, on which District Magistrate illegally granted approval for taking action against three persons namely Mukhtar Ansari, Afjal Ansari (appellant) and Aejaz alias Aejazul Haq on the same day without recording any reason, which indicates his non application of mind.

49.5- PW-2 Surya Prakash Yadav who is second investigating officer of this case has also deposed in his cross-examination that during investigation, no complaint of any kind against Afjal Ansari came to his notice, which could prove that accused Afjal Ansari had committed or was involved in crimes mentioned in chapter XVI, XVII and XXII of IPC.

49.6- In the base case being case crime No. 589 of 2005, appellant has been acquitted, in which it was not found that appellant-Afjal Ansari was gangster and the said incident was done by any gang.

49.7- During the trial, prosecution could not bring any material on record to satisfy the ingredients of charge dated 23.09.2022 framed against the appellant for the offence under Section 3 (1) of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986.

49.8- The appellant has been Member of Legislative Assembly (hereinafter referred to as the "MLA") from Mohammadabad Constituency, District Ghazipur five times since 1985 and twice Member of Parliament from Ghazipur Constituency. He has also won the "Parliamentary Election 2024" from Mohammadabad Constituency, District Ghazipur and has been administered oath of Member of Parliament on 01 July 2024.

49.9- The prosecution could not bring any material on record against the appellant to establish that appellant has earned/gained any movable or immovable property out of antisocial activities as provided under Section 2(b) of the Gangsters Act.

49.10- In summation, Mr. Mishra, relying upon the Full Bench judgment of this Court in the case of **Ashok Kumar Dixit Vs State of U.P. AIR 1987 All 235** and another recent judgment of this Court in the matter of **Pappu alias Dhani Ram Vs State of U.P. 2024 0 Supreme (All) 258**, it is submitted that the proceedings under Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 has been illegally invoked against the appellant at the behest of the then ruling party due to political rivalry to settle political score, whereas by no stretch of imagination, the appellant can be said to be a Gangster or a member of any Gang. The prosecution could not prove its case beyond reasonable doubt rather prosecution witnesses have given evidence in favour of appellant, even then trial Court has illegally convicted and sentence the appellant by the impugned judgement and order dated 29.4.2023, which is liable to be set aside.

49.11- No other point has been raised on behalf of the appellant.

**Submissions on behalf of the State and victim.**

50- Mr. P.C. Srivastava, learned Additional Advocate General, assisted by Mr. J.K.Upadhyay, learned Additional Government Advocate for the State argued that:-

50.1- Mukhtar Ansari was the gang leader and a gangster having long criminal history. At the time of incident dated 29.11.2005, he was having criminal history of 40 cases and was running a gang. The appellant was one of the gang member of Mukhtar Ansari's gang along with others.

50.2- The provisions of The Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 have been invoked after following due procedure provided at the relevant point of time.

50.3- The gang-chart of seven persons namely 1-Mukhtar Ansari, 2-Afjal Ansari, 3- Aejaz @ Aejazul Haq, 4-Munna Bajrangi alias Prem Prakash Singh, 5-Ataur Rehman @ Sikander @ Babu, 6-Firdaus alias Javed and 7-Shahbuddin was prepared by the Inspector of police station-Kotwali, Mohammadabad on the basis of information received by him, but recommendation for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act 1986, was made only against three persons namely Mukhtar Ansari, Afjal Ansari (appellant) and Aejaz @ Aejazul Haq because at that time other three members of Mukhtar Ansari's gang mentioned above at serial No. 4, 5 and 7 were absconding and Firdaus alias Javed whose name was mentioned at serial No. 5 of the gang-chart had died. The gang chart was further forwarded by the authorities concerned with their recommendations to the District Magistrate, who finally approved the same.

50.4- The activity and criminal history of all the members of the gang who have faced trial under the Gangster Act will be seen. Criminal history of all the three persons, against whom District Magistrate granted approval for proceeding under the Gangster Act has been brought on record for the first time by the State before this Court by means of affidavits dated 22.05.2024 and 24.05.2024 mentioning that Mukhtar Ansari who died on 28.4.2024 was having criminal history of sixty five cases and Aejaz alias Aejazul Haq, who also died was having criminal history of two cases.

50.5- So far as the judgment of the Hon'ble Apex Court in the case of **"Farhana (Supra)"** relied upon on behalf of the appellant is concerned, it is argued that the same is distinguishable on the facts of this case because in the said case sole F.I.R. registered against the appellants for the offences under chapter XVII IPC was quashed by the High Court by exercising the powers under Section 482 of Code of Criminal Procedure, 1973 which was not further challenged and had attained finality. Whereas in the present case, appellant-Afjal Ansari has been acquitted in base case crime No. 589 of 2005 by the trial Court because most of eye witnesses of the incident and other material prosecution witnesses turned hostile. Against the said judgment and order of acquittal of appellant-Afjal Ansari, Criminal Appeal No. 1178/2019 (Smt. Alka Rai Versus C.B.I. and others) has been preferred before the Delhi High Court which has been admitted on 15.10.2019 and direction has

been issued for preparation of paper-book and listing of the appeal for hearing

50.6- The order of framing of charge dated 23.09.2022 was also challenged by the appellant in an Application under Section 482 Cr.P.C. No. 38478 of 2022 on the ground that appellant has been acquitted in base case crime No. 589 of 2005 relating to murder of late Krishna Nand Rai, the then MLA along with six others, therefore continuation of the proceedings under the Gangsters Act is an abuse of process of the Court, but the said application u/s 482 Cr.P.C was dismissed by the High Court vide order dated 06.01.2023 and the same was not further challenged before the Hon'ble Supreme Court.

50.7- Presence of Ram Narayan Rai on the spot in the incident dated 29.11.2005 has been wrongly and illegally disbelieved by the trial Court in base case crime No. 589 of 2005 relying upon the statement of hostile prosecution witnesses PW-19, 21, 22, 23 and 26. The stand of Ram Narayan Rai as PW-6 in the present case and as PW-35 in base case crime No. 589 of 2005 is same. He is fully reliable witness, hence his testimony cannot be discarded.

50.8- The appellant-Afjal Ansari has been acquitted of charge of conspiracy because three witnesses namely PW-20 Nand Lal Rai, PW-21 Prem Chand Rai and PW-23 Ramesh Chand Rai also turned hostile.

50.9- It is also argued that "doctrine of precedent" is not applicable in the present case as the facts are entirely different.

50.10- Refuting the submissions of the learned counsel for the appellant, it is also submitted that in view of proviso to Section 33 of the Evidence Act, the principle of estoppel is not applicable as both the cases are not between the same parties. The trial of base case crime No. 589 of 2005 was held between the "C.B.I. versus Afjal Ansari and 12 others", whereas trial of this case has been held between the "State of U.P. versus Afjal Ansari.

50.11- So far as submission on behalf of appellant with regard to certain material omissions are concerned, Mr. P.C. Srivastava relying upon the judgment of the Hon'ble Apex Court in the matter of **Selvamani Versus The State Rep. by the Inspector of Police, 2024 SCC OnLine SC 873**, argued that PW-6 Ram Narain Rai in paragraph No. 7 of his statement has clearly stated that he had given such statement to Investigating Officer that Afjal Ansari and Mukhtar Ansari have a gang. If Investigating Officer has not written this in his statement then he cannot give any reason for it. When Investigating officer was again summoned under Section 311 Cr.P.C. and confronted on 14.02.2023, he has stated inter alia that PW-6 had told him that the accused persons are vicious criminal, who have a gang, hence there is no material omissions with regard to existence of their gang and crime. It is also argued that other omissions are minor contradictions which are meaningless.

50.12- It is next argued that the contents of F.I.R. as a whole will be taken into consideration and not in isolation by picking some words from here and there. In the F.I.R. it is also mentioned that out of fear of members of illegal gang, any person from the society and the public does not have the courage to get a case registered against the gang members and give evidence in the Court. The said fact is

corroborated from the facts of base case crime No. 589 of 2005, in which appellant has been acquitted by the judgment and order dated 03.07.2019 due to hostility of the eyewitnesses.

51- Mr. Sudist Kumar, learned Counsel appearing on behalf of victim also submits that:

51.1- The trial Court while acquitting the appellant and other co-accused in base case crime No. 589/2005 has also taken judicial notice of the facts by observing in last paragraph No. 943 of the judgment dated 03.07.2019 that *"the case in hand is another example of prosecution failing due to hostile witnesses. If the witnesses in this case had the benefit of Witness Protection Scheme, 2018 during trial, the result may have been different."*

51.2- It is next submitted that since the said observations / judicial notice have not been challenged by the appellant and the same is still intact, therefore the judicial notice taken by the trial Court in base case crime No. 589/2005 is also liable to be considered by this Court in the present case.

51.3- Referring the judgment of this Court in the case of **Smt. Alka Rai and another versus Union of India and others** 2006 (5) ADJ 199 (DB), it is also submitted that when investigation of base case crime No. 589 of 2005 was transferred to C.B.I., at that time also the High Court had observed inter-alia that the Court cannot refrain from taking judicial notice that sometimes in such type of matters the police forces under the State cannot avoid biasness.

51.4- Mr. Sudist Kumar, placing reliance upon the judgment of the Hon'ble Apex Court in the case of **Harendra Rai versus State of Bihar and Others**, 2023 SCC OnLine SC 1023, contended that in the said case the trial Court as well as High Court acquitted the accused, but taking the judicial notice of special facts, the Hon'ble Supreme Court convicted the accused.

51.5- Lastly, it is submitted that the prosecution has proved its case beyond reasonable doubt, hence this Criminal appeal is liable to be dismissed.

52- Now this Court proceed to take note of submissions made on behalf of the State and victim in Government appeal No. 198 of 2024 and Criminal Revision No. 3535 of 2023 respectively, filed for enhancement of sentence awarded to accused Afjal Ansari.

**Submissions on behalf of State and victim in Government Appeal and Criminal Revision**

53- Mr. J.K Upadhyay, learned Additional Government Advocate for the state relying upon the judgement of Apex Court in the case of **Sumer Singh vs. Surajbhan Singh and Others**, (2014) 7 SCC 323 and **Suryakant Baburao Alias Ramrao Phad vs. State of Maharashtra and Others**, (2020) 17 SCC 518 submitted that although it is a matter of discretion of the trial court that how much sentence should be awarded to the accused, but aggravating circumstances like criminal history, gravity of offence, role assigned to accused and knowledge of offence as well as mitigating circumstances like mental or physical condition, age of accused at the time of offence are the relevant consideration to decide the quantum of sentence. It is submitted that the trial court has awarded inadequate sentence of four

years to the appellant instead of awarding maximum sentence of ten years. Much emphasis has been given by contending that if MPs and MLAs who are law makers and are involved in such an act, should be given maximum punishment. Mr. Sudist Kumar, learned Counsel appearing in above Criminal Revision on behalf of revisionist-victim has borrowed the argument advanced on behalf of the State.

**Submissions on behalf of accused Afjal Ansari in Government Appeal and Criminal Revision**

54- On the other hand Mr. G.S.Chaturvedi, learned Senior Advocate appearing on behalf of the accused-Afjal Ansari refuting the submissions made on behalf of the State and victim submits that the judgements relied upon by the learned Additional Government Advocate is not applicable to the facts of the present case and in view of the doctrine of proportionality the same are distinguishable on facts. The criminal history of Afjal Ansari cannot be taken into consideration for awarding sentence, which are only relevant factor for the purpose of considering bail application. The Hon'ble Supreme Court while suspending the conviction of Afjal Ansari vide order dated 14.12.2023 has discussed his criminal history in detail. There is no serious criminal history of Afjal Ansari. Only the serious offences and impact of alleged offences on the society can be taken into consideration.

55- Shri Chaturvedi, lastly submits that since Afjal Ansari stood acquitted in base case crime No. 589 of 2005 by the Judgment and order dated 03.07.1019 based upon authoritative material, therefore, he is entitled to be acquitted in the present case in the light of dictum and guideline laid down by the Hon'ble Supreme Court. Hence, there is no question of enhancement of sentence and Government appeal No. 198 of 2024 and Criminal Revision No. 3535 of 2023 are liable to be dismissed.

56- Before delving into the matter, it would be apposite to take note of the definition of Gang, Gangster as well as punishment under the Gangsters Act, which are as follow:-

56.1 "Gang" as provided under Section 2(b) of the Gangsters Act, read as under:-

"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 (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 (Act No. 61 of 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 (Act No. 104 of 1956), or (vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 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 (Act No. 45 of 1860), 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.

56.2 "Gangster" has been defined under Section 2(c) of the Gangsters Act, which reads as under :-

"Gangster" means a member or leader or organizer 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.

56.3 Punishment under the Gangsters Act

Section 3(1) of the Gangsters Act provides for punishment of gangster, which would be two years and may extend to ten years with fine and fine should not be less than Rs. 5,000/-. If a gangster commits an offence against public servant or any member of public servant, then the minimum punishment would be of three years and fine.

**Ingredients**

57- In view of the definition of Gang and Gangster as noted above, the essential requirements to constitute the offence under Section 3 (1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act are being enumerated below:-

(i) There should be a group of persons, who acting either singly or collectively;

(ii) By violence or threat or show of violence or intimidation or coercion or otherwise;

(iii) With object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or for any other person;

(iv) Indulge in anti-social activities in any manner categorized in twenty five categories of Section 2(b) of the Gangsters Act.

**Main issues**

58- Now the centripetal questions which arise for consideration before this Court are that:-

(a) Whether prosecution has proved its case and charges under Section 3 (1) of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 against the appellant beyond reasonable doubt ?

(b) Whether in the light of judgment of the Apex Court in the case of Farhana versus State of Uttar Pradesh and others (supra), impugned judgment and order dated 29.04.2023 of conviction and sentence of the appellant under Section 3 (1) of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 after his acquittal in base case crime No. 589 of 2005 is sustainable ?

(c) Whether judgment of the Apex Court in the case of Farhana (supra), which has been decided on 19.02.2024 will have retrospective effect ?

59- Having heard the learned counsel for the parties at length and examined the record in its entirety, now this Court proceeds to analyse the facts and evidence on record in the light of submissions raised on behalf of the parties.

**Analysis about base case**

60- Regarding an incident dated 29.11.2005, in which Krishna Nand Rai (the then sitting MLA) was murdered along with six other persons, F.I.R. No. 46/05 was registered at Case Crime No. 589 of 2005, under Sections 147,148, 149, 302, 307, 404 and 120 B IPC and 7 Criminal Law Amendment Act at police station Bhawarkol, district Ghazipur, in which appellant-Afjal Ansari has been assigned role of conspiracy with Mukhtar Ansari on 25.10.2005 at Ghazipur Court.

61- After investigation of Case Crime No. 589 of 2005, U.P. police submitted first charge-sheet No. 26/2006 dated 21.02.2006 against the appellant-Afjal Ansari and Aejazul-ul-Haq (who were in custody) as well as Prem Prakash Singh, Atta-ur-Rehman and Firdaus (who were absconding). Second charge-sheet dated 15.03.2006 was submitted against Mukhtar Ansari. Thereafter, vide order dated 23.05.2006 of the Division Bench of this Court passed in Civil Misc. Writ Petition No. 1552 of 2006, investigation of the said Case Crime No. 589 of 2005 was transferred to C.B.I., who submitted third charge-sheet dated 30.08.2006 against Sanjeev Maheshwari @ Jeeva, fourth charge-sheet dated 12.12.2006 against Rakesh Pandey and Ramu Mallah. Fifth charge-sheet was submitted on 20.03.2007 against Mansoor Ansari and sixth supplementary charge-sheet was filed on 15.03.2014 against Prem Prakash Singh @ Munna Bajrangi.

62- Thereafter vide order dated 22.04.2013 of Hon'ble Supreme Court, the trial of case crime No. 589 of 2005 was transferred from the Sessions Court, Ghazipur, U.P. to the appropriate Sessions court CBI in Delhi. Accordingly, trial of the said case was conducted by the Court of Special Judge (PC Act): CBI-9 (MPs/MLAs Cases), RACC, New Delhi.

63- In the said case crime No. 589 of 2005, the appellant has been acquitted by the trial Court vide judgment and order dated 03.07.2019 after recording a specific finding inter alia that the prosecution could not prove the charge of conspiracy against the appellant Afjal Ansari.

64- The judgment and order of acquittal dated 03.07.2019 of the appellant has not been challenged by the State / C.B.I. but the same has been challenged by Smt. Alka Rai (wife of deceased Krishna Nand Rai) by means of Criminal Appeal No. 1178 of 2019 before the High Court of Delhi, which has been admitted and is still pending.

**Analysis about the gang chart**

65- On the basis of Case Crime No. 19 of 1997 and Case Crime No. 589 of 2005, gang chart of seven persons namely 1-Mukhtar Ansari, 2-Afjal Ansari, 3-Aejaz alias Aejaz-ul-Haq, 4-Munna Bajrangi alias Prem Prakash Singh, 5-Ataur Rehman @ Sikander @ Babu, 6-Firdaus alias Javed and 7-Shahbuddin was prepared on 19.11.2007 (after ten years from the date of incident dated 22.01.1997 relating to crime No 19 of 1997 and after about two years from the date of incident dated 29.11.2005 relating to crime No. 589 of 2005), but recommendation for taking action under Section 3 (1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 was made only against three persons namely Mukhtar Ansari, Afjal Ansari (appellant) and Aejaz alias Aejaz-ul-Haq and the same was forwarded to the District Magistrate through the authorities concerned on 19.11 2007, who granted approval on the same day mentioning "Approved for Sl. No.1 to 3." No reason has been recorded for not granting approval in respect of remaining three persons, who were absconding at that time.

**Analysis about charge**

66- First of all, it would be profitable to mention the contents of the charges framed against the appellant on 23.9.2022, which are as under:

<u>आरोप</u>

मैं, रामसुध सिंह, विशेष न्यायाधीश, एम0पी0/एम0एल0ए0/ प्रथम अपर सत्र न्यायाधीश, गाजीपुर आप अभियुक्त अफजाल अंसारी को निम्न आरोप से आरोपित करता हूँ–

''यह कि आप अभियुक्त के विरूद्ध अपराध सं0–589/2005, धारा – 147, 148, 149, 302, 307, 404, 120बी भा0दं0सं0, थाना भांवरकोल, जनपद गाजीपुर में पंजीकृत हुआ तथा आप द्वारा अन्य लोगों के साथ मिलकर एक समाज विरोधी क्रियाकलाप के उद्देश्य से गैंग बनाकर संचालित किया जा रहा था और आपके उक्त गैंग द्वारा भौतिक उद्देश्य से धन एवं सम्पत्ति अर्जित की जा रही थी।

आपका यह कृत्य धारा 3(1) उत्तर प्रदेश गिरोहबन्द एवं समाज विरोधी क्रियाकलाप निवारण अधिनियम के तहत दण्डनीय अपराध है, जो इस न्यायालय के प्रसंज्ञान में है।''

67- Careful examination of charges framed against the appellant, I find that the same are in three parts.

(i) The first part of the charge is that case crime No. 589 of 2005 under section 147, 148, 149, 302, 307, 404 and 120-B IPC was registered against the appellant at PS Bhanwarkol, district Ghazipur.

(ii) The second part of the charge is that appellant for the purpose of antisocial activities formed a gang along with other people and is running the same.

(iii) The third part of the charge is that the gang of appellant was for acquiring money and property for material gain/purpose.

<u>Discussion about first part of charge</u>

68- In this regard it is admitted fact that in the said case crime No. 589 of 2005, the appellant has been acquitted by the trial Court vide judgment and order dated 03.07.2019 after recording a specific finding inter alia that the prosecution has not proved the charge of conspiracy against the appellant Afjal Ansari.

<u>Discussion about second part of charge</u>

69- Record reveals that in the F.I.R. dated 19.11.2007, main allegation has been leveled against Mukhtar Ansari alleging inter alia that the illegal gang of his gangsterism (mafiagiri ) is active in district Ghazipur, who himself and with the assistance of members of his gang, for the material and monetary benefit, by getting involved in the incident like murder, loot, abduction, extortion and other serious offences, earned a lot and was acquiring immense wealth. The gang was being run by Mukhtar Ansari himself from jail by issuing orders who had a long criminal history.

70- Neither in gang chart dated 19.11.2007 nor in the F.I.R. dated 19.11.2007, it is specifically mentioned that the appellant-Afjal Ansari was member of Mukhtar Ansari's gang.

71- F.I.R. shows that the appellant has been made accused in this case because of incident dated 29.11.2005 relating to case crime No. 589 of 2005, wherein allegation of hatching conspiracy was leveled against the appellant, in which he has been acquitted by the Trial Court as noted above.

72- Now this Court proceeds to deal the evidences led by the prosecution and defence before the trial Court.

73- On careful examination of statement of PW-1 Ram Darash Yadav, who had prepared gang-chart and lodged F.I.R., I find that this witness in his cross-

examination has admitted that in the F.I.R. dated 19.11.2007 he had not mentioned that Afjal Ansari was member of Mukhtar Ansari's gang. When he was shown his statement under Section 161 Cr.P.C. dated 28.12.2007, he further admitted that it was not mentioned in his statement that he had told Afjal Ansari to be a member of Mukhtar Ansari's gang. For the first time after fifteen years on 12.01.2023 this witness has stated before the trial Court that Afjal Ansari was a member of Mukhtar Ansari's gang. He has also stated that at present, he does not know that place of Mohammadabad police station area, where people had told about Mukhtar Ansari's gang. He also does not remember the name and address of the people at this time who told him about the gang and its activities. PW-1 further stated that during the period of his posting in police station Mohammadabad, no one had made any oral or written complaint against Afjal Ansari regarding any criminal act and no facts came to light against Afjal Ansari in relation to the offences committed under chapter XVI, XVII and XXII of IPC, whereas, he in his examination-in-chief, has stated that objective of this gang's modus operandi was to obtain political, economic and social benefits. He also admitted that F.I.R. was registered by him on hearsay basis and on the basis of one case only.

74- Except the incident of base case crime No. 589 of 2005, no other specific incident of any such crime has been mentioned by PW-1 Inspector Ram Darash Yadav to show that the appellant has been indulging in antisocial activities and crimes like murder, ransom etc. There is no corroboration of testimony of PW-1 Inspector Ram Darash Yadav from any other evidence.

75- PW-2 Inspector, Surya Prakash Yadav who was the second investigating officer, in his cross-examination dated 19.01.2023, has stated that during investigation, no such fact came to his notice which could prove that accused Afjal Ansari had committed or been involved in the crimes mentioned in chapter XVI, XVII and XXII of IPC. No complaint of any kind against Afjal Ansari came to his notice.

76- PW-3, Head constable Ram Dular Yadav, who had registered F.I.R. of this case, in his examination-in-chief, has stated inter-alia that original F.I.R. has been filed in the record of S.T. No. 90 of 2012. Original G.D. has been destroyed. He proved the destruction report, which was exhibited as Exhibit-Ka-4. He, in his cross-examination has stated that original copy of F.I.R. is not available in the record of this case. Three separate cases were registered on the basis of one F.I.R.

77- PW-4, Narendra Pratap Singh, who, in the year 2006, was posted as Circle Officer, Kasimabad, Ghazipur and had investigated case crime No. 589 of 2005 relating to murder of late Krishna Nand Rai and six others and submitted charge-sheet against Afjal Ansari, Aejazul Haq and second charge sheet against Mukhtar Ansari has proved the charge-sheet against the appellant. He, in his cross-examination, has stated that further investigation of case crime No. 589 of 2005 was conducted by C.B.I. On putting query by the trial Court he has stated that he does not remember which investigating officer took his statement. The trial Court has also observed that even after showing the file, this witness failed to tell the name of investigating officer and stated that he does not remember what was asked by the investigating officer and regarding which facts.

78- PW-5, Inspector Om Prakash Singh, who had made initial investigation of case crime No. 589 of 2005, in his cross-examination, has stated inter alia that no such fact has come to his notice that Afjal Ansari does not allow any witness to testify. During his posting, no person had made any complaint against Afjal Ansari. He also stated that no such fact has come to his notice that Afjal Ansari has acquired property by committing crimes for himself or for anyone else. His entire family is a respectable and political family.

79- PW-6, Ram Narayan Rai who is brother of deceased Krishna Nand Rai and informant of base case crime No. 589 of 2005 claims himself to be an eye witness of incident dated 29.11.2005, but the trial Court in that case has disbelieved his presence at the spot. First of all it would be apposite to discuss paragraph No. 3 of examination-in-chief dated 04.02.2023 of PW-6 and statement dated 14.02.2023 of PW-2 Surya Prakash Yadav recorded on his re-examination, on which learned counsel for the parties advanced extensive argument. Paragraph No. 3 of examination-in-chief of PW-6 are as follow :

*"As per my knowledge, Afjal Ansari was conspirator in murder case. Afjal Ansari and Mukhtar Ansari etc. are having a gang consisting of 50-60 persons. The main leader of this gang is Afjal Ansari against whom 5-6 cases are registered. In addition thereto about 50-60 cases are registered against Mukhtar Ansari. The main aim of this gang is to murder people and to grab the land by putting the people in fear."*

80- After the above statement of PW-6 (Ram Narayan Rai), on an application under Section 311 Cr.P.C, PW-2-Inspector Surya Prakash Yadav (investigating officer) was recalled for further cross-examination. On putting specific question with regard to statement given in paragraph No. 3 of the examination-in-chief by PW-6 as noted above, PW-2 in his cross-examination dated 14.2.2023 deposed that Ram Narayan Rai did not give him the same statement as he has given in paragraph No. 3 of his examination-in-chief. Seeing the statement under Section 161 Cr.P.C., this witness stated that PW-6 has only stated that accused persons are vicious criminals, who have a gang. The relevant extract, which I culled out from the cross-examination examination of PW-6 are as follows :-

Para-6. At this moment I cannot remember when the Investigating Officer of this case took my statement. I am B.A. I have not passed L.L.B. We are three brothers. Krishna Nand was the youngest. The families of all the three brothers live jointly. I don't remember whether I told the Investigating Officer about the atmosphere of fear, that arose after this murder or not. ( First omission)

Para-7. It is wrong to say that today I am telling for the first time in the Court about the fear that created after the murder. I had never told this to Investigating Officer before. I had given this statement to Investigating Officer that Afjal Ansari and Mukhtar Ansari have a gang. If Investigating Officer has not written this in my statement then I cannot give any reason for it.( Second omission)

Para-8. I don't remember whether I told the Investigating Officer about the presence of 50-60 people in the gang or not. It is wrong to say that I am telling about this for the first time today in the court. I had told this to the Investigating Officer that the leader of gang is Afjal

Ansari. If the Investigating Officer has not written this in my statement then I cannot give any reason for it. It is wrong to say that I am telling this for the first time in the court today.(Third omission)

Para-9. I don't remember whether I had told the Investigating Officer about 5-6 cases being registered against Afjal Ansari or not. It is wrong to say that I am telling this for the first time in the court today. (Fourth omission)

Para-10. I don't even remember whether I had told the Investigating Officer about registration of 50-60 cases against Mukhtar Ansari or not. It is wrong to say that I am telling this for the first time in court today.( Fifth omission)

Para-11. I had told the investigating officer that purpose of this gang is to commit murder and to take over the land by threatening people. If the Investigating Officer has not written this in my statement then I cannot give any reason for it. It is wrong to say that I am telling this for the first time in the court today.( Sixth omission)

81- PW-6 in his cross-examination has also disclosed the fact relating to an incident in which bomb was blast in the house of Mrs Alka Rai, wherein her gunner lost his life stating that in the said case his son Manoj Rai had named Afjal Ansari and Mukhtar Ansari, but on the same day, their involvement was found false. In the said incident, his son Manoj Rai and one Babu Dhan Chaudhary were arrested.

82- The statement under Section 161 Cr.P.C. of PW-6 shows that ingredients of gang and gangster qua the appellant- Afjal Ansari are lacking. The cross-examination of PW-6 shows that on putting questions by the defence relating to the essential ingredients for a gang and gangster qua appellant, PW-6 has either stated that he does not remember or stated that he had told every thing to the Investigating Officer and if the Investigating Officer has not written this in his statement then he cannot give any reason thereof. The aforesaid statements of PW-6 do not inspire confidence.

83- At this juncture it would be useful to refer the judgment of the Hon'ble Apex Court in the case of **Tahsildar Singh Vs. State of U.P**. (1959) AIR (SC) 1012. In paragraph Nos. 16 and 17, it was held as under-

> *"16. The object of the main section as the history of its legislation shows and the decided cases indicate is to impose a general bar against the use of statement made before the police and the enacting clause in clear terms says that no statement made by any person to a police officer or any record thereof, or any part of such statement or record, be used for any purpose. The words are clear and unambiguous. The proviso engrafts an exception on the general prohibition and that is, the said statement in writing may be used to contradict a witness in the manner provided by s. 145 of the Evidence Act. We have already noticed from the history of the section that the enacting clause was mainly intended to protect the interests of accused. At the stage of investigation, statements of witnesses are taken in a haphazard manner. The police- officer in the course of his investigation finds himself more often in the midst of an excited crowd and label of*

*voices raised all round. In such an atmosphere, unlike that in a Court of Law, be is expected to hear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the statements which appear to him to be relevant. These statements are, therefore, only a summary of what a witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is a correct statement.*

*17. At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a police- officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar."*

84- The Apex Court in the case of **V.K. Mishra & Another vs. State of Uttrakhand & Another**, AIR 2015 SC 3043 has also held as under:-

*15. Section 162 Cr.P.C. bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1)Cr.P.C. can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162 (1) Cr.P.C. The statements under Section 161 Cr.P.C. recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose:- (i) of contradicting such witness by an accused under Section 145 of Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court and (iii) the re-examination of the witness if necessary.*

85- It is also well settled in plethora of cases that unless the omission in statement recorded under Section 161 Cr.P.C. of a witness is significant and relevant having regard to context in which omission occurs, it will not amount to

contradiction of evidence of witness recorded in Court.

86- Considering the statement of Ram Narayan Rai recorded under Section 161 CrPC on 14.12.2008 and his statement recorded before the trial Court as PW-6 on 04.02.2023 as well as statement of PW-2 recorded on 14.02.2023, I find that in the light of judgment of the Hon'ble Apex Court in the case of **Tahsildar Singh (supra) and VK Mishra & another (supra)** there are material and significant omissions relating to be a member of gang and gangsterism qua the present appellant which amount to material contradictions in the prosecution case.

87- PW-7 Om Prakash Singh who had registered the F.I.R. of case crime No. 589 of 2005 has proved the photocopy of chik FIR which was exhibited as Ext. Ka-7. Since investigating officer namely SO Paltu Ram and SHO of PS Bhanwarkol Daya Shanker Pandey who submitted charge sheet No. 100 /2010 (Paper No.3A) against the appellant in this case had died, therefore, PW-7 has proved signature of Daya Shanker Pandey (investigating officer) on the charge sheet of this case, which was exhibited as Ext. Ka-8.

88- Apart from above mentioned base case crime No. 589 of 2005, the prosecution could not bring any material on record to establish that the appellant-Afjal Ansari was co-accused along with Mukhtar Ansari or other members of his gang in connections with the other offences under chapter XVI, XVII and XXII of IPC.

Discussion about third part of charge

89- In this regard, it is also not in dispute that prosecution could not bring any material evidence on record to establish that the appellant has acquired any movable or immovable property out of the anti-social activities provided under sub-section (b)(i) to (xxv) of Section 2 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986. No proceedings of attachment of property of the appellant as provided under Section 14 the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 were initiated by the District Magistrate.

**Analysis of statement under Section 313 Cr.P.C.**

90- After going through the statement under Section 313 Cr.P.C. of the appellant, I find that appellant has specifically stated that on the day of incident (i.e. on 29.11.2005) of the base case crime No. 589 of 2005, he was in Delhi and was attending the Lok Sabha Session, which was going on that day. So far as allegation of hatching conspiracy in Krishna Nand Rai's murder case on 25th October, 2005 in Ghazipur Court is concerned, the appellant has stated that on 24th and 25th of October 2005, he was in Lucknow and on 26th October 2005, he met His Excellency the President of India along with a delegation in Delhi, which clearly goes to show that on 25th October, 2005 he could not have hatched any conspiracy in Ghazipur. The prosecution could not bring on record any material to disbelieve the said stand of the appellant.

**Analysis about defence evidence**

91- The appellant in order to show his good character, for his own aid, has produced defence witnesses namely retired Honorary Captain Heera Lal Singh Yadav, Shanker Dayal Rai and Baliram Patel. The

word "character" includes both reputation and disposition. "Reputation" means what is thought of a person by others, and is constituted by public opinion. "Disposition" respect the whole frame and texture of mind. The prosecution in rebuttal had an opportunity to lead evidence of bad character of the appellant, but the same has not been done by the prosecution in accordance with Section 54 of the Indian Evidence Act.

**Criminal history of appellant- Afjal Ansari**

92- It is crucial to emphasis at this stage that the appellant himself has disclosed the seven criminal cases registered against him, hence it is necessary to discuss the same elucidating their context and significance in relation to act and conduct of the appellant. A concise overview and summary of those cases are as under:-

(i) Case Crime No. 28/1998 was registered under Section 171F of the Indian Penal Code, 1860 (hereinafter, 'IPC') and Section 135(2) of the Representation of People's Act, 1951 (hereinafter, 'RPA') on 16.02.1998, at Police Station Nonhara, District Chandauli, Uttar Pradesh, for violation of the Model Code of Conduct during the election period. The Appellant has not yet been summoned by the investigating officer or the concerned Court in this case.

(ii) Case Crime No. 260/2001 was registered on 09.08.2001, at Police Station Mohammadabad, Uttar Pradesh, under Sections 147, 148 and 353 of the IPC, and Section 3 of the Prevention of Public Properties from Damages Act, 1984 along with Section 7 of the Criminal Law Amendment Act, 1932. The Appellant has since been granted bail in this case and his trial is pending.

(iii) Case Crime No. 493/2005 was registered under Sections 302, 506, 120B of IPC on 27.06.2005, at Police Station Mohammadabad, Uttar Pradesh in which the appellant was named as a conspirator. However, since the appellant was found to have played no active role in the subject crime, his name was dropped/expunged during the early stages of investigation and no charge sheet was filed against him.

(iv) Case Crime No. 589/2005 was registered under Sections 147, 148, 149, 307, 302, 404 and 120B of the IPC, at Police Station Bhanwarkol, District Ghazipur, on 29.11.2005. The Appellant was accused of hatching conspiracy in the said murder case, in which he has been acquitted by the Trial Court at Rouse Avenue, New Delhi vide judgment and order dated 03.07.2019. This is the only case mentioned in the gang chart that was prepared and relied upon in the instant case.

(v) Crime Case No. 1051/2007 was registered under Sections 302, 120-B, 436, 427 of the IPC and Sections 3, 4 and 5 of the Explosive Act, 1884 and Section 7 of the Criminal Law Amendment Act, 1932. In this case, the name of the appellant was dropped after it was deduced that he had no role to play in the

reported crime. The appellant was neither chargesheeted nor summoned by the concerned Trial Court in this particular instance.

(vi) Case Crime No. 607/2009 under Sections 171 and 188 of the IPC was registered on 11.04.2009 at Police Station, Mohammadabad, Uttar Pradesh, alleging violation of the Model Code of Conduct during the election period. The appellant has admittedly not been summoned in this case.

(vii) Case Crime No. 18/2014 was registered under Sections 171J, 188 of the IPC and Section 121(2) of the RPA, at Police Station Chakarghatta, District Chandauli, Uttar Pradesh and the appellant has already been granted bail in this matter.

**Impact of Criminal History of Mukhtar Ansari in this case**

93- It is well settled that each case has to be decided on its own merit. Although FIR of Mukhtar Ansari, Afjal Ansari and Aejaz alias Aejazul-Haq is the same, but separate case was registered against them at different crime number and charge sheet was also filed separately. They have also been tried separately. The criminal history of Mukhtar Ansari and Aejazul Haq was neither brought on record by the prosecution in the trial of the appellant nor same was put to the appellant during his statement under Section 313 Cr.P.C. The appellant Afjal Ansari is also not a co-accused in the cases registered against Mukhtar Ansari except case crime No. 589 of 2005, in which he has been acquitted by the trial Court at Delhi. The case of appellant is distinguishable from the case of Mukhtar Ansari. As such criminal history of Mukhtar Ansari has no bearing on the merit of this case against appellant Afjal Ansari.

**Judicial Notice**

94- So far as submission on behalf of the State and victim that the trial court while acquitting the appellant in base case crime No. 589 of 2005 has taken judicial notice by observing *that "the case in hand is another example of prosecution failing due to hostile witnesses. If the witnesses in this case had the benefit of Witness Protection Scheme during trial the result may have been different"* is concerned, this Court is of the view that since the judgement and order dated 03.07.2019 of acquittal of the appellant and other accused persons of case crime No. 589 of 2005 is subject matter of Criminal Appeal No. 1178 of 2019, which is sub-judice before the High Court of Delhi, therefore, at this stage, this Court has no jurisdiction to make any comment upon the said judgement and order of acquittal of the appellant. So far as judgment in the case of **Harendra Rai versus State of Bihar and Others (supra)** relied upon on behalf of the prosecution is concerned, there is no dispute about the propositions of law laid down by the Hon'ble Supreme Court in the said case, but the same is distinguishable on the facts of the case in hand. In the said case the Hon'ble Supreme Court convicted the accused taking judicial notice of special facts (incident of assault on the witness occurred before the trial Court, conduct of the presiding officer, influence of accused and report of inspecting judge, etc), whereas it is not so in the present case. The judicial notice has been taken by the trial Court at Delhi in the judgment and order dated 03.07.2019 of the base case crime

No. 589 of 2005, which is the subject matter of above noted Criminal Appeal pending before the High Court of Delhi. Hence the judgement in the case of **Harendra Rai (supra)** is not helpful to the prosecution in the present case at this stage.

**<u>Principle of estoppel</u>**

95- The principle of issue of estoppel in a criminal trial has been well settled by the Hon'ble Supreme Court in catena of judgements that where an issue of fact has been tried by a competent court on an earlier occasion and a finding has been recorded in favour of accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the acceptance/rejection of evidence to disturb the finding of fact when the accused is tried subsequently for different offence. In the present case it is not in dispute that appellant has been acquitted in base case crime No. 589 of 2005 and as on date there is nothing adverse against the appellant in the said case, hence the judgement of acquittal of appellant in that case will operate estoppel against the prosecution in the present case and the same is binding in all subsequent proceeding between the parties unless the said finding in favour of accused or judgment is altered, modified or set aside by the superior court. A latin maxim which means that a judicial decision must be accepted as correct, may be usefully extracted here "res judicata pro veritate accipitur".

**<u>Findings recorded by the trial Court</u>**

96- I find that the trial court while convicting the appellant has not considered the fact in proper prospective that appellant had already been acquitted in base case crime No. 589 of 2005, in which allegation of hatching conspiracy was leveled against him. From the perusal of impugned judgement and order of conviction of appellant, it seems that the trial judge of this case was quite influenced by the observations given by the trial court at Delhi in base case crime No. 589 of 2005 relating to hostile attitude of most of the prosecution witnesses in that case. Although the trial judge at Delhi has taken a judicial notice of the fact that the witnesses turned hostile, but did not make any observation or quoted any specific evidence that appellant-Afjal Ansari was instrumental in turning the witnesses hostile. In the present case under the Gangster Act also no such evidence was led by the prosecution before the trial court at Ghazipur that how the appellant-Afjal Ansari was instrumental in turning the witnesses hostile in base case crime No. 589 of 2005.

**<u>Principles laid down in the case of Farhana versus State of U.P.(Supra)</u>**

97- After going through the judgment of the Apex Court in the case of **Farhana versus State of Uttar Pradesh and others (supra)**, I find that main issue in that case before the Hon'ble Supreme Court was *"as to whether the proceedings of the FIR under the provisions of the Gangsters Act and the prosecution of the accused can be continued in spite of exoneration in the predicate offences covered by Section 2(b)(i) of Gangsters Act."*

98- The Hon'ble Apex Court after wholesome treatment decided the said issue holding that since the very foundation for continuing the prosecution of the appellants under the provisions of the Gangsters Act stands struck off and as a consequence, the continued prosecution of the appellant for the said offence is unjustified and tantamounts to abuse of the process of Court. In paragraph Nos. 12 to 17, it was held as follows:

> *12. From a bare perusal of Section 2(b)(i) of the Gangsters Act, it would become apparent that the person alleged to be the member of the gang should be found indulging in anti-social activities which would be covered under the offences punishable under Chapters XVI, or XVII or XXII IPC. There is no dispute that the case set up by the prosecution against the appellants insofar as the offences under the Gangsters Act are concerned, is limited to Section 2(b)(i) reproduced supra and none of the other clauses of the provision have been pressed into service for the proposed prosecution.*
>
> *13. Needless to say that for framing a charge for the offence under the Gangsters Act and for continuing the prosecution of the accused under the above provisions, the prosecution would be required to clearly state that the appellants are being prosecuted for any one or more offences covered by anti-social activities as defined under Section 2(b).*
>
> *14. There being no dispute that in the proceedings of the sole FIR registered against the appellants for the offences under Chapter XVII PC being Crime Case No. 173 of 2019, the appellants stand exonerated with the quashing of the said FIR by the High Court of Judicature at Allahabad by exercising the powers under Section 482 of Criminal Procedure Code, 1973, vide order dated 3rd March, 2023 passed in Application No. 7228 of 2023.*
>
> *15. Hence, the very foundation for continuing the prosecution of the appellants under the provisions of the Gangsters Act stands struck off and as a consequence, the continued prosecution of the appellants for the said offence is unjustified and tantamounts to abuse of the process of Court.*
>
> *16. As a consequence of the discussion made herein above, the impugned orders dated 14th November, 2022 and 6th December, 2022 passed by the High Court of Judicature at Allahabad are quashed and set aside. Resultantly, the impugned FIR being Crime Case No. 424 of 2022 for offence punishable under Section 3(1) of the Gangsters Act, registered at Police Station-Bhognipur, District-Kanpur Dehat and all the proceedings sought to be taken thereunder against the appellants are hereby quashed.*
>
> *17. The appeals are allowed accordingly.*

**<u>Retrospective effect of the case of Farhana (supra)</u>**

99- In the present case, it is admitted fact that appellant had

been acquitted in base case crime No. 589 of 2005 on 03.07.2019 much before framing of charge under Section 3(1) of the Gangsters Act against him on 23.09.2022 and thereafter an Application under Section 482 Cr.P.C. No. 38478 of 2022 filed by the appellant against the order of framing of charge on the ground of his acquittal in base case was dismissed by the High Court vide order dated 06.01.2003. Thereafter he has been convicted under Section 3(1) of the Gangsters Act by the impugned judgment and order dated 29.04.2023. Since the case of **Farhana (supra)** was decided by the Hon'ble Supreme Court on 19.02.2024 subsequent to the conviction of the appellant, therefore another issue arises before this Court as to whether the judgement in the case of **Farhana (supra)** will have retrospective effect or not. In this regard in order to sort out this controversy, it would be useful to take support of the judgement of the Apex Court in the matter **P.V.George Versus State of Kerala** (2007) 3 SCC 557, wherein it has been held that the law declared by a court will have retrospective effect, if not otherwise stated to be so specifically. The said judgment has been further relied upon by the Hon'ble Apex Court in the case of **Manoj Parihar & Others versus State of Jammu & Kashmir & Others** 2022 Live Law (SC) 560 and reiterated the same view. Hence, this Court has no hesitation to hold that judgment of the Hon'ble Apex Court in the case of **Farhana (supra)** will be applicable with retrospective effect. Accordingly, in order to maintain the hierarchy and judicial discipline, this Court is bound to follow the ratio of law settled by the Hon'ble Supreme Court in the matter of Farhana (supra) and as such appellant is also entitled to get benefit of principles laid down by the Hon'ble Supreme Court in the case of Farhana (supra).

**General principles of conviction or acquittal**

100- Here it would also be relevant to mention that making allegations against any person and to lead evidence admissible under the law in the concerned courts to prove the allegations, both are entirely different. No person can be convicted on the basis of allegations only, unless the prosecuting agency prove its case in accordance with law beyond reasonable doubt. Hence a high responsibility lies upon the prosecution and on the investigating agencies to be more careful in collecting evidence in order to ensure fair investigation, because without fair investigation, fair trial is not possible. It must be impartial, conscious and uninfluenced by external influences, which is one of the essentials of criminal justice system and integral facet of rule of law. The procedure for setting the criminal law in motion, investigation should also be free from objectionable feature or legal infirmities because the just, fair and transparent investigation is right of

the accused as well as victim. The conviction or acquittal of any accused is based on the material evidences led by the prosecution before the trial Court not on the allegations of the prosecution and it is prosecution who has to prove it's case not the accused.

**<u>Conclusion</u>**

101- In the above backdrop of facts and legal position, the conclusions based on the evidence on record, this Court is of the view that the prosecution could not prove its case and charges under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986, against the appellant beyond reasonable doubt. Since appellant Afjal Ansari has been acquitted in base Case Crime No. 589 of 2005 by the trial Court at Delhi vide judgment and order dated 03.07.2019, therefore on this ground also he is liable to be acquitted in the light of judgment dated 19.02.2024 of the Hon'ble Supreme Court in the matter of **Farhana (supra)**, which has retrospective effect.

**<u>Result</u>**

<u>Criminal Appeal No. 5295 of 2023</u>

102- As a fallout and consequence of above discussion, the impugned judgement and order dated 29.04.2023 passed by the learned Additional Sessions Judge/Special Judge, M.P./M.L.A Court, Ghazipur in Special Session Trial No. 980 of 2012 arising out of Case Crime No. 1052 of 2007, under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986, PS Mohammadabad, district Ghazipur convicting and sentencing the appellant is hereby set-aside. Consequently, Criminal Appeal No. 5295 of 2023 succeeds and is allowed. The appellant is acquitted of all the charges levelled against him.

103- The appellant is on bail. His bail bond is cancelled and sureties are discharged from their liability. He need not surrender before the trial court. However, he is directed to execute bail bond and sureties within two weeks to the satisfaction of trial Court concerned in terms of Section 437-A Cr.P.C. to appear before the Hon'ble Supreme Court on issuance of notice in respect of any appeal or petition filed against this judgement. The said bail bond shall be in force for six months.

2- <u>Government Appeal No. 198 of 2024 and Criminal Revision No. 3535 of 2023</u>

104- So far as above Government Appeal filed by the state and Criminal Revision filed by the victim for enhancement of sentence awarded to accused Afjal Ansari is concerned, this Court is of the view that there is no dispute about the propositions of law laid down by the Hon'ble Supreme Court in the case of **Sumer Singh (supra)** and **Suryakant Baburao Alias Ramrao Phad (supra)**, but

for enhancement of sentence every case turns on its own facts and evidence. Even one additional or different fact may make a big difference between the conclusion in two cases, because even a single significant detail may alter the entire aspect.

105- Since Criminal Appeal No. 5295 of 2023 of Afjal Ansari has been allowed and impugned judgment and order of conviction dated 29.04.2023 of the appellant-Afjal Ansari has been set-aside as noted above, therefore, afore-captioned connected Government Appeal and Criminal Revision are liable to be dismissed.

106- Accordingly, Government Appeal No. 198 of 2024 and Criminal Revision No. 3535 of 2023 are hereby dismissed.

107- Let a copy of this judgement along with Trial Court's record be transmitted to the court concerned for compliance.

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**(2024) 7 ILRA 1173**
**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 16.07.2024**

**BEFORE**

**THE HON'BLE ABDUL MOIN, J.**

Criminal Revision No. 809 of 2024

**Chetram** ...**Revisionist**
**Versus**
**State of U.P. & Anr.** ...**Respondents**

**Counsel for the Revisionist:**
Krishna Gopal

**Counsel for the Respondents:**
G.A.

**Criminal Law-(The Code of Criminal Procedure, 1973-Section 319)** (The Bhartiya Nagrik Suraksha Sanhita, 2023-Sections-438/442)-Facts- Revisionist has been summoned by exercising the powers under Section 319 CrPC- That prerequisite for exercise of the power under Section 319 of the Code is the satisfaction of the court to proceed against a person who is not an accused but against whom evidence is there- Once the trial court finds that there is some 'evidence' against such a person on the basis of which it can be gathered that he/she appears to be the guilty of the offence, there can be exercise of the power under Section 319 of the Code**. (Para 20, 22 & 23)**

**Revision dismissed.** (E-15)

**List of Cases cited:-**

1.Brijendra Singh & ors. Vs St. of Raj: (2017) 7 SCC 706

2.Hardeep Singh Vs St. of Pun. & ors. (2014) 3 SCC 92

3. Yashodhan Singh & ors. Vs. St. of U.P. & anr. (2023) 9 SCC 108

4. Manjeet Singh Vs St. of Har. & ors. (2021) 8 SCC 321

5.Mohd. Rafiq Vs St. of U.P & ors.in Criminal Revision No.772 of 2024, decided on 11.07.2024

6. Sandeep Kumar Vs St. of Har. & anr. AIR 2023 SC 3648

7. Rajesh & ors. Vs St. of Har. (2019) 6 SCC 368

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Sri Krishna Gopal, learned counsel for the revisionist as well as Sri Anurag Verma, the learned A.G.A. for the State-respondents and perused the record.

2. Instant revision under Section 438/442 B.N.S.S., 2023 has been filed against the order dated 15.05.2024 passed by the learned Additional District and

Sessions Judge/FTC-2nd, Bahraich in Criminal Case No.321 of 2018 arising out of Case Crime No.117 of 2018, under Sections 307, 452, 323 and 506 IPC, Police Station Herdi, District Bahraich whereby the revisionist has been summoned by exercising the powers under Section 319 of the Code of Criminal Procedure (hereinafter referred to as 'Code').

3. Contention of the learned counsel for the revisionist is that though the name of the revisionist found place in the FIR that had been lodged by respondent No.2, yet in the charge-sheet that had been filed by the investigating officer dated 13.07.2018, a copy of which is Annexure-2 to the revision, he was not named. Thereafter upon an application being filed by the respondent No.2, the learned court has passed the order impugned whereby the revisionist has been summoned.

4. Placing reliance on the judgments of the Hon'ble Supreme court in the cases of ***Brijendra Singh & Ors vs State of Rajasthan : (2017) 7 SCC 706*** as well as ***Hardeep Singh vs State of Punjab & Ors : (2014) 3 SCC 92***, the argument of the learned counsel for the revisionist is that the learned court has only considered the statements of the Prosecution Witnesses (hereinafter referred to as 'P.Ws.') 1 to 3 while passing the order impugned but has failed to consider the material that had been gathered by the enquiry officer whereby the revisionist had not been named and this 'evidence' should also have been considered by the learned court while passing the order impugned. He contends that non consideration of the said material, as gathered by the investigating officer, while passing the order impugned, thus vitiates the impugned order and therefore, it deserves to be set aside.

5. On the other hand, Shri Anurag Verma, learned A.G.A. has placed reliance on the Constitution Bench judgment of the Hon'ble Supreme Court in the case of ***Hardeep Singh (supra)*** as well as the judgments of the Hon'ble Supreme Court in the cases ***Yashodhan Singh & Ors vs State of U.P. & Anr : (2023) 9 SCC 108*** and ***Manjeet Singh vs State of Haryana & Ors : (2021) 8 SCC 321*** to contend that the judgment of the Hon'ble Supreme Court in the case of ***Brijendra Singh (supra)*** has been considered in the judgment in the case of ***Yashodhan Singh (supra)***.

6. Reliance has also been placed on the judgment of this Court in the case of ***Mohd. Rafiq vs State of U.P & Ors in Criminal Revision No.772 of 2024***, decided on 11.07.2024, to contend that power of summoning as granted to the court under the provisions of Section 319 of the Code has been considered threadbare by this court.

7. Placing reliance on the aforesaid judgment, the argument of the learned A.G.A. is that there is no infirmity in the order impugned whereby the learned court has considered the statements of the P.Ws. 1, 2 and 3 and has been of the view that prima facie a case is made out against the revisionist while passing the impugned order and thus there is no infirmity in the impugned order.

8. Having heard learned counsel for the parties and perused the record, it emerges that after the FIR had been lodged by respondent No.2 against various persons including the revisionist namely Chetram, the investigating officer submitted his report dated 13.07.2018 whereby the name of the revisionist does not find place.

9. Upon an application under Section 319 of the Code being filed by the respondent No.2, learned court has summoned the revisionist after considering the statements of the P.Ws. 1, 2 and 3 to find that prima facie a case is made out for summoning the revisionist and hence the instant revision.

10. The sheet anchor of the argument of the learned counsel for the revisionist is that the material collected by the investigating officer while submitting the report should also have been considered by the learned trial court while issuing the impugned summoning order inasmuch as there is only one sided consideration of the statements of the P.Ws.1, 2 and 3 without considering the material gathered by the investigating officer, while passing the impugned order and as such considering the law laid down by the Hon'ble Supreme Court in the case of ***Brijendra Singh (supra)*** the order impugned is legally unsustainable.

11. On the other hand, said order has been supported on the basis of the judgments of the Hon'ble Supreme Court in the cases of ***Hardeep Singh (supra), Yashodhan Singh (supra)*** and ***Manjeet Singh (supra)***.

12. For consideration of the argument of the learned counsel for the revisionist, the court has to consider as to what has been laid down by the Hon'ble Supreme Court in the case ***Brijendra Singh (supra)***. For the sake of convenience, relevant observations as have been made by the Hon'ble Supreme Court in the case ***Brijendra Singh (supra)*** are reproduced below:-

> *"14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 km. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 CrPC to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that the appellants' plea of alibi was correct.*
>
> *15. This record was before the trial court. Notwithstanding the same, the trial court went by the depositions of the complainant and some other persons in their examination-in-chief, with no other material to support their so-called verbal/ocular version. Thus, the ?evidence? recorded during trial was nothing more than the statements which were already there under Section 161 CrPC*

> *recorded at the time of investigation of the case.* ***No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where a plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty-bound to look into the same while forming prima facie opinion and to see as to whether much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record.*** *There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the revision petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing the agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."*
>
> *(Emphasized by the Court )*

13. From perusal of the aforesaid observations as made by the Hon'ble Supreme court in the case of ***Brijendra Singh (supra)***, it emerges that the Hon'ble Supreme Court has held that once from the police investigation it was revealed that the statements of certain persons regarding the presence of the accused at the place of occurrence was doubtful and did not inspire confidence, consequently this aspect should have been considered by the learned court while summoning the accused and the trial court was duty bound to look into the said evidence while passing the order impugned.

14. On the other hand, Hon'ble Supreme Court in the case of ***Yashodhan Singh (supra)*** while considering the judgment of Hon'ble Supreme Court in the cases of ***Brijendra Singh (supra)*** as also ***Hardeep Singh (supra)*** has held as under:-

> *"28. In Brijendra Singh [Brijendra Singh v. State of Rajasthan, (2017) 7 SCC 706 : (2017) 4 SCC (Cri) 144] , after referring to Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , this Court considered the question as to the degree of satisfaction that is required for invoking the powers under Section 319CrPC and the related question, namely, as to, in what situations, this power should be exercised in respect of a person named in the FIR but not charge-sheeted. This Court held that once the trial court finds that there is some ?evidence? against such a person on the basis of which it can be gathered that he appears to be guilty of the offence, there can be exercise of power under Section 319CrPC.* ***It was observed that the evidence in this context means the material that is brought before the court during trial.*** *Insofar as the material or evidence collected by the investigating officer (IO) at the*

*stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by court to invoke the power under Section 319CrPC."*

*(Emphasized by the Court )*

15. The Hon'ble Supreme Court in the case of ***Hardeep Singh (supra)*** has held as under:-

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

*(Emphasized by the Court )*

16. Subsequently, the Hon'ble Supreme Court in the case of ***Manjeet Singh (supra)*** while considering the Constitution Bench judgment in the case of ***Hardeep Singh (supra)*** has held as under:-

*"**13.1.4**. While answering Question (iii), namely, **whether the word ?evidence? used in Section 319(1)CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word ?evidence? is limited to the evidence recorded during trial, this Court, in the aforesaid decision has observed and held as under** : (Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , SCC pp. 126-27 & 131-32, paras 58-59, 78 & 82-85)*

*'58. To answer the questions and to resolve the impediment that is being faced by the trial courts in exercising of powers under Section 319CrPC, the issue has to be investigated by examining the circumstances which give rise to a situation for the court to invoke such powers. The circumstances that lead to such inference being drawn up by the court for summoning a person arise out of the availability of the facts and material that come up before the court and are made the basis for summoning such a person as an accomplice to the offence alleged to have been committed. **The material should disclose the complicity of the person in the commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence. The words as used in Section 319CrPC indicate that the material has to be ?where ? it appears from the evidence? before the court.***

*59. Before we answer this issue, let us examine the meaning of the word ?evidence?. According to Section 3 of the Evidence Act, ?evidence? means and includes:*

*"(1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;*

*such statements are called oral evidence;*

*(2) all documents including electronic records produced for the inspection of the court;*

*such documents are called documentary evidence.?*

***

*78. **It is, therefore, clear that the word ?evidence? in Section 319CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents.** It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319CrPC is to be exercised and not on the basis of material collected during the investigation.*

***

82. ***This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material along with the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges.** After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.*

*83. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. This would harmonise such material with the word ?evidence? as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court.*

*84. The word ?evidence? therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319CrPC. **The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it.** The duty*

*and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.*

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

*(Emphasized by the Court )*

17. Recently the Hon'ble Supreme Court in the case of ***Sandeep Kumar vs State of Haryana & Anr :AIR 2023 SC 3648*** after referring to ***Hardeep Singh (supra)*** and ***Manjeet Singh (supra)*** has held as under:-

*"14. The entire purpose of criminal trial is to go to the truth of the matter. Once there is satisfaction of the Court that there is evidence before it that an accused has committed an offence, the court can proceed against such a person. At the stage of summoning an accused, there has to be a prima facie satisfaction of the Court. The evidence which was there before the Court was of an eye witness who has clearly stated before the Court that a crime has been committed, inter alia, by the revisionist. The Court need not cross-examine this witness. It can stop the trial at that stage itself if such application had been moved under Section 319. The detail examination of the witness and other witnesses is a subject matter of the trial which has to begin afresh. The scope and ambit of Section 319 CrPC has been discussed and dealt with in detail in the Constitution Bench judgment of Hardeep Singh v. State of Punjab reported in (2014) 3 SCC 92 where it said*:

*"12. Section 319 CrPC springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr. P.C.*

*13. It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial."*

*15. In Hardeep Singh (supra), this court further said that the Court only has to see at the state of Section 319, whether a prima facie case is made out although the degree of satisfaction has to be much higher.*

*"95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction*

*that is required is much stricter. A two-Judge Bench of this Court in Vikas v. State of Rajasthan, held that on the objective satisfaction of the court a person may be ?arrested? or ?summoned?, as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.*

*16. In Para 106 it stated as under:*

*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? it 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."*

*17. In our considered opinion, the prosecution had fully made out its case for summoning the three as accused under Section 319, Cr. P.C., so that they may also face trial.*

"

18. The Hon'ble Supreme Court in the case of ***Rajesh & Ors vs State of Haryana : (2019) 6 SCC 368*** after considering the sheet anchor judgment of the revisionist herein in the case of ***Brijendra Singh (supra)*** as well as Constitution Bench judgment in the case of ***Hardeep Singh (supra)*** has held as under:-

*"6.8. Considering the law laid down by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] and the observations and findings referred to and reproduced hereinabove, it emerges that (i) the Court can exercise the power under Section 319 CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the Court need not wait till the cross-examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (ii) a person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC, provided from the evidence (may be on the*

*basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial."*

19. Scope of summoning under the provisions of Section 319 of the Code has also been considered threadbare recently by this Court in the case of ***Mohd. Rafiq (supra)*** wherein this Court has held as under:-

*"27. The Hon'ble Supreme Court in the case of Hardeep Singh (supra) has held as under:-*

*"81. The second question referred to herein is in relation to the word `evidence` as used under Section 319 Cr.P.C., which leaves no room for doubt that the evidence as understood under Section 3 of the Evidence Act is the statement of the witnesses that are recorded during trial and the documentary evidence in accordance with the Evidence Act, which also includes the document and material evidence in the Evidence Act. Such evidence begins with the statement of the prosecution witnesses, therefore, is evidence which includes the statement during examination-in-chief. In Rakesh (Supra), it was held that ?It is true that finally at the time of trial the accused is to be given an opportunity to cross-examine the witness to test its truthfulness. But that stage would not arise while exercising the court?s power under Section 319 CrPC. Once the deposition is recorded, no doubt there being no cross-examination, it would be a prima facie material which would enable the Sessions Court to decide whether powers under Section 319 should be exercised or not.? In Ranjit Singh (Supra), this Court held that ?it is not necessary for the court to wait until the entire evidence is collected,? for exercising the said power. In Mohd. Shafi (Supra), it was held that the pre-requisite for exercise of power under Section 319 Cr.P.C. was the satisfaction of the court to proceed against a person who is not an accused but against whom evidence occurs, for which the court can even wait till the cross examination is over and that there would be no illegality in doing so. A similar view has been taken by a two-Judge Bench in the case of Harbhajan Singh & Anr. v. State of Punjab & Anr. (2009) 13 SCC 608. This Court in Hardeep Singh (Supra) seems to have misread the judgment in Mohd. Shafi (Supra), as it construed that the said judgment laid down that for the exercise of power under Section 319 Cr.P.C., the court has to necessarily wait till the witness is cross examined and on complete appreciation of evidence, come to the conclusion whether there is a need to proceed under Section 319 Cr.P.C."*

*(Emphasized by Court)*

*28. From perusal of the aforesaid observations as have been made by the Hon'ble Supreme Court in Hardeep Singh (supra), it clearly emerges that the Hon'ble Supreme Court which considering the powers under Section 319 of the*

*Code has held that the evidence as understood under Section 3 of the Evidence Act is statement of the witnesses that are recorded during trial and the documentary evidence in accordance with the Evidence Act and such evidence begins with the statement of the prosecution witnesses and, therefore, would also include statements including examination in chief. Further, the Hon'ble Court held that it would be discretion of the Court concerned to summon any persons who are found to be accused.*

*29. Likewise, the Hon'ble Supreme Court in the case of Sukhpal Singh Khaira (supra) has held as under:-*

*"20. A close perusal of Section 319 of CrPC indicates that the power bestowed on the court to summon any person who is not an accused in the case is, when in the course of the trial it appears from the evidence that such person has a role in committing the offence. Therefore, it would be open for the Court to summon such a person so that he could be tried together with the accused and such power is exclusively of the Court. Obviously, when such power is to summon the additional accused and try such a person with the already charged accused against whom the trial is proceeding, it will have to be exercised before the conclusion of trial. The connotation ?conclusion of trial? in the present case cannot be reckoned as the stage till the evidence is recorded, but, is to be understood as the stage before pronouncement of the judgment as already held in Hardeep Singh (supra) since on judgment being pronounced the trial comes to a conclusion since until such time the accused is being tried by the Court."*

*(Emphasized by Court)*

*30. From perusal of the judgment in the case of Sukhpal Singh Khaira (supra), it clearly emerges that the Hon'ble Supreme Court has held that it is open for the Court to summon such a person so that he would be tried together with the accused and such power is exclusively of the Court. The said observation also finds place in the recent judgment of the Supreme Court in the case Sandeep Kumar (supra).*

*31. The Supreme Court in the case of Juhru & Ors vs Karim & Anr : Criminal Appeal No.549 of 2023, decided on 21.02.2023 after considering its earlier judgments in the case of Hardeep Singh (supra) and Sukhpal Singh Khaira (supra) has held as under :-*

*"17. It is, thus, manifested from a conjoint reading of the cited decisions that power of summoning under Section 319 Cr.P.C. is not to be exercised routinely and the existence of more than a prima facie case is sine quo non to summon an additional accused. We may hasten to add that with a view to prevent the frequent misuse of power to summon additional accused under Section 319 Cr.P.C., and in conformity with the binding judicial dictums referred to above, the procedural safeguard can be that ordinarily the summoning of a person at the very threshold of the trial may be discouraged and the*

*trial court must evaluate the evidence against the persons sought to be summoned and then adjudge whether such material is, more or less, carry the same weightage and value as has been testified against those who are already facing trial. In the absence of any credible evidence, the power under Section 319 Cr.P.C. ought not to be invoked."*

*(Emphasized by Court)*

*32. From perusal of the judgment of the Hon'ble Supreme Court in the case of Juhru (supra), it also emerges that the Apex Court has categorically held that the powers of summoning under Section 319 of the Code is not to be exercised routinely and the existence of more than a prima facie case is sine qua non to summon an additional accused."*

20. From the judgments as referred to above, it is apparent that the scope of exercise of powers under Section 319 of the Code is vested with the court i.e. the power to summon is exclusively of the court and that prerequisite for exercise of the power under Section 319 of the Code is the satisfaction of the court to proceed against a person who is not an accused but against whom evidence is there.

21. Being armed with the aforesaid interpretation as given to Section 319 of the Code and power to summon an accused, when the impugned order is seen in context of the law laid down by the Hon'ble Supreme Court in the aforesaid judgments, it thus emerges that the learned court while passing the order impugned has considered the statements of P.Ws.1, 2 and 3 to arrive at a prima facie satisfaction of the revisionist to be summoned for being tried for the offences as have been levelled.

22. The judgment of the Hon'ble Supreme Court in the case of ***Brijendra Singh (supra)*** which is the sheet anchor of the argument of the learned counsel for the revisionist has also been considered by the Hon'ble Supreme Court in the case of ***Yashodhan Singh (supra)*** wherein the Hon'ble Supreme Court has categorically held that once the trial court finds that there is some 'evidence' against such a person on the basis of which it can be gathered that he/she **appears** to be the guilty of the offence, there can be exercise of the power under Section 319 of the Code.

23. Keeping in view the aforesaid discussion and the satisfaction of the Court as per the provisions of Section 319 of the Code vis--vis the impugned order and summoning the revisionist, this Court does not find any perversity in the impugned order. The revision is accordingly ***dismissed***.

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**(2024) 7 ILRA 1183**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 19.07.2024**

**BEFORE**

**THE HON'BLE SHAMIM AHMED, J.**

Crl. Misc. W.P. No. 5099 of 2024

**Madhav Raj & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Opp. Parties**

**Counsel for the Petitioners:**
Amitesh Pratap Singh, Abhijeet P. Singh Chauhan, Naveen Kumar Singh, Shesh Ram Yadav

**Counsel for the Opp. Parties:**
G.A., Purnima Mayank

**A. Criminal Law – Order passed by Sub Divisional Magistrate under Section 133 CrPC- Removal of encroachment on the public road- Order assailed in revision-revision also dismissed- Both these orders under challenge in the writ petition- both orders passed after examining the material on record- no illegality- Both orders upheld- petition dismissed.**

**HELD:**
After considering the arguments as advanced by learned counsel for the respective parties as well as after perusal of records, this Court is of the view that the order passed by the learned Sub Divisional Magistrate, Colonelganj, Gonda dated 03.10.2022 is just and proper as the same has been passed after considering the police report and the entire evidence available on record. The learned Sub Divisional Magistrate, Colonelganj, Gonda gave a finding that the petitioners have encroached the land and a positive direction has been given to remove the encroachment, which has not yet been done and even the Criminal Revision filed by the petitioners against the order dated 03.10.2022 has also been dismissed by a detailed order dated 10.05.2024 passed by learned Additional Sessions Judge, Court No.4/Special Judge (E.C. Act), District-Gonda. Thus, this Court does not find any justification to quash the impugned orders under challenge in this writ petition. (Para6)

**Petition dismissed.** (E-14)

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

1. Heard Shri Amitesh Pratap Singh, learned Counsel for the petitioners, Ms. Punima Mayank, learned Counsel for respondent Nos.4 to 8, Shri Rajeev Kumar Verma, learned A.G.A. for the State-respondent Nos.1 to 3 and perused the material placed on record.

2. The present petition has been filed on behalf of the petitioners seeking quashing of the order dated 10.05.2024 passed by respondent No.2 i.e. the Additional Sessions Judge, Court No.4/Special Judge (E.C. Act), District-Gonda in Criminal Revision No.430/2022 as well as order dated 03.10.2022, which was passed by the respondent No.3 i.e. the Sub Divisional Magistrate, Tehsil-Colonelganj, District-Gonda in a proceeding under Section 133 Cr.P.C.

3. Learned Counsel for the petitioners submits that the respondent Nos.4 to 8 filed an application under Section 133 Cr.P.C. before the Sub Divisional Magistrate, Colonelganj, District-Gonda i.e. respondent No.3 to remove the alleged illegal encroachment done by the petitioners. Thereafter, the respondent No.3 called police report from Police Station-Kotwali Dehat, District-Gonda and the concerned police station submitted its report on 03.12.2021 before the respondent No.3 stating therein that the petitioners have encroached a public way and the pathway of the respondent Nos.4 to 8 but in naksha najri of the report it is clearly shown that the unpaved road is provided from the other side, which is clearly visibly in the naksha najri. He further submits that the respondent Nos.4 to 8 committed forgery and produced a reply on behalf of the petitioners by some other person and the respondent Nos.4 to 8 are trying to use this road by adopting illegal methods.

4. Learned Counsel for the petitioners further submits that the respondent No.3 passed the impugned order dated 03.10.2022 and directed the concerned police station to remove the illegal encroachment done by the petitioners without considering the material available on record and also without

considering the legal and factual aspects of the case. He further submits that being aggrieved by the order dated 03.10.2022 passed by respondent No.3, the petitioners preferred a criminal revision bearing Criminal Revision No.430 of 2022 before the Additional Sessions Judge, Court No.4/Special Judge (E.C. Act), District-Gonda i.e. the respondent No.2. He further submits that the respondent No.2 also erred in law and dismissed the criminal revision filed by the petitioners without considering the legal and factual aspects of the case, thus, he submits that the present petition may be allowed and both the impugned orders may be quashed by this Court.

5. On the other hand, learned Counsel for respondent Nos.4 to 8 and learned A.G.A for the State-respondent Nos.1 to 3 vehemently opposed the submissions advanced by learned Counsel for the petitioners and submits that the proceedings under Section 133 Cr.P.C. have been initiated by the respondent No.3 on the police report submitted by the concerned police station and the respondent No.3 after considering the police report dated 03.12.2021 and after going through the entire evidence available on record passed the impugned order dated 03.10.2022 and directed the concerned police station to remove the illegal encroachment done by the petitioners on the public road. They further submit that instead of removing the illegal encroachment, the petitioners approached the respondent No.2 by way of filing a criminal revision and the respondent No.2 also dismissed the criminal revision filed by the petitioners vide order dated 10.05.2024 after considering the factual and legal aspects of the case. They further submit that the petitioners have illegally encroached the public road and are regularly creating obstruction over the said road, which is creating problem to the respondent Nos.4 to 8 as well as to the general public, thus, they submits that the order dated 03.10.2022 and 10.05.2024 passed by respondent No.3 and respondent No.2 respectively were rightly passed, there is no illegality and infirmity in the impugned orders. They further submits that if the petitioners are claiming that they have not encroached a public road and have done construction on their own land, then they have an alternate remedy to approach the competent court by filing a civil suit alongwith an application claiming injunction in their favour, in accordance with law, thus, they finally submit that the present petition lacks merit and is liable to be dismissed.

6. After considering the arguments as advanced by learned counsel for the respective parties as well as after perusal of records, this Court is of the view that the order passed by the learned Sub Divisional Magistrate, Colonelganj, Gonda dated 03.10.2022 is just and proper as the same has been passed after considering the police report and the entire evidence available on record. The learned Sub Divisional Magistrate, Colonelganj, Gonda gave a finding that the petitioners have encroached the land and a positive direction has been given to remove the encroachment, which has not yet been done and even the Criminal Revision filed by the petitioners against the order dated 03.10.2022 has also been dismissed by a detailed order dated 10.05.2024 passed by learned Additional Sessions Judge, Court No.4/Special Judge (E.C. Act), District-Gonda. Thus, this Court does not find any justification to quash the impugned orders under challenge in this writ petition.

7. With the aforesaid observations, the instant writ petition stands ***dismissed***.

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**(2024) 7 ILRA 1186**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 10.07.2024**

**BEFORE**

**THE HON'BLE SIDDHARTH, J.**
**THE HON'BLE SYED QAMAR HASAN RIZVI, J.**

Crl. Misc. W.P. No. 7463 of 2024

**Shobhit Nehra & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Opp. Parties**

**Counsel for the Petitioners:**
Sri Rahul Chaudhary, Sri V.P. Srivastava (Sr. Adv.), Sri Salil Singh

**Counsel for the Opp. Parties:**
Atul Kumar Shahi, G.A., Sri Vinay Sharan (Sr. Advocate)

**Criminal Law – FIR against petitioners challenged- A long history of civil disputes between the parties- However, it does not mean that police investigation against the criminal allegations during the pendency of civil suit cannot be carried out- It is the duty of constitutional court to secure personal liberty of individuals- Protection from arrest until the submission of chargesheet can be given- FIRs being written by the experts- Relegating the petitioners to the remedy under Section 438 CrPC- Not justifiable in light of huge pendency of cases in St. of UP- Right to liberty protected without obstructing investigation and without quashing FIR- petition disposed of. (Paras 31, 33, 34, 35, 37, 38, 39, 40, 41, 43, 46 and 47)**

**HELD:**

Keeping in view, the allegations made in the FIR, there can be civil dispute between the parties, but if some crime is committed by one party against the other during the pendency of civil suit, it would require investigation. (Para 31)

It is convenient for the court to assume that the allegations in the FIR are gospel truth and thereafter close the chapter. However, the fact remains that the truth is yet to emerge from the statutory investigation to be conducted by the investigating officer. There is also possibility that the allegations made in the FIR are found by the investigating officer to be false. In that case denial of any relief to the petitioners would not be in the interest of justice. As per Article 21 of the constitution of India right to life and liberty of "we the people" cannot be curtailed only because the courts have set up a standard which provides that if by merely going through the FIR commission of cognizable offence / offences is found, no interference would be required in under the Article 226 of constitution of India and right to liberty of the petitioner cannot be protected and he should take recourse to Section 438 Cr.P.C for seeking anticipatory bail. (Para 33)

Now a days FIR is lodged mostly by getting it drafted by a legal expert or the head constable (diwan) of the police station. In the first information report, the ingredients for constituting the alleged offence / offences are incorporated so meticulously that the court may lay its hand off by a bare reading of FIR itself. The first information report is written with precision and perfection so that it fits into the convenient parameters of the court settled by the court itself. (Para 34)

Although it is convenient for the court to deny relief by the accused to the accused by just going through the contents of FIR but where it appears to the courts that there is possibility of false implication and allegations in the FIR do not appear to be absolutely correct and may have been concocted to falsely implicate the accused / petitioner then, irrespective of the severity of allegations, interference is called by court to protect the right to liberty of the accused / petitioner. (Para 35)

After considering the totality of facts and circumstances, like previous litigation between the parties, earlier enmity between them counter blast implication, etc., court should interfere to protect right to liberty of accused even if allegations in the FIR show commission

of cognizable offence by accused/petitioner. (Para 36)

In such a situation relegating an accused from the court hearing matters under Article 226 of the Constitution of India to avail remedy u/s 438 Cr.P.C before Sessions Court and then before the High Court only for protection from arrest during investigation amounts to harassment of a litigant. On an average 200-300 Criminal Misc. Writ Petitions are filed under Article 226 of the Constitution of India per day before this court challenging the first information reports. Not all get heard promptly. During this period of pendency of writ petition before this court accused is under threat of arrest. If he fails get any relief his arrest is made by police granting him little time to approach the Sessions Court for seeking anticipatory bail and on being unsuccessful seeking anticipatory bail from the High Court. (Para 41)

It is clear from the above paragraph that in the case where facts are hazy and the investigation has just begun, High Court should permit the investigation to proceed. In case the High Court stays further investigation, it should assign reasons. We are not staying the investigation but it appears from the material on record that in present case implication of petitioners may be found to be false, therefore, their right to liberty is required to be protected during the period of statutory investigation in the allegations made against them in the FIR. Investigation can be stayed in this case but that would come in the way of speedy investigation which in requirement of criminal administration of justice as held by Apex Court in the above paragraph. We do not intend to delay the investigation proceedings at all but for the reasons given above intend to protect the petitioners from arrest till investigation against them is completed by police. (Para 43)

In view of the above consideration, this court is of the view that without obstructing the investigation and without quashing the FIR, the right to liberty of petitioners deserves to be protected for the detailed reasons assigned herein above. (Para 46)

**Petition disposed of.** (E-14)

**List of Cases cited:**

1. St. ofHarayan Vs Bhajan Lal, AIR 1992 (SC) 604

2. Indian Oil Corporation Vs NTPC India Limited & ors., 2006(6) SCC 736

3. Neeharika Infrastructure Pvt. Ltd., Vs St. ofMah. & ors.., (2021) 19 SCC 401

4. Hema Mishra Vs St. ofU.P., 2014 (4) SCC 453

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri V. P. Srivastava, learned Senior Counsel assisted by Sri Rahul Chaudhary and Sri Salil Singh, learned counsel for the petitioners; learned A.G.A. for the State-respondent no.1 & 2 and Sri Vinay Sharan, learned Senior Counsel assisted by Sri Atul Kumar Shahi, learned counsel for respondent no.3.

2. The present writ petition has been preferred with the prayer to quash the impugned First Information Report dated 23.04.2024, registered as Case Crime No. 0274 of 2024, under Sections- 436, 450, 392 and 120-B IPC, Police Station- Modi Nagar, District- Commissionerate Ghaziabad (Rural), and for a direction to the respondents not to arrest the petitioners in pursuance of impugned First Information Report.

3. There is allegation in the FIR that Modi Charitable Fund Society is a registered society and Sandeep Kumar Yadav is Secretary of the same. Modi Industries Ltd., is a registered company and Umesh Kumar Modi is its Managing Director and petitioner no. 1 is Company Secretary of the same. Various education institutions are being run by the aforesaid society and their records are kept in the office of society situated at Modi Bhawan,

Modi Nagar. The petitioners and other employees of Modi Industries Ltd., demolished the entire office of society and destroyed the records kept therein and also committed the robbery of valuable goods kept in the office and hence the FIR was lodged.

4. The brief facts pleaded in the present case are as follows:-

5. The dispute essentially arises because of a long-standing family dispute between the Modi Family. There was a MoU dated 24.01.1989 which was entered in between the various members of the Modi Family. In the said MoU there was an attempt made by various members of the Modi Group to settle their inter-se disputes which includes various properties belonging to various family trusts and societies.

6. Subsequently, disputes arose between members of the Modi family for the enforcement of MoU 1989 which traveled up to the Hon’ble Supreme Court of India in the case of (K.K. Modi vs. K.N. Modi and Others, AIR 1998 SC 1297) wherein the Hon'ble Supreme Court categorically observed that there are various suits which arc pending adjudication for the enforcement of she MoU 1989 before the Delhi High Court and those issues should bc raised and decided before the Hon'ble High Court of Delhi. Copy of the judgment passed by Hon'ble Supreme Court of India and in the case of (K.K. Modi vs. K.N. Modi & others) has been annexed as Annexure No.2 to this writ petition.

7. Learned Single Judge of the Delhi High Court vide its judgment dated 05.10.2007 (in the matter of K.K. Modi vs. K.N. Modi & others i.e. CS (0S) No, 1394 /1996 and MK Modi vs. KK Modi & Ors. i.e. CS (OS) No. 434/1998) gave a categorical finding that the Hon'ble Supreme Court (in the matter of KK Modi vs. KN Modi & Ors. - AIR 1998 SCI297) had not decided the validity of the MoU of 1989 and in fact had only recorded the submissions made by some members of the Modi Family belonging to Group A. It is pertinent to mention that Dr. DK Modi who is running the Multanimal Degree College Society is part of Group A of the Modi family. The relevant paragraphs of the aforesaid judgment are reproduced herein below for the sake of convenience:

> *"38. The argument that the Apex Court had held the MOU had been substantially acted upon by the parties, and they must be held to the settlement and for that reason the suit to enforce the said settlement could not be withdrawn is also fallacious. The above statement has been read out of context and relied upon as a finding/determination of fact by the Apex Court, though it was only recorded as a submission made on behalf of the Group A parties. The Court instead of commenting on the said submission, directed the parties to raise the same before the High Court. The said paragraph from the copy of the judgment placed amongst the order sheets in the Part 1 file of suit no. 1394/96 is reproduced herein for the sake of ready reference.*
>
> *“"Group A also contends that there is no merit in the challenge to the decision of the Chairman of IFCI which has been made binding under the*

*Memorandum of Understanding. The entire Memorandum of Understanding-including Clause 9 has to be looked upon as a family settlement between various members of the Modi family. Under the Memorandum of Understanding, all pending disputes in respect of the rights of various members of the Modi family forming part of either Group A or Group B have been finally settled and adjusted. Where it has become necessary to split any of the existing companies, this has also been provided for in the Memorandum of Understanding. It is a complete settlement, providing how assets are to be valued, how they are to be divided, how a scheme for dividing some of the specified companies has to be prepared and who has to do this work. In order to obviate any dispute, the parties have agreed that the entire working out of this agreement will be subject lo such directions as the Chairman, IFCI may give pertaining to the implementation of Memorandum of Understanding. He is also empowered to give clarifications and decide any differences relating to the implementation of the Memorandum of Understanding. Such a family settlement which settles disputes within the family should not be lightly interfered with especially when the settlement has been already acted upon by some members of the family. In the present case, from 1989 to l995 the Memorandum of Understanding has been substantially acted upon and hence the parties must be held to the settlement which is in the interest of the family and which avoids disputes between the members of the family. Such settlements have to be viewed a little differently from ordinary contracts and their internal mechanism for working out the settlement should not be lightly disturbed. The respondents may make appropriate submissions in this connection before the High Court. We are sure that they will be considered as and when the High Court is required to do so whether in interlocutory proceedings or at the final hearing.*

*39. The Hon'ble Supreme Court after recording the submissions of the Group 'A' parties, left it to the High Court to decide these issues "as and when....required".*

8. A copy of the relevant pages of the judgment dated 05.10.2007 passed by Hon'ble Delhi High Court have been annexed as Annexure No.3 to the writ petition.

9. Subsequently, Dr. D.K. Modi, who is running the Multanimal Modi Degree College Society (pertinently respondent no. 3 has filed the present FIR who is the secretary of the said society) initiated a Civil Suit before the Hon’ble Delhi High Court bearing Case No. 991 of 2009, wherein, he sought enforcement of he said MoU of 1989.

10. The Hon'ble Delhi High Court on 05.12.2014 framed various issues for adjudication of the Civil Suit No. 991 of 2009, wherein, one of the issue framed by the Hon'ble Delhi High Court is reproduce herein below:-

"Issue No. 14: Whether the terms of the Memorandum of understanding dated 24.01.1989 are final and binding between the parties and the plantiff is entitled to the properties and assets earmarked for Group A under the same ?

11. Number of interim reliefs were sought by Dr. D.K. Modi in the said suit, however, till date no interim relief has been granted. The next date fixed before the Hon'ble Delhi High Court is 13th of August, 2024.

12. By the passage of time, the disputes between the family members i.e., Mr. U.K. Modi (who is part of Group B of the Modi family) and Dr. D.K. Modi (who is part of Group A of the Modi family and is also running the Multanimal Degree College Society) worsened, resulting in various attempts by Dr. D.K. Modi and (first informant i.e., respondent no. 3 who is secretary of the said society) to usurp the properties of the Modi Industries Limited. In furtherance to the said unsuccessful attempts, an Original Suit No. 961 of 2020 was filed before the Court of Civil Judge (Senior Division), Ghaziabad with same allegations seeking permanent injunction against the Modi Industries Ltd., and Others (including the petitioners) from interfering with the possession and working of the society at its registered Office in Modi Bhawan, Modi Nagar, Ghaziabad. The said suit was accompanied with an application under Order-39, Rule 1 and 2 read with Section 151 Cr.P.C seeking temporary injunction.

13. Learned Civil Judge (Senior Division), Ghaziabad upon the above application under Order 39, Rule 1 & 2 was pleased to grant an ex-parte injunction to maintain status quo over the disputed property and notices were issued to the defendant therein.

14. Upon the service of the notice of the suit No. 961 of 2020, the Modi Industries Ltd., along-with the petitioners herein filed their objection to the application under Order 39, Rule-1 & 2 on 11.12.2020.

15. The said objections were duly considered by the learned Civil Judge (Senior Division) Ghaziabad and upon perusing the objection and considering the material available on record, the learned Court was pleased to reject the application of the plaintiff under Order 39 Rule I & 2 CPC, vide its order dated 20.02.2021 and vacated the ex-parte interim order. The said order is a detailed order elaborating the issue in dispute which is also the subject matter of the present First Information Report, moreover, the said order has been concealed by the first informant in the present first Information Report.

16. Being aggrieved by the order dated 20.02.2021 passed by the learned Civil Judge (Senior Division) Ghaziabad, the society preferred a Misc. Appeal under order 43, Rule-1 CPC, bearing Misc. Appeal No. 3 of2021 (Multanimal Modi Degree College Society vs. Modi Industries Lid. & others) before the court of Additional District Judge, Court no.5, Ghaziabad which is pending till date and no relief has been granted.

17. During the pendency of the above appeal, the plaintiff / appellant therein preferred an application before the Court of Additional District Judge, Court no. 5, Ghaziabad on 25.08.2023, inter-alia, alleging therein that the defendants in the

suit in order to cause irreparable loss to the a plaintiff / appellant have deliberately demolished the property in dispute. It is relevant to mention here that, no allegation with regard to Robbery, Fire, Explosive has been made in the said application filed on 25.08.2023, in Misc. Appeal No. 3 of 2021.

18. The said application was vehemently objected by the petitioners along with Modi Industries Ltd., stating on oath the correct factual situation and categorically bringing on record that the actual possession of the property in the dispute is with Modi Industries Limited only. The said appeal is pending till date for consideration and no order has been passed failing which the respondent no. 3 has illegally triggered criminal law in motion by lodging the impugned FIR.

19. For the same incident, the present FIR has been lodged, where in, informant has deliberately concealed filing of Misc. Appeal No. 13 on 25.08.2023 which shows that the first informant with all malicious intention is trying to give criminal colour to civil dispute, which is pending between the parties before appropriate forum.

20. If the above was not enough, Dr. D.K. Modi, who always had his eyes over Modi Bhawan, Modi Nagar, in pursuance to his illegal intent, made another attempt of illegally and unlawfully, usurping said assets of Modi Industries Ltd., that is Modi Bhavan, Modi Nagar. He fraudulently and behind the back of Modi Industries Ltd., got a scheme sanctioned from the Board for Industrial and Financial Reconstruction (BIFR) where he illegally and unlawfully claimed Modi Bhawan as an asset of Modi Spinning and Weaving Mills Company Ltd. (which is managed and controlled by Dr. D.K. Modi). In addition to the above, he even entered into an agreement dated 24.04.2019 with another member of the Modi family, wherein, he again tried to distribute the said asset i.e., Modi Bhawan, between himself and another member of the family by claiming his company (Modi Spinning and Weaving Mills Company Ltd.) to be owner of the said asset.

21. Modi Spinning and Weaving Mills Company Ltd., then filed a petition before the Hon'ble Delhi High Court (W.P. No. 6238 of 2019), for implementation of the scheme sanctioned by the BIFR or in the alternative, the said agreement dated 24.04.2019. Dr D. K. Modi was also party to said frivolous petition. As soon as Modi Industries Ltd. (who was represented through Petitioner No. 1) learnt about the said illegal and unlawful act of Dr. D.K. Modi, it filed appropriate applications before the Hon'ble Delhi High Court and opposed the unlawful actions of the Dr. D.K. Modi. During course of hearing before the Hon'ble Delhi High Court on 26.04.2023, while dealing with the objection filed on behalf of Modi Industries Ltd., the counsel appearing on behalf of Modi Spinning and Weaving Mills Company Ltd., (which is managed and controlled by Dr. D.K. Modi) conceded that the asset of Modi Industries Ltd., i.e., Modi Bhawan, will not be treated as property forming part of the scheme sanctioned by the BIFR.

22. The learned Senior Counsel for the petitioners has submitted that impugned first informant has been lodged concealing all the above facts and to exert pressure on Modi Industries Ltd., to hand over the possession of the property in dispute in favour of Dr. D.K. Modi and his Society by

way of conspiracy on the basis of false and fabricated First Information Report with ulterior motives.

23. Present FIR is based on the Application U/S. 156(3) Cr.P.C. filed by the First Informant before the Chief Judicial Magistrate, Ghaziabad who sought report from the Police Station, Modi Nagar, District Ghaziabad. In compliance of which the report was submitted by the Police Station, Modi Nagar, Ghaziabad, wherein it has been categorically stated that upon inspection of the premises in dispute no construction or demolition activity was found. Moreover, dispute with regard to the same is already pending before the Hon'ble Delhi High Court as well as Civil Suit is pending before Civil Judge, Ghaziabad and Misc. Appeal is pending before the Additional District Judge Court no.5, Ghaziabad.

24. In addition to the above nowhere in the first information report it has been disclosed that what loss has been caused to the society, it is simply to take defence in the pending WRIT C No.29271 of 2022 before this Honble Court, which has been filed by another society managed by Dr. DK Modi along with the present Society.

25. Learned Senior Counsel for the petitioners further submits that bare perusal of the FIR reveals that the date of incident as mentioned the First Information Report is 10.12.2022, whereon, it is alleged that petitioners were demolishing the property in dispute and further they committed robbery of articles namely table, chair, fan, etc., however, the said allegations were missing in the interim application moved before the Additional District judge, Court no.5 Ghaziabad and have appeared for the first time in the present First Information Report. The prosecution story even if otherwise taken to be true does not constitutes any offence under alleged sections as the dispute is purely civil in nature and pending before the competent court of civil jurisdiction in which both the parties, i.e., petitioners as well as respondent no.3, are contesting parties and respondent no.3 after failing to obtain any favorable order of injunction or order in Misc. Appeal has resorted to invoke the criminal law for quick relief and exerting pressure on the petitioners to succumb to the dictates of Dr. K.N. Modi.

26. Learned Senior Counsel for the petitioners finally submits that the ingredients for constituting the offences under Sections 436, 450, 392 and 126-B IPC are not made out against the petitioners. Dispute between the parties is purely of civil nature and has been given colour of criminal case only to exert pressure on the Modi Industries Limited. As per the judgments of Apex Court in the case of ***State of Harayan vs. Bhajan Lal, AIR 1992 (SC) 604*** and in the case of ***Indian Oil Corporation vs. NTPC India Limited and Others, 2006(6) SCC 736***, the impugned FIR deserves to be quashed.

27. Counter affidavit has been filed on behalf of respondent no. 3 wherein it has been stated that the petitioners have opened the lock of office of the society and its institutions and robbed the important goods and files kept therein. This was done only to prevent the society to run smoothly. The petitioners and their chairman want to grab the society and several civil litigations are already pending between the parties. The offences alleged are fully made out against the petitioners.

28. Learned A.G.A appearing on behalf of state-respondent nos. 1 and 2 has also supported the case set up by the respondent no. 3 against the petitioners.

29. After considering the rival submissions, this court finds that there is civil dispute between the parties pending before the Civil Court, Ghaziabad in the form of injunction suit. Regarding commission of certain offences during the pendency of suit, FIR has been lodged by respondent no. 3.

30. After going through the material on record, this court does not finds the present case to be purely of civil nature.

31. Keeping in view, the allegations made in the FIR, there can be civil dispute between the parties, but if some crime is committed by one party against the other during the pendency of civil suit, it would require investigation.

32. In the present case, the allegations of commission of alleged crime have been made against the petitioners who are the employees of the Modi Industries Limited by their rival party, respondent no. 3. Except the allegations made in the FIR, there is no other documentary evidence brought on record in support of the allegations in the counter affidavit. Some photographs have been filed along with counter affidavit filed by respondent no. 3 which also do not clearly show any demolition, fire, etc., as alleged in the FIR. Even otherwise the above photographs are to be looked into by the investigating officer and without being part of case diary they cannot be relied upon by the court. There is civil dispute pending between the family members of Modi family which can be a ground for falsely implicating the employees of Modi Industries Limited, the petitioners.

33. It is convenient for the court to assume that the allegations in the FIR are gospel truth and thereafter close the chapter. However, the fact remains that the truth is yet to emerge from the statutory investigation to be conducted by the investigating officer. There is also possibility that the allegations made in the FIR are found by the investigating officer to be false. In that case denial of any relief to the petitioners would not be in the interest of justice. As per Article 21 of the constitution of India right to life and liberty of "we the people" cannot be curtailed only because the courts have set up a standard which provides that if by merely going through the FIR commission of cognizable offence / offences is found, no interference would be required in under the Article 226 of constitution of India and right to liberty of the petitioner cannot be protected and he should take recourse to Section 438 Cr.P.C for seeking anticipatory bail.

34. Now a days FIR is lodged mostly by getting it drafted by a legal expert or the head constable (diwan) of the police station. In the first information report, the ingredients for constituting the alleged offence / offences are incorporated so meticulously that the court may lay its hand off by a bare reading of FIR itself. The first information report is written with precision and perfection so that it fits into the convenient parameters of the court settled by the court itself.

35. Although it is convenient for the court to deny relief by the accused to the accused by just going through the contents of FIR but where it appears to the courts that there is possibility of false

implication and allegations in the FIR do not appear to be absolutely correct and may have been concocted to falsely implicate the accused / petitioner then, irrespective of the severity of allegations, interference is called by court to protect the right to liberty of the accused / petitioner.

36. After considering the totality of facts and circumstances, like previous litigation between the parties, earlier enmity between them counter blast implication, etc., court should interfere to protect right to liberty of accused even if allegations in the FIR show commission of cognizable offence by accused/petitioner.

37. Very long FIR containing the precise allegations making out the ingredients for constituting the alleged offences are mostly drafted by experts and the courts are required to be cautious of such FIRs which appear to be almost perfect with regard to allegations made therein. The human acts are imperfect and the genuine FIR does not contains the perfect recital supported by all the ingredients for constituting all the offences alleged. Therefore, protecting the liberty of the petitioner / accused during the pendency of investigation is in accordance of requirement of Article 21 of constitution of India. No rule of convenience, niceties of law of procedure can override the constitutional mandate. Such a right is vested in the citizen by the basic law of land. In case relief is denied to the petitioner / accused under Article 226 of constitution of India and he is compelled to obtain bail/ anticipatory bail during the period of investigation and then if the investigating officer finds, after concluding investigation, that implication of petitioner / accused was not correct then the state has not made any provision to indemnify such an accused / petitioner for under going the troubles in obtaining bail / anticipatory bail which is not easy where the false allegations made in the FIR are so convincing and perfectly made out that even the bail court refuses to grant bail.

38. In the state of Uttar Pradesh Anticipatory bail application is not entertained by the High Court directly. First approach to the Sessions Court is necessary in view of Full Bench decision of the High Court in the case of Ankit Bharti vs. State of U.P. and Another, passed in Crl. Misc. Anticipatory Bail Application u/s 438 Cr.P.C. No. 1094 of 2020. Before the Sessions Court time is lost in hearing of anticipatory bail application. Mostly such applications are rejected by the Sessions Court. Then before the High Court second inning starts. During this period police gets sufficient opportunity to arrest an accused or exempt him from arrest in lieu of money or other considerations. Another practical problem is large number of filing of anticipatory bail applications in this court per day.

39. On an average about 70-80 anticipatory bail applications are filed before this court per day. There is also pendency of about 2500 anticipatory bail applications in this court, not to say of the same before the sessions courts all over the state in 75 districts. During pendency of such applications many accused get arrested by police and many anticipatory applications are dismissed as infructuous. Most of those who escape arrest have to manage the police. As soon as the notice of filing of anticipatory bail applications by an accused reaches the police station concerned the effort of his arrest gets intensified by the informant in the police both. The denial of prompt protection from

arrest in a big source of corruption. The same himself from arrest the accused has no option but to please the police on day to day basis in the hope getting protection from arrest first in proceedings u/A 226 of Constitution of India then in proceedings under Section 438 Cr.P.C from the sessions Court and then from High Court. Some accused manage the police even till they approach the Apex Court. These are stark realities which a litigant facts on being implicated in an FIR containing allegations which made out cause of commission of cognizable offence.

40. With heavy filing of anticipatory bail applications before the 75 Sessions Courts of the state and also before this court, if in the cases where from the FIR and other material brought on record it appears to the High Court that the allegations in the FIR are though prima facie credible but investigation should not be hampered and correct facts should be ascertained thereby, directing the accused to avail remedy of anticipatory bail / bail would further increase the number of cases in courts. Besides causing harassment to litigants it would increase the work of Sessions court as well as this court. If limited protection from arrest till conclusion of investigation is granted to the accused approaching this court under Article 226 of the Constitution of India all the above proceedings can be avoided and work load of Sessions Court and High Court can be reduced and unnecessary harassment of litigant by police can also be avoided. There are the peculiar practical difficulties in this State in denying protection to an an accused for limited period under Article 226 of the Constitution of India, while refusing the quashing of FIR.

41. In such a situation relegating an accused from the court hearing matters under Article 226 of the Constitution of India to avail remedy u/s 438 Cr.P.C before Sessions Court and then before the High Court only for protection from arrest during investigation amounts to harassment of a litigant. On an average 200-300 Criminal Misc. Writ Petitions are filed under Article 226 of the Constitution of India per day before this court challenging the first information reports. Not all get heard promptly. During this period of pendency of writ petition before this court accused is under threat of arrest. If he fails get any relief his arrest is made by police granting him little time to approach the Sessions Court for seeking anticipatory bail and on being unsuccessful seeking anticipatory bail from the High Court.

42. We are not oblivious of the mandate of the Apex Court in the case of ***Neeharika Infrastructure Pvt. Ltd., vs. State of Maharashtra and Others., (2021) 19 SCC 401***. In paragraph 16 of the aforesaid judgment the Apex Court has held as follows :-

> *" In a given case, there may be allegations of abuse of process of law by converting a civil dispute into a criminal dispute, only with a view to pressurise the accused. Similarly, in a given case the complaint itself on the face of it can be said to be barred by law. The allegations in the FIR/complaint may not at all disclose the commission of a cognizable offence. In such cases and in exceptional cases with circumspection, the High Court may stay the further investigation. However, at the same time, there*

*may be genuine complaints/FIRs and the police/investigating agency has a statutory obligation/right/duty to enquire into the cognizable offences. Therefore, a balance has to be struck between the rights of the genuine complainants and the FIRs disclosing commission of a cognizable offence and the statutory obligation/duty of the investigating agency to investigate into the cognizable offences on the one hand and those innocent persons against whom the criminal proceedings are initiated which may be in a given case abuse of process of law and the process. However, if the facts are hazy and the investigation has just begun, the High Court would be circumspect in exercising such powers and the High Court must permit the investigating agency to proceed further with the investigation in exercise of its statutory duty under the provisions of the Code. Even in such a case the High Court has to give/assign brief reasons why at this stage the further investigation is required to be stayed. The High Court must appreciate that speedy investigation is the requirement in the criminal administration of justice."*

43. It is clear from the above paragraph that in the case where facts are hazy and the investigation has just begun, High Court should permit the investigation to proceed. In case the High Court stays further investigation it should assign reasons. We are not staying the investigation but it appears from the material on record that in present case implication of petitioners may be found to be false, therefore, their right to liberty is required to be protected during the period of statutory investigation in the allegations made against them in the FIR. Investigation can be stayed in this case but that would come in the way of speedy investigation which in requirement of criminal administration of justice as held by Apex Court in the above paragraph. We do not intend to delay the investigation proceedings at all but for the reasons given above intend to protect the petitioners from arrest till investigation against them is completed by police.

44. Had it been a case with clear allegations in the FIR and not hazy allegations with mitigating circumstances like pendency of civil dispute between the parties, this court would never have interfered.

45. Even the Apex Court in the case of ***Hema Mishra vs. State of U.P., 2014 (4) SCC 453***, has held that though High Court has very wide powers under Article 226 of Constitution of India but they are to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by the authorities indiscriminately making pre-arrest of the accused persons. However, the High Court should ensure that such powers is not exercised so liberally as to convert it into section 438 Cr.P.C. If the High Court finds that in a given case if the protection against pre-arrest is not given, it could amount some miscarriage of justice, it would be free to grant relief in the nature of anticipatory bail in exercise of its power under Article 226 of Constitution of India. However, such a blank interim order of not to arrest or "no coercive steps" cannot be passed mechanically in a routine manner. Reasons are to be assigned.

46. In view of the above consideration, this court is of the view that without obstructing the investigation and

without quashing the FIR, the right to liberty of petitioners deserves to be protected for the detailed reasons assigned herein above.

47. Accordingly, petition is disposed of directing that till cognizance is taken on police report under Section 173(2) Cr.P.C., by the court, the respondents shall not arrest the petitioners pursuant to the First Information Report dated 23.04.2024, registered as Case Crime No. 0274 of 2024, under Sections- 436, 450, 392 and 120-B IPC, Police Station- Modi Nagar, District- Commissionerate Ghaziabad (Rural), subject to cooperation in ongoing investigation, which shall be concluded within two months.

48. In case, the accused persons do not cooperate with the investigation, the investigating officer shall be at liberty to file a recall application for recalling this order before this court.

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**(2024) 7 ILRA 1197**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 09.07.2024**

**BEFORE**

**THE HON'BLE VIVEK KUMAR BIRLA, J.**
**THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.**

Crl. Misc. W.P. No. 9135 of 2024

**Smt. Geeta & Ors.** **...Petitioners**
**Versus**
**State of U.P. & Ors.** **...Opp. Parties**

**Counsel for the Petitioners:**
Raj Kamal

**Counsel for the Opp. Parties:**
G.A., Prem Chandra Dwivedi

**Juvenile Justice (Care and Protection of Children) Act, 2015, Section 94 – Presumption and determination of age - Age of the victim is to be determined on the basis of an ossification test where there is no reliable document regarding the age - If neither the birth certificate from the school nor the high school certificate nor the birth certificate issued by a competent authority as required by Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short, 'Juvenile Justice Act') is available, then the only option as per Section 94 of the Juvenile Justice Act is to rely upon the ossification test report. (Para 9)**

**Allowed.** (E-5)

**List of Cases cited**:

1. Smt. Juli Kumari and Another vs. State of UP and 2 Others, Criminal Misc. Writ Petition No. 17046 of 2022

2. State of M.P. vs. Anoop Singh, reported in 2015 (7) SCC 773

3. Suhani vs. State of U.P., 2018 0 Supreme (SC) 1430

4. P. Yuvaprakash vs. State Rep. By Inspector of Police, 2023 SCC OnLine SC 846

(Delivered by Hon'ble Vivek Kumr Birla, J. & Hon'ble Arun Kumar Singh Deshwal, J.)

1. Heard Sri Raj Kamal, learned counsel for the petitioners, Sri Prem Chandra Dwivedi, learned counsel for the respondents and Sri Ratan Singh, learned AGA for the State-respondents.

2. The present writ petition has been preferred with the prayer to quash the impugned first information report dated 14.05.2024 registered as Case Crime No.118 of 2024, under Section-363, 366 I.P.C., Police Station-Araon, District-Firozabad, and for a direction to the

respondents not to arrest the petitioners in pursuance of the impugned first information report.

3. Learned counsel for the petitioners submitted that petitioner nos.1 and 2 are major and out of their own free will, they got married on 15.05.2024, therefore, no offence is made out against the petitioners. Reliance has been placed by the petitioners on the judgement and order dated 05.12.2022 passed by this court in **Criminal Misc. Writ Petition No. 17046 of 2022 (Smt. Juli Kumari and another vs. State of UP and 2 others).**

4. In support of the above contention, petitioner nos.1 and 2 had filed joint affidavit in the present writ petition. Learned counsel for the petitioners further submitted that after getting married, they have also applied for online registration of their marriage, which has been annexed as annexure no.5 to the writ petition.

5. After hearing the aforesaid submission and on perusal of record on finding that there is no reliable evidence regarding the age of the petitioner no.1, this court directed by order dated 06.06.2024 to petitioner no.2 to produce the petitioner no.1 before the CJM, Firozabad with further direction that the CJM, Firozabad shall ensure the ossification test of petitioner no.1 for determination of her age and also directed the CJM, Firozabad to record the statement of petitioner no.1, u/s 164 Cr.P.C. in presence of Investigating Officer of the present case with further direction that after recording the statement of petitioner no.1, CJM, Firozabad will forward the copy of the same in a sealed cover along with the report of ossification test. Copy of the order dated 06.06.2024 passed by this court is being quoted as under:

> *"The petitioner does not appear to be educated and there is no proof of her age. The investigation so far has led the Police to a surreptitious certificate being issued by the In-charge Headmaster of Composite Vidyalaya Saifpur, District Firozabad who has certified the petitioner's date of birth to be 10.10.2007. The certificate does not inspire confidence. It is written on a plain paper by the In-Charge Headmaster/ Headmistress with a rubber stamp seal. It is not that a scholar's transfer register maintained in ordinary course of business issued by the said school, showing the victim's date of birth. The certificate too has been issued on 16.05.2024, that is to say, after the FIR was registered and appears to be a self-serving document. This shows that there is no better proof about the victim's age available with the 4th respondent as well; else it would have been provided to the Police.*
>
> *In the circumstances, it is directed that the second petitioner, Rohit s/o Bhoore Singh, who claims to have married the victim on 15.05.2024 at the Arya Samaj Mandir, Tundla, Firozabad shall produce her before the Chief Judicial Magistrate, Firozabad on 10.06.2024 and the Chief Judicial Magistrate shall cause the victim to be produced in turn before the Chief Medical Officer, Firozabad, who will forthwith constitute a Medical Board comprising three*

*doctors, one of whom will be an Orthopaedician. The Medical Board shall submit a report to this Court through the Chief Judicial Magistrate in a sealed cover based on a scientific test evaluating the victim's age. This course of action is necessary because no better evidence envisaged under Section 94 of the Juvenile Justice Act, 2015 is forthcoming.*

*It is further provided that when the victim appears before the Chief Judicial Magistrate on 10.06.2024, the Investigating Officer will also remain present and get the statement of the victim under Section 164 Cr.P.C. recorded before the Chief Judicial Magistrate. A certified copy of the statement of the victim shall also be forwarded to this Court in a sealed cover along with the report of the Medical Board by the date fixed.*

*Lay this petition as fresh again on 14.06.2024.*

*Until the next date of listing, the Police are restrained from arresting the petitioners in Case Crime No. 118 of 2024 under Section 363, 366 I.P.C., Police Station Araon, District Firozabad.*

*It is further provided that on the next date of listing, the victim and petitioner no. 2 shall remain personally present before this Court.*

*Let this order be communicated to the Chief Judicial Magistrate, Firozabad, the Superintendent of Police, Firozabad through the Chief Judicial Magistrate, Firozabad, the Chief Medical Officer, Firozabad through the Chief Judicial Magistrate, Firozabad, the Station House Officer, Police Station Araon, District Firozabad through the Superintendent of Police, Firozabad by the Registrar (Compliance) within 24 hours."*

6. In pursuance of the order dated 06.06.2024, ossification test report of petitioner no.1 along with the statement of petitioner no.1 recorded u/s 164 Cr.P.C. was sent to this court in a sealed cover. As per the ossification test report, age of the girl was determined about 17 years. It is settled law as per the judgement of **State of M.P. Vs. Anoop Singh** reported in **2015 (7) SCC 773** that there are always chances of difference of two years either plus or minus in the age determined by the ossification test report and such presumption is always given to the accused, therefore, age of petitioner no.1 can be presumed to be above 18 years. Paragraph no.17 of **Anoop Singh' case (supra)** is being quoted as under:

*"17. The High Court also relied on the statement of PW 11 Dr A.K. Saraf who took the x-ray of the prosecutrix and on the basis of the ossification test, came to the conclusion that the age of the prosecutrix was more than 15 years but less than 18 years. Considering this the High Court presumed that the girl was more than 18 years of age at the time of the incident. With respect to this finding of the High Court, we are of the opinion that the High Court should have relied firstly on the documents as stipulated under Rule 12(3)(b) and only in the absence, the medical opinion should have been sought. We find that the trial court has also*

*dealt with this aspect of the ossification test. The trial court noted that the respondent had cited Lakhanlal v. State of M.P. [2004 SCC OnLine MP 16 : 2004 Cri LJ 3962] , wherein the High Court of Madhya Pradesh said that where the doctor having examined the prosecutrix and found her to be below 18½ years, then keeping in mind the variation of two years, the accused should be given the benefit of doubt. Thereafter, the trial court rightly held that in the present case the ossification test is not the sole criterion for determination of the date of birth of the prosecutrix as her certificate of birth and also the certificate of her medical examination had been enclosed."*

7. From perusal of the statement of petitioner no.1, it is clear that she specifically stated that she herself left her house along with petitioner no.2 from her own free will and, thereafter, she got married with petitioner no.2 and now she wanted to live with petitioner no.2.

8. Hon'ble Supreme Court in the cases of **Suhani Vs. State of U.P**. reported in **2018 0 Supreme (SC) 1430** and **P. Yuvaprakash Vs. State Rep. By Inspector of Police** reported in **2023 SCC OnLine SC 846**, determine the age of victim on the basis of ossification test where there is no reliable document regarding the age. Paragraph nos.14, 16 and 19 of **P. Yuvaprakash case (supra)** are being quoted as under:

*"14. Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.*

*16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94(2) of the JJ Act, this court held in Sanjeev Kumar Gupta v. The State of Uttar Pradesh4 that:*

*"Clause (i) of Section 94(2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.*

*19. It is clear from the above narrative that none of the documents produced during the trial answered the description of "the date of birth certificate from the school" or "the matriculation or equivalent certificate" from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim's age was below 18 years as per Section 94(2)(iii) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating "that the age of the said girl would be more than 18 years and less than 20 years". In the cross-examination, she admitted that M's age could be taken as 19 years. However, the High Court rejected this evidence, saying that "when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor". This finding is, in this court's considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94(2)(i) mandates; nor are they in accord with Section 94(2)(ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the*

*details regarding examination of the victim's bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9.”*

9. In the present case, neither the birth certificate of school nor high school certificate nor birth certificate issued by competent authority as required by Section-94 of the Juvenile Justice (Care And Protection of Children) Act, 2015 (in short 'Juvenile Justice Act') is available, therefore, only option as per Section-94 of the Juvenile Justice Act is relying upon the ossification test report.

10. Therefore, considering the age of petitioner no.1 determined by the ossification test as well as statement of petitioner no.1 recorded u/s 164 Cr.P.C., it is clear that petitioner no.1 is of marriageable age and she willingly got married with petitioner no.2 as she had clearly stated in her statement that she had left her home with petitioner no.2 willingly and both of them have been living as husband and wife. Therefore no case u/s 363, 366 IPC is made out.

11. In view of the above, writ petition succeeds and is **allowed**.

12. The first information report dated 14.05.2024 registered as case crime no.118 of 2024, u/s 363, 366 IPC, Police Station-Araon, District-Firozabad as well as all consequential proceedings are hereby quashed.

13. Photocopies of the ossification test report as well as statement of petitioner no.1 recorded u/s 164 Cr.P.C. be kept on record. The original shall be returned in a sealed cover, at the earliest as per rule/procedure.

14. We, however, clarify that while deciding the present petition, we have not looked into the validity of marriage of the petitioners.

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**(2024) 7 ILRA 1202**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 12.07.2024**

**BEFORE**

**THE HON’BLE VIVEK KUMAR BIRLA, J.**
**THE HON’BLE ARUN KUMAR SINGH DESHWAL, J.**

Crl. Misc. W.P. No. 9665 of 2024

**Hussain Zaidi Alias Guddu ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Opp. Parties**

**Counsel for the Petitioner:**
M J Akhtar, Shahzad Alam

**Counsel for the Opp. Parties:**
G.A., Satyam Narayan, Shams Uz Zaman

**(A) Criminal Law - Indian Penal Code, 1860 - Sections - 420, 467, 468 & 471 - complaint/FIR disclosing civil transaction may also have a criminal texture but if the dispute is predominantly civil in nature then merely because FIR/complaint attracts ingredients of any criminal offence will not resist the court from quashing the criminal proceeding but in those cases where there are specific allegations of committing forgery and allegations in the FIR/complaint are not predominantly civil in nature but criminal in nature, then there is no bar to continue the criminal proceeding despite the fact**

**that civil proceeding is pending between the parties . (Para - 16)**

Specific allegation of commission of forgery on part of petitioner - forging signatures of first informant and his brothers and also forging photographs – contention - dispute is essentially civil in nature and civil dispute is already pending. (Para – 10, 17)

**HELD: -** Dispute in question cannot be said to be essentially civil in nature and from the perusal of the impugned FIR, cognizable offence is made out. If FIR discloses a cognizable offence, then merely because a civil suit is pending between the parties will not be a ground to quash the FIR. Such an allegation must be investigated. (Para – 14,17,18)

**Petition dismissed.** (E-7)

**List of Cases cited**:

1. Lalita Kumari Vs Govt. of U.P. & ors., (2014) 1 SCC (Cri) 524

2. Paramjeet Batra Vs St. of Uttarakhand & ors., (2013) 11 SCC 673

3. Randheer Singh Vs St. of U.P. & ors., (2021) 14 SCC 626

4. Usha Chakraborty Vs St. of W.B. , 2023 SCC OnLine SC 90

5. Mitesh Kumar J. Sha Vs St. of Karn. & ors. , (2022) 14 SCC 572

6. Vesa Holdings (P) Ltd. & anr. Vs St. of Kerala , 2015 8 SCC 293

7. Tuphail Ahmad & ors. Vs St. of U.P. & ors. , 2023 (12) ADJ 209

8. St. of Har. & ors. Vs Bhajan Lal & ors. , 1992 Supp. (1) SCC 335

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

1. Pursuant to the order of this Court, learned AGA has produced the copy of the instructions which is taken on record.

2. Heard Sri V.M. Zaidi, learned Senior Advocate, assisted by Sri M.J. Akhtar and Sri Shahzad Alam, learned counsel for the petitioner, Sri Satyam Narayan, learned counsel for the informant and Sri Ratan Singh, learned AGA for the State.

3. The present writ petition has been preferred with the prayer to quash the impugned first information report dated 15.05.2024 and the investigation of Case Crime No.152 of 2024, under Sections-420, 467, 468, 471 IPC, Police Station- Civil Lines, District- Meerut.

4. Contention of learned counsel for the petitioner is that the impugned FIR is illegal as no preliminary investigation was conducted by the police before lodging the same as directed by the Hon'ble Apex Court in the case of **Lalita Kumari Vs. Government of Uttar Pradesh & Others** reported in **(2014) 1 SCC (Cri) 524** regarding cases being civil in nature. It is also submitted by learned counsel for the petitioner that the allegation in the impugned FIR is that a forged family settlement dated 02.11.2007 was prepared but same was not executed by the petitioner and one of the uncle of the petitioner, Sayed Muste Hasan Zaidi alias Nanhey Miyan had purchased stamp paper and prepared the family settlement dated 02.11.2007 with the consent of all his brother and their heirs in the year 2007 itself. After the death of the father of the petitioner, petitioner came to know about the settlement dated 02.11.2007 from his uncle and when respondent no.4 and his other family members did not agree for

partition of the property then the petitioner filed a Civil Suit bearing No.769 of 2003 in the court of Additional Civil Judge (Senior Division)-II, Meerut for declaration and injunction on 12.07.2023 claiming his ownership and title in the family property in dispute. On the basis of family settlement dated 02.11.2007 obtained by the petitioner from his uncle Sayed Muste Hasan Zaidi (real brother of respondent no.4) which is still pending and validity of the family settlement dated 02.11.2007 is yet to be adjudicated by the civil court. But the respondent no.4 after the knowledge of the aforesaid suit instead of contesting the same before the civil court had lodged an impugned FIR on the basis of false and concocted story. It is further submitted by learned counsel for the petitioner that regarding the genuineness of the signature of the respondent no.4 and his brothers, report of hand writing expert was also filed by the petitioner before the civil court and family settlement dated 02.11.2007 was also verified by the Advocate Notary and also issued his certificate dated 25.04.2024. It was further submitted that though in FIR there is allegation that stamp used to prepare forge family settlement dated 02.11.2007 was purchased on 06.12.2007 but information given to petitioner by treasury office shows that stamp in question was purchased on 29.10.2007 not on 06.12.2007. Therefore, this allegation is absolutely false. In support of this submission learned Senior Counsel also produced copy of R.T.I. information given by the concerned treasury office.

5. It is lastly contended by learned counsel for the petitioner that dispute regarding the family settlement dated 02.11.2007 has been pending before the civil court but by the impugned FIR, the petitioner has given the colour of criminality to the civil dispute between the parties. Therefore, no offence u/s 420, 467, 468 & 471 IPC is made out and impugned FIR is liable to be quashed.

6. *Per contra*, Sri Satyam Narayan, learned counsel for opposite party no.4 as well as Sri Ratan Singh, learned AGA have vehemently opposed the present petition and submitted that from the perusal of the FIR, it is clear that there is specific allegation of committing forgery by preparing forged family settlement dated 02.11.2007 in which the signatures of the respondent no.4 and other co-sharer of the property have been forged.

7. The instructions were sought from the State on the issue as to whether before lodging the first information report, any preliminary enquiry was conducted or not.

8. Instructions so produced by learned AGA reflect that a preliminary enquiry was conducted before registration of the first information report.

9. After hearing the submission of learned counsel for the parties and on perusal of record on the basis of instructions of learned AGA it is clear that preliminary enquiry was conducted before the registration of impugned FIR, therefore, contention of learned counsel for the petitioner that no preliminary enquiry/investigation was conducted before registration of impugned FIR despite the dispute is of civil in nature, is misconceived.

10. So far as contention of learned counsel for the petitioner that dispute is essentially civil in nature and civil dispute is already pending regarding the alleged

family settlement dated 02.11.2007 is concerned, the Hon'ble Apex Court considered this issue in the case of **Paramjeet Batra Vs. State of Uttarakhand & Others** reported in **(2013) 11 SCC 673** and observed that High Court must not hesitate in quashing the criminal proceeding which are essentially of a civil nature and further observed that a complaint disclosing civil transaction may also have criminal texture but the High Court must see whether a dispute which is essentially of civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted, the High Court should not hesitate to quash the criminal proceeding to prevent the abuse of process. Paragraph no.12 of the **Paramjeet Batra's (supra)** case is being quoted as under:

> *"12. While exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash the criminal proceedings to prevent abuse of process of the court."*

11. Relying upon the decision of ***Paramjeet Batra (supra),*** the Hon'ble Apex Court in the case of ***Randheer Singh Vs. State of Uttar Pradesh & Others*** reported in ***(2021) 14 SCC 626*** as well as in the case of ***Usha Chakraborty Vs. State of West Bengal*** reported in ***2023 SCC OnLine SC 90*** observed that where a dispute is essentially of a civil nature, but is given a cloak of criminal offence then such dispute can be quashed.

12. Hon'ble Apex Court again considered this issue in **Mitesh Kumar J. Sha Vs. State of Karnataka & Others** reported in **(2022) 14 SCC 572**, observed that when the civil dispute is given criminal colour then such cases is nothing but abuse of process of law. Paragraph no.44 of the said judgement is being quoted as under:

> *"44. Moreover, this Court has at innumerable instances expressed its disapproval for imparting criminal colour 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 abuse of the process of law which must be discouraged in its entirety."*

13. However in the case of **Vesa Holdings (P) Ltd. & Another Vs. State of Kerala** reported in **2015 8 SCC 293**, Hon'ble Supreme Court observed that merely because civil remedy is also available, cannot be a ground to quash the criminal proceeding. Paragraph no.13 of the said judgement is being quoted as under:

*"13. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case there is nothing to show that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC. In our view the complaint does not disclose any criminal offence at all. The criminal proceedings should not be encouraged when it is found to be mala fide or otherwise an abuse of the process of the court. The superior courts while exercising this power should also strive to serve the ends of justice. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of the court and the High Court committed an error in refusing to exercise the power under Section 482 of the Criminal Procedure Code to quash the proceedings."*

14. A coordinate Bench of this Court in **Tuphail Ahmad and Others Vs. State of U.P. And Others** reported in **2023 (12) ADJ 209**, also observed that if FIR discloses cognizable offence then merely because civil suit is pending between the parties will not be a ground to quash the FIR. Paragraph no.13 of **Tuphail Ahmad's (supra)** case is being quoted as under:

*"13. In this view of the matter and the law laid down by the Hon'ble Apex Court in the case of **Trisuns Chemical Industry (supra), Paramjeet Batra (supra), Vesa Holdings (supra)** as well as judgment passed by a Co-ordinate Bench of this Court in the case of **Dilip Kumar Singh @ Deepu Singh (supra)** and considering the facts and circumstances of the case as alleged in the first information report and the contents of the Original Suit No.191 of 2023 (Tuphail Ahmad vs. Rajesh Tandon) as already discussed in the proceeding paragraphs, we find that the argument of the learned counsel for the petitioners that as a civil dispute is pending and no criminality is attached in the act, is not sustainable in the eye of law hence, stands rejected."*

15. It is also relevant to mention that Apex Court in the case of ***State of Haryana and others vs. Bhajan Lal and others*** reported in ***1992 Supp. (1) SCC 335***, has laid down the guidelines for quashing the FIR or complaint and observed as under: Paragraph nos.102 and 103 of the said judgement are being quoted as under:

*"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following*

*categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*

*(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*

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

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

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

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

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

*(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*

*103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."*

16. From the above analysis, it is explicit that settled position of law is that the complaint/FIR disclosing civil transaction may also have a criminal texture but if the dispute is predominantly civil in nature then merely because FIR/complaint attracts ingredients of any criminal offence will not resist the court from quashing the criminal proceeding but in those cases where there are specific allegations of committing forgery and allegations in the FIR/complaint are not predominantly civil in nature but criminal in nature, then there is no bar to continue the criminal proceeding despite the fact that civil proceeding is pending between the parties.

17. In the present case there is specific allegation of commission of forgery on the part of the petitioner by forging the signatures of first informant and his brothers and also forging the photographs. Therefore, dispute in question cannot be said to be essentially civil in nature and from the perusal of the impugned FIR, cognizable offence is made out.

18. Therefore, this court is of the view that such allegation must be investigated, therefore, petition fails and hence **dismissed**.

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**(2024) 7 ILRA 1208**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 26.07.2024**

**BEFORE**

**THE HON'BLE SIDDHARTHA VARMA, J.**
**THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.**

Crl. Misc. W.P. No. 9930 of 2024
With
Crl. Misc. W.P. No. 10379 of 2024
With
Crl. Misc. W.P. No. 10852 of 2024
With
Crl. Misc. W.P. No. 10916 of 2024
With
Crl. Misc. W.P. No. 10968 of 2024

**Abdul Lateef @ Mustak Khan ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Opp. Parties**

**Counsel for the Petitioner:**
Sri Pankaj Kumar Chuabe, Sri Rafeek Ahmad Khan

**Counsel for the Opp. Parties:**
G.A.

**Criminal Law – Gang chart prepared in violation of the U.P. Gangsters and Anti-Social Activities (Prevention) Rules, 2021 - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986- Sections 2(b), 2(b) (i) to 2(b) (xxv), 2(c) of the Act, 1986- Gangsters Act can be invoked only when the conditions in these provisions are fulfilled- persona who are members of any gang and commit offences mentioned in these provisions- Unlike other States, even a single base case sufficient in the St. of U.P.- Continuing activity not a prerequisite- Satisfaction of the authorities after joint meeting is must- Adherence to Rules, 2021 is mandatory- Elaborate guidelines laid down in *Sanni Mishra* reiterated- Petition allowed. (Paragraphs 8 to 12, 24 to 27, 30, 32, 38 and 39)**

**HELD:**
Before proceeding on the factual aspect as well as legal question, involved herein, it would be appropriate to discuss the basic object of the Gangsters Act. The Gangsters Act was enacted to deal with those criminals who commit crime by forming a gang or who assist or abet illegal activities of a gang which are mentioned in Section 2(b) of the Gangsters Act. The Gangsters Act can be invoked only against the persons who are termed as gangsters as per Section 2(c) of the Gangsters Act. Therefore,

the Gangsters Act can be imposed only on those persons who are members of any gang and commit offence mentioned in Section 2(b)(i) to 2(b)(xxv) of the Gangsters Act or who assist such persons in any manner. Definition of the word 'gang' has been given in Section 2(b) of the Gangsters Act, providing group of persons either acting singly or collectively with the object of disturbing public order or gaining any undue temporal, pecuniary or material advantage for himself of any other person through violence, or threat, or intimidation, or coercion, or other similar activities by indulging in illegal activities mentioned in Section 2(b) of the Gangsters Act. Section 2(b), defining the word 'gang' is quoted as under:-

*"2(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"*
(Para 8)

The Apex Court in the case of ***Shraddha Gupta (supra)*** observed that on the basis of a single case, the Gangsters Act can be imposed against a person. This observation was widely misused by the police authorities for invoking the Gangsters Act only on the basis of a single case, ignoring the fact that the observation of the Apex Court in ***Shraddha Gupta (supra)*** is regarding commission of a single case by the member of a gang or by any person who assists or abets the gang in its illegal activities. Therefore, though the Gangsters Act can be imposed only on the basis of a single case against a criminal, the basic condition must be fulfilled that the criminal must be a member of a gang and involved in illegal activities as mentioned in Section 2(b) of the Gangsters Act, only then the Gangsters Act can be imposed only on the basis of a single case. However, this Court came across a number of cases where the Gangsters Act has been imposed only on the basis of a single case against an accused without there being sufficient material to show that the person is a member of a gang and involved in illegal activities, mentioned in Section 2(b) of the Gangsters Act. This is nothing but misuse of the Gangsters Act by some of the St. Officers. (Para 11)

The St. Government, just to prevent the misuse of the Gangsters Act, has framed the Rules, 2021. While framing these rules, the St. Government also took into consideration several guidelines issued by the High Court as well as the Apex Court regarding invocation of the Gangsters Act. The basic purpose of issuance of the Rules, 2021 is that no innocent person be falsely implicated in the Gangsters Act by providing check and balance on the police as well as administrative officers who are competent authorities to recommend and approve the gang chart before registration of the F.I.R. under the Gangsters Act. (Para 12)

The above guidelines show that the Court has specifically directed the competent authorities that at the time of preparing gang chart, the date of filing of the charge sheet ought to be mentioned in column-6 of the gang chart and the competent authorities must record their required satisfaction by writing in clear words and not by signing a pre-typed satisfaction. It was also directed that before approving the gang chart, the District Magistrate/Commissioner of Police should conduct a joint meeting with the District Police Chief to discuss material available for invocation of the Gangsters Act. (Para 24)

From a perusal of the above mentioned circulars of the Director General of Police, U.P. as well as Chief Secretary, Govt. of U.P., it is clear that there were specific directions to all the District Magistrates as well as District Police Chiefs to record their required satisfaction in the gang chart instead of signing a pre-typed satisfaction and it was also provided that there must be a joint meeting to conduct due discussion between the District Magistrate and the District Police Chief before approving the gang chart. It was also directed by those circulars that the competent authorities must peruse all the documents annexed with the gang chart before forwarding and approving the same. (Para 27)

This Court again found in the present cases that the gang charts of the impugned FIRs have been prepared in utter violation of the Rules, 2021 as well as directions issued by this Court in

***Sanni Mishra (supra), Asim @ Hassim (supra), Rajeev Kumar @ Raju (supra), Anil Mishra (supra)*** and also in violation of circular dated 19.1.2024 issued by the Director General of Police as well as circular dated 21.1.2024 issued by the Chief Secretary, Govt. U.P. (Para 30)

**Petition allowed.** (E-14)

**List of Cases cited:**

1. Sanni Mishra @ Sanjayan Kumar Mishra Vs St. of U.P. & ors.; 2024 (1) ADJ 231 (DB)

2. Asim @ Hassim Vs St. of U.P. & anr.; 2024 (1) ADJ 125 (DB)

3. Shraddha Gupta v. St. of Uttar Pradesh & ors.; 2022 SCC OnLine SC 514

4. Anil Mishra Vs St. of U.P. & ors.; 2024 (3) ADJ 285 (DB)

5. Dharmendra @ Bheema Vs St. of U.P. & anr.; Criminal Misc. Writ Petition No. 1049 of 2024

6. Rajeev Kumar @ Raju Vs St. of U.P. & ors.; Criminal Misc. Writ Petition No. 9428 of 2024

7. Mohd. Arif @ Guddu Vs St. of U.P. & ors.; Criminal Misc. Writ Petition No. 10980 of 2024

8. St. of Pun. Vs Davinder Pal Singh Bhullar & ors.; 2011 (14) SCC 770

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

1. As a common question is involved in all the above five writ petitions, all the writ petitions are being disposed of by a common judgement.

2. Basic issue in all the above writ petitions is preparation of gang chart in accordance with the U.P. Gangsters and Anti Social Activities (Prevention) Rules, 2021 (hereinafter referred to as "Rules, 2021"). In all the above writ petitions first information reports, under the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as "Gangsters Act"), have been challenged on the ground that while preparing the gang charts of the FIRs in question, the competent authorities have not applied their minds and prepared gang charts in violation of the Rules, 2021 as well as several directions issued by this Court in the cases of ***Sanni Mishra @ Sanjayan Kumar Mishra vs. State of U.P. and others; 2024 (1) ADJ 231 (DB)*** as well as other judgements.

3. The following contentions have been made by the learned counsel for the petitioner in **Criminal Misc. Writ Petition no. 9930 of 2024:-**

(i) That while recommending and approving the gang chart of the impugned FIR, the competent authorities instead of recording their satisfaction simply signed pre-typed satisfaction which is against the law laid down by the Division Bench of this Court in the case of ***Sanni Mishra (supra).***

(ii) That from perusal of the gang chart, it is clear that while signing the pre-typed satisfaction for approval, the District Magistrate has not mentioned the date of his signature. This fact clearly shows that there was no joint meeting of District Magistrate and Superintendent of Police as required by the Rule 5(3)(a) of the Rules, 2021.

(iii) That the impugned F.I.R. was registered under Section 3(1) of the Gangsters Act without describing the corresponding provision of Section 2(b) of the

Gangsters Act, mentioning the anti social activities on the basis of which the petitioner was termed as gangster. Therefore, the F.I.R. itself is in violation of directions issued by the Division Bench of this Court in the case of ***Asim @ Hassim vs. State of U.P. and another; 2024 (1) ADJ 125 (DB).***

4. The following contentions have been made by the learned counsel for the petitioners in **Criminal Misc. Writ Petition Nos. 10379 of 2024 and 10852 of 2024:-**

(i) That while preparing the gang chart of the impugned F.I.R., the Senior Superintendent of Police, Etawah did not record any satisfaction as required by Rule 16(2) of the Rules, 2021, but he simply mentioned the word "recommended". While approving the gang chart, the District Magistrate has not recorded satisfaction as required by Section 16(3) of the Rules, 2021 which prescribes that before approving the gang chart, the District Magistrate should also mention that apart from the gang chart he has perused the attached forms/evidences enclosed with the gang chart but he simply mentioned that he has perused the gang chart and report annexed with the gang chart, though there was no report of the Senior Superintendent of Police with the gang chart. Therefore, while approving the gang chart there is complete non application of mind on the part of the District Magistrate, Etawah.

(ii) That before approving the gang charts, the District Magistrate and the Senior Superintendent of Police have not conducted due discussion in a joint meeting as required by the Rule 5(3) of the Rules, 2021.

5. The following contentions have been made by the learned counsel for the petitioner in **Criminal Misc. Writ Petition No. 10916 of 2024**:-

(i) That while approving the gang chart no date was mentioned by the Nodal Officer while signing his satisfaction on the gang chart.

(ii) From the perusal of the gang chart, it is clear that recommendation of the Superintendent of Police on the gang chart was made on 24.4.2024 but the approval was granted by the District Magistrate on 10.5.2024. Both the aforesaid dates show that there was no joint meeting between the Superintendent of Police and the District Magistrate and the gang chart has been approved without application of mind as required by Rule 17 of the Rules, 2021.

6. The following contentions have been made by the learned counsel for the petitioner in Criminal Misc. Writ Petition no. 10968 of 2024:-

(i) That while recommending and approving the gang chart of the impugned F.I.R. the competent authorities, instead of recording their satisfaction, simply signed pre-typed satisfaction which is against the law laid down by the Division

Bench of this Court in the case of Sanni Mishra (supra).

(ii) That before approving the gang chart the District Magistrate and the Senior Superintendent of Police have not conducted due discussion in a joint meeting as required by the Rule 5(3) of the Rules, 2021.

7. Sri Amit Sinha, learned A.G.A. on behalf of the State-respondents has submitted that there is no requirement to conduct joint meeting before approval of the gang chart. Learned A.G.A. submitted that though there is a technical fault in approving the gang chart on the part of the competent authorities, that cannot be a ground to quash the impugned F.I.R. under the Gangsters Act. It is also submitted that in pursuance of the judgement of the Division Bench of this Court, Chief Secretary, Govt. of U.P. has also issued circular dated 21.4.2024 to all the District Magistrates as well as Superintendents of Police for strictly following the Rules, 2021 in the light of the guidelines issued by this Court while preparing the gang chart under the Gangsters Act. It is further submitted that the Director General of Police had also issued circular dated 19.4.2024 to all the Senior Superintendents of Police/Superintendents of Police/Commissioners of Police to strictly follow the guidelines, issued by this Hon'ble Court in the case of Sanni Mishra (supra) as well as in other judgements of this Hon'ble Court so as to prepare the gang chart in accordance with the Rules, 2021. However, some of the District Magistrates and District Police Chiefs, mistakenly, could not take into consideration those guidelines and because of that reason mistakes were committed while preparing and approving the gang charts under the Gangsters Act.

8. Before proceeding on the factual aspect as well as legal question, involved herein, it would be appropriate to discuss the basic object of the Gangsters Act. The Gangsters Act was enacted to deal with those criminals who commit crime by forming a gang or who assist or abet illegal activities of a gang which are mentioned in Section 2(b) of the Gangsters Act. The Gangsters Act can be invoked only against the persons who are termed as gangsters as per Section 2(c) of the Gangsters Act. Therefore, the Gangsters Act can be imposed only on those persons who are members of any gang and commit offence mentioned in Section 2(b)(i) to 2(b)(xxv) of the Gangsters Act or who assist such persons in any manner. Definition of the word 'gang' has been given in Section 2(b) of the Gangsters Act, providing group of persons either acting singly or collectively with the object of disturbing public order or gaining any undue temporal, pecuniary or material advantage for himself of any other person through violence, or threat, or intimidation, or coercion, or other similar activities by indulging in illegal activities mentioned in Section 2(b) of the Gangsters Act. Section 2(b), defining the word 'gang' is quoted as under:-

> *"2(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"*

9. From the perusal of the definition of the word 'gang', it appears that if two or more persons group together for committing illegal activities, as mentioned in Section 2(b) of the Gangsters Act itself, then that group will be considered as a gang. But in the Gangsters Act, it was nowhere mentioned whether the activity of the member of a group should be one or more than one to attract the liability under the Gangsters Act as mentioned in the Maharastra Control of Organized Crime Act, 1999 and the Gujarat Control of Terrorism and Organized Crime Act, 2015. As per the Maharastra Control of Organized Crime Act as well as the Gujarat Control of Terrorism and Organized Crime Act, to attract the liability there must be a continuing unlawful activity which requires more than one charge sheet. However, in the U.P. Gangsters Act, it is nowhere mentioned that to attract the liability under the Gangsters Act there must be continuing unlawful activity which requires more than one charge sheet for the offences. For ready reference, Sections 2(1)(d), 2(1)(e) of the Maharastra Control of Organized Crime Act as well as Sections 2(1)(c) and 2(1)(e) of the Gujarat Control of Terrorism and Organized Crime Act are quoted as under:-

***"Maharastra Control of Organized Crime Act***

*2(1)(d). "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence.*

*2(1)(e). "organised crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency.*

***Gujarat Control of Terrorism and Organized Crime Act***

*2(1)(c). "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cogntzable offence punishable with imprisonment for a term of three years or more,'-- undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent court within the preceding period of ten years and that court has taken cognizance of such offence.*

*2(1)(e). "organised crime" means continuing unlawful activity and terrorist act including extortion, land grabbing, contract killing, economic offences, cyber crimes having severe*

*consequences, prostitution or ransom by an individual, singly or jointly, either as syndicate, by use of violence or at of violence or intimidation or coercion or other means."*

10. This issue was also considered by the Apex Court in the case of ***Shraddha Gupta v. State of Uttar Pradesh and Others; 2022 SCC OnLine SC 514***. While considering the issue whether the provision of the Gangsters Act can be invoked if the member of a gang is involved in a single case, Hon'be the Apex Court observed that on perusal of the definition of 'gang' and 'gangster' in the U.P. Gangsters Act, continuation of illegal activities is not required as required in the the Maharastra Control of Organized Crime Act as well as the Gujarat Control of Terrorism and Organized Crime Act. Therefore, even if the member of a gang is involved in a single base case, the provisions of the Gangsters Act can be imposed against him. Paragraph No. 39 of ***Shraddha Gupta (supra)*** case is quoted as under:-

*"39. 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 in clause (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/charge sheet 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."*

11. The Apex Court in the case of ***Shraddha Gupta (supra)*** observed that on the basis of a single case, the Gangsters Act can be imposed against a person. This observation was widely misused by the police authorities for invoking the Gangsters Act only on the basis of a single case, ignoring the fact that the observation of the Apex Court in ***Shraddha Gupta (supra)*** is regarding commission of a single case by the member of a gang or by any person who assists or abets the gang in its illegal activities. Therefore, though the Gangsters Act can be imposed only on the basis of a single case against a criminal, the basic condition must be fulfilled that the criminal must be a member of a gang and involved in illegal activities as mentioned in Section 2(b) of the Gangsters Act, only then the Gangsters Act can be imposed only on the basis of a single case. However, this Court came across a number of cases where the Gangsters Act has been imposed only on the basis of a single case against an accused without there being sufficient material to show that the person is a member of a gang and involved in illegal activities, mentioned in Section 2(b) of the Gangsters Act. This is nothing but misuse of the Gangsters Act by some of the the State Officers.

12. The State Government, just to prevent the misuse of the Gangsters Act, has framed the Rules, 2021. While framing these rules, the State Government also took into consideration several guidelines issued by the High Court as well as the Apex Court regarding invocation of the Gangsters Act. The basic purpose of issuance of the Rules, 2021 is that no innocent person be falsely implicated in the Gangsters Act by providing check and balance on the police as well as administrative officers who are competent authorities to recommend and approve the gang chart before registration of the F.I.R. under the Gangsters Act.

13. The majority of criminal Acts and Rules, enacted and framed by the State, are substantially based on societal norms which can be traced back to the religious teachings, found in the religious texts.

14. This Court is of the view that the object of procedural Rules, framed under the Gangsters Act as well as in other criminal laws, must be tested on the old saying that ***"99 accused may be acquitted, but one innocent person should not be punished".***

15. Rigveda, the ancient Indian Vedic texts contains several hymns and verses that prohibit harassment and oppression of innocent people. Several verses of Rigveda emphasize the importance of protecting the innocent and the weak and warn against oppressing or harassing them. The Rigveda teaches that Gods are on the side of the oppressed and will punish those who engage in harassment and oppression. The Mandal-1, Sukta-5th, Varg-10th (1.5.10) of the Rigveda (interpretation by Swami Dayanand Saraswati) is being quoted as under:-

> *"मा नो मर्ता अभि द्रुहन् तनूनामिन्द्र गिर्वणः। ईशानो यवया वधम् ॥ १०॥*
>
> *(mā no martā abhi druhan tanūnām indra girvaṇaḥ | īśāno yavayā vadham)*
>
> *Indra, who are the object of praises, let no men do injury to our*

*persons; you are mighty, keep off violence."*

16. The Bible, both old and new testaments, condemns harassment and oppression of an innocent person. The Bible teaches that protecting the innocent and promoting justice is a fundamental aspect of faith and harassment and oppression are considered sinful behaviour. The relevant extract of the Bible is quoted as under:-

> ***"Exodus 23:7***
>
> *Have nothing to do with a false charge and do not put an innocent or honest person to death, for I will not acquit the guilty."*

17. Quran, the holy book of Islam, strictly condemns harassment and oppression of innocent people. The Quran teaches that protecting the innocent and promoting justice is a fundamental aspect of Islam and oppression and harassment are considered grave sins. The Surah Al-Ma'edah (Surah-5), Ayat 32 of the Quran is quoted as under:-

> “ مِنْ أَجْلِ ذَٰلِكَ كَتَبْنَا عَلَىٰ بَنِيٓ
> أَوْ فَسَادٍ فِى مَن قَتَلَ نَفْسًۢا بِغَيْرِ نَفْسٍ إِسْرَٰٓءِيلَ أَنَّهُۥ
> فَكَأَنَّمَا قَتَلَ ٱلنَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا ٱلْأَرْضِ
> أَحْيَا ٱلنَّاسَ جَمِيعًا ۚ وَلَقَدْ جَآءَتْهُمْ رُسُلُنَا فَكَأَنَّمَآ
> ٱلْأَرْضِ بِٱلْبَيِّنَٰتِ ثُمَّ إِنَّ كَثِيرًا مِّنْهُم بَعْدَ ذَٰلِكَ فِى
> لَمُسْرِفُونَ ٣٢ ”
>
> *(Min Ajli thalika katabna 'ala banee israeela annahu man qatala nafsan bighayri nafsin aw fasadin fee alardi fakaannama qatala alnnasa jamee'an waman ahyaha fakaannama ahya alnnasa jamee'an walaqad jaa thum rusuluna bialbayyinati thumma inna katheeran minhum ba'da thalika fee alardi lamusrifoona)*
>
> *Because of that, We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land – it is as if he had slain mankind entirely. And whoever saves one – it is as if he had saved mankind entirely. And our messengers had certainly come to them with clear proofs. Then indeed many of them, [even] after that, throughout the land, were transgressors."*

18. The above verses of different religious texts clearly show that harassment of innocent persons is a great sin and our legal system also prescribes several procedures to protect the innocent persons and punish the guilty. Before the enforcement of the Constitution of India, Dr. B.R. Ambedkar Ji, while addressing the final constituent assembly, said ***"However good the constitution may be, if those who are implementing it are not good it will prove to be bad".*** Therefore, providing law and procedure for its implementation may not result as desired if the persons who are implementing the same have mala fide intension or do not respect the law and its procedure.

19. Similar is the situation in the State of U.P. Here, though the policy of State Government for zero tolerance towards crime is appreciable but if some of its officials do not follow proper procedure and guidelines, prescribed by the State Government itself, then in such circumstances the object of the Government to achieve good governance and zero tolerance towards crime was bound to be defeated.

20. This Court came across myriad cases where it was found that the competent authorities under the Gangsters Act were not following the procedure prescribed by the Rules, 2021 in preparation of gang chart which is the first stage of invoking the Gangsters Act upon criminal(s). Though all the State officers cannot be blamed, but certainly there is a considerable number of State officers who are invoking the Gangsters Act without following due procedure laid down by the Rules, 2021 itself. Considering the laxity on the part of some of the State officers in preparation of the gang chart against the well established procedure laid down by the State Government, several Benches of this Court had issued directions for preparation of the gang chart as well as for invocation of the Gangsters Act.

21. This Court in the case of ***Anil Mishra vs. State of U.P. and others; 2024 (3) ADJ 285 (DB)*** observed that satisfaction of the competent authorities should be the satisfaction in true sense and not the formality and a dishonest satisfaction will be no satisfaction at all. Paragraph No.32 of the aforesaid judgement is quoted as under:-

> *"32. Satisfaction of the competent authority only means that the competent authority must be in fact satisfy and not a dishonest satisfaction, which will be no satisfaction at all. The satisfaction contemplated by the Gangster Rule is satisfaction in point of fact on the materials placed before the competent authority. The satisfaction of the competent authority referred to under the Rule is not with respect to the allegations levelled against the gangster but the satisfaction is confined to those allegations that the accused can be prosecuted under the Gangster Act. Whatever may be the nature of charge against the accused, the satisfaction of the competent authority should be with regard to that the materials placed before him and the nature of the accused indulging in community antisocial activities. It is expedient to sanction prosecution under the Gangster Act."*

22. In the case of ***Asim @ Hassim (supra)***, a Division Bench of this Court, just to prevent misuse of the Gangsters Act, observed that the Gangsters Act can be imposed on a person who is a member of a gang and who is also involved in the category of illegal activities mentioned in Section 2(b) of the Gangsters Act and, therefore, without mentioning the relevant provision which makes him gangster, the provision of the Gangsters Act cannot be invoked merely because that person has committed an offence. In that case the Division Bench of this Court directed that while registering an F.I.R. under the Gangsters Act, relevant provision of Section 2(b) regarding illegal activities in which the person is involved and on the basis whereof he was termed as gangster should also be mentioned in the F.I.R. Though this judgement was referred to the larger Bench by another Division Bench in the case of ***Dharmendra @ Bheema vs. State of U.P. and another; Criminal Misc. Writ Petition No. 1049 of 2024***, the reference is yet to be decided. Therefore, till the reference is decided, the law laid down in Asim @ Hassim (supra) is still hold good. Paragarphs No. 5 & 9 of the judgement in ***Asim @ Hassim (supra)*** are quoted as under:-

*"5. From the provisions, quoted as above as well as from the perusal of other provisions of Gangsters Act, it is clear that a person can be prosecuted under Section 3 of Gangsters Act only after he falls under the definition of "gangster" being part of the gang which is involved in anti social activities as mentioned in Section 2(b)(i) to (xxv) of the Act. The purpose of making special provisions of Gangsters Act for dealing with gangsters and for preventing their anti social activities. The provision of this Act are stringent and are therefore required to be interpreted strictly so as to prevent their misuse on the part of State authorities.*

*9. In the present case, the impugned F.I.R. was registered u/s 3(1) Gangsters Act, without mentioning the corresponding provision, mentioning the anti social activities in which the accused is involved and on the basis of which he was named as gangster. A person cannot be punished without specifying the offence committed by him which would justify his classification as a Gangster. "*

23. This Court again considered the Rules, 2021 on finding that the gang chart is not being prepared as per the rules and issued several directions in the case of ***Sanni Mishra (supra).*** Following guidelines were issued in paragraph No.22 of the aforesaid judgment:-

*"22. In view of the above, this court lays down following directions for preparation of gang-chart before lodging FIR under the Gangster Act, 1986 :*

*(i) Date of filing of chargesheet under base case must be mentioned in Column-6 of the gang-chart except in cases under Rule 22(2) of the Gangster Rules, 2021.*

*(ii) While forwarding or approving the gang-chart, competent authorities must record their required satisfaction by writing in clear words, not by signing the printed/typed satisfaction.*

*(iii) There must be material available for the perusal of the court which shows that the District Magistrate before approving the gang-chart had conducted a joint meeting with the District Police Chief and held a due discussion for invocation of the Gangster Act, 1986."*

24. The above guidelines show that the Court has specifically directed the competent authorities that at the time of preparing gang chart, the date of filing of the charge sheet ought to be mentioned in column-6 of the gang chart and the competent authorities must record their required satisfaction by writing in clear words and not by signing a pre-typed satisfaction. It was also directed that before approving the gang chart, the District Magistrate/Commissioner of Police should conduct a joint meeting with the District Police Chief to discuss material available for invocation of the Gangsters Act.

25. In pursuance of the judgements in Asim @ Hassim (supra) as well as Sanni Mishra (supra), the Director General of Police, U.P., issued circular dated

19.1.2024 to all the District Police Chiefs. The circular dated 19.1.2024, issued by the Director General of Police, U.P. is quoted as under:-

*"विजय कुमार,*
*आई०पी०एस*

*डीजी परिपत्र सं०-04/2024*
*पुलिस महानिदेशक, उत्तर प्रदेश।*
*पुलिस मुख्यालय, गोमती नगर विस्तार,*
*लखनऊ-226002*
*दिनांकः जनवरी 19,2024*

*विषयः उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) नियमावली-2021 के प्राविधानों के अनुपालन के सम्बन्ध में दिशा निर्देश।*

*प्रिय महोदय/महोदया,*

*1. पत्र संख्याः डीजी-सात-एस-14 (15)/2023 दि० 02.01.2024*

*2. पत्र संख्याः डीजी-सात-एस-14 (09)/2021 दि० 01.06.22*

*3. पत्र संख्या: डीजी सात-एस-14(09)/2021 दि० 25.04.22*

*4. डीजी परिपत्र सं०-40/22 दि० 09.12.2022*

*उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) अधिनियम 1986 के अन्तर्गत अभियुक्तों के विरुद्ध कार्यवाही के दौरान अभियुक्तों का सम्पूर्ण एवं त्रुटिहीन आपराधिक इतिहास अंकित किये जाने तथा इस सम्बन्ध में उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) नियमावली 2021 के प्राविधानों के अनुपालन के सम्बन्ध में इस मुख्यालय स्तर से पार्श्वीकित वॉक्स में अंकित पत्र तथा डीजी परिपत्र पूर्व में निर्गत किये गये हैं किन्तु इन निर्देशों का कमिश्नरेट/जनपद स्तर पर कड़ाई से अनुपालन नहीं किया जा रहा है।*

*श्री आशुतोष कुमार सण्ड, शासकीय अधिवक्ता, मा० उच्च न्यायालय इलाहाबाद ने अपने पत्र दिनांकित 18.12.2023 (छायाप्रति संलग्न) द्वारा अवगत कराया है कि मा० उच्च न्यायालय में गिरोहवन्द अधिनियम के अभियुक्तों द्वारा प्रथम सूचना रिपोर्ट को चुनौती देते हुये रिट याचिकायें योजित की जा रही हैं, जिसमें गिरोहबन्द नियमावली में दी गयी विभिन्न व्यवस्थाओं का पालन न किये जाने को आधार बनाया जा रहा है। विद्वान शासकीय अधिवक्ता ने उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) अधिनियम 1986 के अन्तर्गत की जा रही कार्यवाहियों में विवेचनाधिकारियों, प्रभारी निरीक्षकों, नोडल अधिकारियों, पुलिस अधीक्षकों तथा जिला मजिस्ट्रेटों द्वारा सामान्य रूप से की जा रही त्रुटियों का निम्नवत उल्लेख अपने पत्र में किया है-*

*a- Under Rule 5(3)a there must be a joint meeting of the District Magistrate/ Commissioner of Police with the District Police Chief.*

*b- Under Rule 8(3) the Status of each case on the date of the approval of the Gang chart should be strictly mentioned.*

*c- According to Rules the Addl. Superintendent of Police (Nodal Officer) must record his satisfaction in clear words as required under Rule16(1) of the Rules.*

*d- Under Rule 16(2) Senior Superintendent of Police/ Superintendent of Police after going through the recommendation of the Addl. Superintendent of Police under Rule 16(1) shall record his satisfaction for approving the same and will forward the same to the District Magistrate or the Commissioner of Police.*

*e- Under Rule 17(2) clearly prohibits the use of the pre-printed rubber stamp for all gang chart for its approval as such, the satisfaction etc. should be seen after recorded due application of mind; and as such, the signature of the concerned authority on the*

*printed form clearly shows of non application of mind.*

*f- According to Rule 20(3) before submitting the charge sheet before the concerned special court the Addl. Superintendent of Police shall obtained the opinion from the concerned prosecuting officer in order to ascertain that there is no illegality/irregularity either in conducting of the investigation or with regard to outcome of the document collected during course of investigation and after that approval the Addl. Superintendent of Police shall forward the same to Senior Superintendent of Police or Superintendent of Police for its approval as required under Rule 20(4).*

*g- Under Rule 26(1) the Commissioner of Police/Senior Superintendent of Police/Superintendent of Police as the case may be, will peruse the entire record whenever the aforesaid Charge sheet is forwarded before him for the grant of the approval as required under Rule 20.*

*h- Rule 5, the gang-chart which is prepared prosecuting the gang member shall only contained the number of the cases which are considered for invoking the provision but excluding the cases on the basis of which earlier any proceeding under the Gangster Act was initiated. However, the list of the aforesaid cases shall be annexed along with the gang chart as provided under Rule 5D in form prescribed under the Rule.*

*विद्वान शासकीय अधिवक्ता ने अपने पत्र में क्रिमिनल मिस. रिट पिटीशन संख्या-18729/2023 आसिम उर्फ हासिम बनाम उ०प्र० राज्य व अन्य सम्बन्धित मु.अ.सं. 307/2023 अन्तर्गत धारा-3(1) उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) अधिनियम 1986, थाना-मुंडापांडे, जनपद-मुरादाबाद तथा क्रिमिनल मिस. रिट पिटीशन संख्या-16258/2023 सन्नी मिश्रा उर्फ संजयन कुमार मिश्रा बनाम उ०प्र० राज्य व अन्य सम्बन्धित मु.अ.सं. 366/2023 अन्तर्गत धारा-3(1) उत्तर प्रदेश गिरोहवन्द तथा समाज विरोधी क्रियाकलाप (निवारण) अधिनियम 1986, थाना-राजघाट, जनपद-गोरखपुर का उल्लेख किया है, इन रिट याचिकाओं में मा० उच्च न्यायालय इलाहाबाद द्वारा जनपद मुरादाबाद तथा गोरखपुर में पंजीकृत प्रथम सूचना रिपोटों को रद्द कर दिया गया है।*

*क्रिमिनल मिस. रिट पिटीशन संख्या-16258/2023 उपरोक्त में मा० उच्च न्यायालय इलाहाबाद द्वारा पारित आदेश दिनांकित 13.12.2023 में गिरोहबन्द अधिनियम के अन्तर्गत की जा रही कार्यवाहियों में सामान्य रूप से इस प्रकार की तकनीकी त्रुटियों पर अप्रसन्नता व्यक्त करते हुये निम्नवत टिप्पणी की गयी है-*

*25. At last, this court feels it appropriate to express its displeasure about the manner of preparing the gang-charts in Gangster Act, 1986. This court finds in number of cases that the police authorities as well as District Magistrate forwarded/ approved the gang-chart without application of mind and contrary to Rules, 2021. This negligence on the part of police officials as well as of District Magistrate on the one hand fails to protect the innocent person and on the other hand, hardcore criminals and gangsters get benefit of such technical lacuna in Court.*

*26. Therefore, the Chief Secretary of U.P. is directed to issue necessary guidelines to all the District Magistrate/Commissioner of Police/SSP/SP Additional SP*

*regarding the preparation, forwarding and approval of the gangchart in accordance with the Gangster Rules, 2021 in light of observations made above.*

मा० उच्च न्यायालय द्वारा की गयी उपरोक्त टिप्पणी से उ०प्र० पुलिस की व्यवसायिक दक्षता पर प्रश्नचिन्ह लगता है, यह स्थिति कदापि स्वीकार्य नहीं है। दुर्दात अपराधियों के विरुद्ध की जा रही कार्यवाहियों में प्रारम्भिक स्तर पर लगातार की जा रही त्रुटियों के कारण मा० उच्च न्यायालय में राज्य का पक्ष प्रस्तुत करने वाले शासकीय अधिवक्ता/अपर शासकीय अधिवक्ता की स्थिति मा० न्यायालय में असहज होती है तथा उनके द्वारा राज्य का पक्ष सशक्त रूप से रखना सम्भव नहीं हो पाता, जिसका लाभ अंततः अभियुक्तों को ही मिलता है।

अतः आप सभी को निर्देशित किया जाता है कि शासकीय अधिवक्ता द्वारा उनके पत्र में इंगित की गयी त्रुटियों के सम्बन्ध में अपने अधीनस्थ अधिकारियों / विवेचकों को विस्तृत रूप से अवगत करायें तथा भविष्य में गिरोहबन्द अधिनियम के अन्तर्गत की जा रही कार्यवाहियों में उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) नियमावली-2021 में दी गयी व्यवस्था का अक्षरशः अनुपालन सुनिश्चित किया जाए तथा इस मुख्यालय स्तर से पूर्व में निर्गत परिपत्रों एवं निर्देशों का कड़ाई से अनुपालन सुनिश्चित कराया जाये। यदि किसी अधिकारी या कर्मचारी द्वारा इन निर्देशों के अनुपालन में शिथिलता बरती जाती है तो उसके विरुद्ध नियमानुसार कठोर कार्यवाही की जायेगी तथा पर्यवेक्षण अधिकारियों का भी दायित्व निर्धारण किया जायेगा। संलग्नकः यथोपरि ।

*भवदीय,*

*(विजय कुमार)*

*1. समस्त पुलिस आयुक्त,*
*उत्तर प्रदेश।*

*2. समस्त वरिष्ट पुलिस अधीक्षक/पुलिस अधीक्षक,*
*प्रभारी जनपद/रेलवेज, उत्तर प्रदेश।*

*प्रतिलिपिः निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु :-*

*1. पुलिस महानिदेशक (कानून एवं व्यवस्था), उ०प्र० लखनऊ।*

*2. अपर पुलिस महानिदेशक, अभियोजन, उ०प्र० लखनऊ।*

*3. अपर पुलिस महानिदेशक, रेलवेज, उ०प्र० लखनऊ।*

*4. अपर पुलिस महानिदेशक, अपराध, उ०प्र० लखनऊ।*

*5. समस्त जोनल अपर पुलिस महानिदेशक, उ०प्र० ।*

*6. समस्त परिक्षेत्रीय पुलिस महानिरीक्षक / पुलिस उपमहानिरीक्षक, उ०प्र० ।"*

26. Thereafter, the Chief Secretary, Govt. of U.P. issued circular dated 21.1.2024 to the Director General of Police, to all the District Magistrates/Commissioners of Police as well as District Police Chiefs to strictly follow the guidelines, issued by the Division Bench of this Court in ***Asim @ Hassim (supra)*** as well as ***Sanni Mishra (supra)*** while preparing the gang chart. The circular dated 21.1.2024, issued by the Chief Secretary, Govt. of U.P., is quoted as under:-

***"महत्वपूर्ण/मा० उच्च न्यायालय प्रकरण***

***संख्या- 4705/छः-पु०-9-2023***

*प्रेषक,*

*दुर्गा शंकर मिश्र,*
*मुख्य सचिव,*
*उत्तर प्रदेश शासन।*

*सेवा में,*

*1. पुलिस महानिदेशक, उत्तर प्रदेश, लखनऊ।*

*2. अपर पुलिस महानिदेशक, अभियोजन, अभियोजन निदेशालय, लखनऊ।*

*3. समस्त मण्डलायुक्त, उत्तर प्रदेश।*

*4. समस्त जिला मजिस्ट्रेट, उत्तर प्रदेश।*

*5. समस्त पुलिस आयुक्त/जनपदीय वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, उत्तर प्रदेश*

*गृह (पुलिस) अनुभाग-9 लखनऊ दिनांक 21 जनवरी, 2024*

***विषय : उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के प्राविधानों के पूर्ण अनुपालन के संबंध में।***

*महोदय,*

*उपर्युक्त विषयक शासनादेश संख्या-1208/छः पु०-9-22-31(43)/2013 टीसी दिनांक 18.04.2022 एवं शासनादेश संख्या-3421/छ :-पु०-9-22-31(43)/2013 टीसी दिनांक 24.07.2023 का कृपया संदर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा उत्तर प्रदेश गिरोहबन्द और समाज विरोधी क्रिया कलाप (निवारण) अधिनियम, 1986 (उत्तर प्रदेश अधिनियम संख्या 7 सन् 1986) के प्रभावी प्रवर्तन तथा राज्य में गिरोहबन्दों की सम्पत्ति तथा उनके द्वारा अपराधों आदि के माध्यम से अर्जित प्रसुविधाओं के संबंध में दक्ष वसूली प्रणाली स्थापित करके गिरोहबन्दों को दण्डित करने की त्वरित एवं पारदर्शी प्रक्रिया का उपबन्ध करने के लिए उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 दिनांक 27.12.2021 को राज्य सरकार द्वारा अधिसूचित किये जाने के दृष्टिगत उक्त के प्राविधानों के अनुसार गैंग चार्ट तैयार करने में पूर्ण सावधानी बरतने तथा नियमावली के प्राविधानों का अक्षरशः अनुपालन सुनिश्चित करने के निर्देश दिये गये हैं।*

*2. उत्तर प्रदेश गिरोहबन्द और समाज विरोधी क्रिया कलाप (निवारण) अधिनियम, 1986 के प्राविधानों हेतु स्पष्ट नियमों का प्राविधान उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 में किये जाने तथा उक्त के अनुपालन के संबंध में मुखरित शासनादेशों के बावजूद शासन के संज्ञान में यह तथ्य आया है कि कतिपय मामलों में उक्त नियमावली द्वारा गैंग चार्ट बनाये जाने, गैंग चार्ट अनुमोदित किये जाने तथा आरोप पत्र प्रेषित किये जाने से पूर्व सम्बंधित अभियोजन अधिकारियों से परीक्षण कराये जाने संबंधी नियमों का अनुपालन नहीं किया जा रहा है, जिसके कारण जहाँ एक ओर संगठित अपराधियों को अनुचित लाभ प्राप्त हो रहा है, वहीं दूसरी ओर शासन को मा० उच्च न्यायालय के समक्ष असहज परिस्थिति का सामना करना पड़ रहा है, जो एक गम्भीर विषय है। मा० उच्च न्यायालय द्वारा रिट याचिका (क्रिमिनल) संख्या-14042/2023 दीपू यादव उर्फ दीपू सिंह बनाम उत्तर प्रदेश राज्य में पारित आदेश दिनांक 21.09.2023, रिट याचिका (क्रिमिनल) संख्या-18729/2023 असीम उर्फ हसीम बनाम उत्तर प्रदेश राज्य में पारित आदेश दिनांक 02.12.2023, रिट याचिका (क्रिमिनल) संख्या-16528/2023 सन्नी मिश्रा उर्फ संजयन कुमार मिश्रा बनाम उत्तर प्रदेश राज्य में पारित आदेश दिनांक 13.12.2023 जैसे विभिन्न मामलों में इस संबंध में चिन्ता व्यक्त की गयी है।*

*3. अतः उपर्युक्त दृष्टिगत मुझे यह कहने का निदेश हुआ है कि उत्तर प्रदेश गिरोहबन्द और समाज विरोधी क्रिया कलाप (निवारण) अधिनियम, 1986 (उत्तर प्रदेश अधिनियम संख्या 7 सन् 1986) के अन्तर्गत गैंग चार्ट तैयार करने तथा उक्त के अनुमोदित किये जाने एवं विवेचनोपरान्त विधिक संवीक्षा तथा अन्य सुसंगत कार्यवाहियों के संबंध में निम्नलिखित निर्देशों का तत्परता एवं प्रभावी ढंग से अनुपालन सुनिश्चित की जाए :*

*1. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 5(3) क के अनुसार गैंग चार्ट संक्षिप्त रूप से नही बल्कि जिला मजिस्ट्रेट/ पुलिस आयुक्त / वरिष्ठ पुलिस अधीक्षक /पुलिस अधीक्षक की संयुक्त बैठक में सम्यक रूप से विचार विमर्श करने के पश्चात अनुमोदित किया जायेगा, अतः यह सुनिश्चित किया जाय कि गैंग चार्ट के अनुमोदन हेतु जिला मजिस्ट्रेट/पुलिस आयुक्त की जिला पुलिस प्रमुख के साथ एक संयुक्त बैठक अपरिहार्य रूप से आहूत की जाय।*

*2. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 8(3) के अनुसार गैंग चार्ट में दर्शाये गये गिरोह के विरुद्ध मामलों और दोषसिद्धियों या न्यायालय में स्थित तत्संबंधी प्रक्रम की नवीनतम प्रास्थिति (स्टेटस) का स्पष्ट रूप से उल्लेख किया जाना आवश्यक है। अतः तद्नुसार गैंग चार्ट के अनुमोदन की तिथि पर प्रत्येक मामले की अद्यतन स्थिति के उल्लेख संबंधी उक्त नियम का कड़ाई से अनुपालन किया जाए।*

*3. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 16 (1) में अपर पुलिस अधीक्षक द्वारा गैंग चार्ट के अग्रसारण संबंधी नियम उल्लिखित है। अतः नियमानुसार अपर पुलिस अधीक्षक (नोडल अधिकारी) को नियमों के नियम 16 (1) के अन्तर्गत गैंग चार्ट के संबंध में अपनी संतुष्टि स्पष्ट शब्दों में अभिलिखित की जाए।*

*4. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 16(2) के के अन्तर्गत जनपदीय पुलिस प्रभारी, वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक द्वारा नियम 16 (1) में प्रदत्त अपर पुलिस अधीक्षक की संस्तुति का अध्ययन करने के पश्चात् गैंग चार्ट को अनुमोदन दिये जाने हेतु अपनी संतुष्टि दर्ज करते हुए इसे जिला मजिस्ट्रेट या पुलिस आयुक्त को प्रेषित किया जाए।*

*5. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 17 (2) के अन्तर्गत पूर्व मुद्रित रबर की मोहर पर अंकित गिरोह चार्ट पर हस्ताक्षर प्रतिषिद्ध किये गये हैं। तद्नुसार गैंग चार्ट पर स्वतंत्र मस्तिष्क के उचित उपयोग के बाद ही सक्षम अधिकारी द्वारा गैंग चार्ट पर अनुमोदन दर्ज किया जाएगा और पूर्व मुद्रित रबर की मोहर कदापि प्रयोग में नहीं लायी जायेगी।*

*6. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 20 (3) के अनुसार गिरोहबन्द से संबंधित विवेचना पूर्ण होने परन्तु आरोप पत्र या अंतिम रिपोर्ट न्यायालय को प्रेषित किये जाने से पूर्व, उक्त अन्वेषण संबंधी दस्तावेज, अपर पुलिस अधीक्षक द्वारा संबंधित अभियोजक को प्रेषित किये जाएंगे। अतः यह सुनिश्चित किया जाए कि गिरोहबन्द की समस्त विवेचनाओं संबंधी अभिलेखों का परीक्षण संबंधित अभियोजन अधिकारी से करा लिया जाए। यदि अभियोजन अधिकारी द्वारा विवेचना के संचालन में या विवेचना के दौरान एकत्र किए गए दस्तावेज़ के परिणाम के संबंध में कोई अवैधता/अनियमितता इंगित की जाती है तो उक्त का निराकरण कराने के पश्चात् जब अभियोजन अधिकारी द्वारा यह सुनिश्चित कर दिया जाए कि कोई अवैधता/अनियमितता शेष नहीं है, तब ही अपर पुलिस अधीक्षक उक्त अभिलेखों को वरिष्ठ पुलिस अधीक्षक या पुलिस अधीक्षक को नियमावली, 2021 के नियम 20 (4) के अन्तर्गत अनुमोदनार्थ अग्रसारित करेंगे।*

*7. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 26 (1) के अन्तर्गत, यथास्थिति पुलिस आयुक्त/वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, नियम 20 के अधीन आवश्यक अनुमोदन के अनुदान के लिए जब भी उपरोक्त आरोप पत्र उनके समक्ष भेजा जाएगा, तो उनके द्वारा समस्त अभिलेखों का अपरिहार्य रूप से पुनः अनुशीलन किया जाए।*

*8. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 5, के प्राविधानों का पूर्ण अनुपालन किया जाए। गैंग चार्ट जो गिरोह के सदस्य पर मुकदमा चलाने के लिए तैयार किया जाता है, उसमें केवल उन मामलों को शामिल किया जाएगा जिनके आधार पर अधिनियम के अन्तर्गत कार्यवाही हेतु विचार किया गया है, लेकिन गैंग चार्ट में उन मामलों का उल्लेख नहीं किया जाएगा जिनके आधार पर पहले भी गैंगस्टर अधिनियम के तहत कोई कार्यवाही शुरू की गई थी। हालाँकि, उपरोक्त मामलों की सूची नियम 5डी के अन्तर्गत निर्धारित प्रपत्र में दिए गए गैंग चार्ट के साथ संलग्न की जाएगी।*

*9. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 36 में यह प्रावधान है कि गिरोहबंद की चल एवं अचल सम्पत्तियों और उनके अर्जित किये जाने के स्रोत का सम्यक अन्वेषण किया जाय। उक्त अन्वेषण में उक्त नियमावली के नियम-64 के अधीन जिला स्तरीय, मण्डल स्तरीय तथा राज्य स्तरीय समितियों से भी सूचनाओं का आदान-प्रदान किये जाने का प्रावधान किया गया। अतः गिरोहबंद अधिनियम की धारा 14 के अधीन अधिहरण हेतु सम्पूर्ण सम्पति के विवरणों और दस्तावेजी साक्ष्य सहित रिपोर्ट अनिवार्य रूप से पुलिस आयुक्त /जिला मजिस्ट्रेट के समक्ष प्रस्तुत की जायेगी और पुलिस आयुक्त /जिला मजिस्ट्रेट द्वारा पारित गिरोहबंद की सम्पत्ति अधिहरण के आदेश की प्रति भी अन्वेषण में सम्मिलित की जाय।*

*10. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम-64 के अधीन गिरोहबन्द अधिनियम के अंतर्गत कार्यवाहियों के पर्यवेक्षण तथा पुनरीक्षण और उनसे आनुषंगिक मामलों के निस्तारण एवं प्रबंधन के सम्बन्ध में जिला स्तरीय, मण्डल स्तरीय एवं राज्य स्तरीय समितियों का गठन किया गया है। जिला मजिस्ट्रेट/पुलिस आयुक्त की अध्यक्षता वाली जिला स्तरीय पर्यवेक्षण समिति की प्रत्येक त्रैमास बैठक सुनिश्चित की जाय। इसी प्रकार मण्डलायुक्त की अध्यक्षता में गठित मण्डल स्तरीय पर्यवेक्षण समिति की बैठक प्रत्येक छः माह में अपरिहार्य रूप से आहूत की जाये।*

*11 . उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम-64 के अधीन गठित जिला स्तरीय एवं मण्डल स्तरीय एवं राज्य स्तरीय पर्यवेक्षण समिति को ऐसे समस्त आदेश जारी करने का प्राधिकार प्राप्त है, जिसके द्वारा गिरोह या अपराधी द्वारा किन्ही सरकारी सेवाओं कारोबारों, संविदाओं, पट्टों, राजकीय योजनाओं आदि की प्रसुविधा को निवारित किया जा सके और यदि उनके द्वारा ऐसी प्रसुविधा प्राप्त की गयी है, तो उनकी वसूली की जाय। तदनुसार यह सुनिश्चित किया जाय कि किसी भी गिरोहबंद को किसी भी दशा में किसी राजकीय सेवाओं, कारोबारों, पट्टों एवं राजकीय योजनाओं का कोई लाभ प्राप्त न हो तथा उक्त की कुर्की, प्रशासक की नियुक्ति, जब्ती, अनुज्ञप्तियों का निलंबन एवं निरस्तीकरण एवं प्रत्युद्धरण आदि माध्यमों का प्रयोग यथावश्यकता किया जाय।*

*4. उक्त के अतिरिक्त मुझे यह भी कहने का निदेश हुआ है कि उक्त निर्देशों के अनुपालन में किसी भी प्रकार की शिथिलता क्षम्य नहीं होगी तथा उक्त में उपेक्षावान तथा दोषी पाये जाने वाले अधिकारियों/कर्मचारियों का उत्तरदायित्व निर्धारित किया जाएगा।*

*संलग्नक : यथोक्त।*

*भवनिष्ठ,*

*Digitally Signed by दुर्गा शंकर मिश्र*

*Date: 21-01-2024 12:24:53*

*मुख्य सचिव*

*संख्या एवं दिनांक तदैव*

*प्रतिलिपित*

*निम्नलिखित को सूचनार्य एवं आवश्यक कार्यवाही हेतु प्रेषितः*

*1-विशेष पुलिस महानिदेशक, कानून एवं व्यवस्था, उत्तर प्रदेश।*

*2-अपर पुलिस महानिदेशक, अपराध, उत्तर प्रदेश लखनऊ।*

*3-श्री आशुतोष कुमार सण्ड, शासकीय अधिवक्ता, मा० उच्च न्यायालय, इलाहाबाद को उनके पत्र संख्या-क्रिम0/19316/इलाहाबाद दिनांकित 18.12.2023 के क्रम में।*

*4-समस्त जोनल अपर पुलिस महानिदेशक, उत्तर प्रदेश।*

*5-समस्त परिक्षेत्रीय पुलिस महानिरीक्षक, उत्तर प्रदेश।*

*6-समस्त परिक्षेत्रीय अपर निदेशक अभियोजन, उत्तर प्रदेश।*

*7-समस्त जनपदीय संयुक्त निदेशक अभियोजन /वरिष्ठ अभियोजन अधिकारी, उत्तर प्रदेश।*

*8-गार्ड फाईल।*

*आज्ञा से,*

*(राजेश कुमार राय)*

*विशेष सचिव।"*

27. From a perusal of the above mentioned circulars of the Director General of Police, U.P. as well as Chief Secretary, Govt. of U.P., it is clear that there were specific directions to all the District Magistrates as well as District Police Chiefs to record their required satisfaction in the gang chart instead of signing a pre-typed satisfaction and it was also provided that there must be a joint meeting to conduct due discussion between the District Magistrate and the District Police Chief before approving the gang chart. It was also directed by those circulars that the competent authorities must peruse all the documents annexed with the gang chart before forwarding and approving the same.

28. However, despite issuance of circulars by the Chief Secretary, Govt. of U.P. as well as the Director General of Police to all the District Magistrates as well as other police officers, this Court found that some of the officers were still not following the procedure while preparing the gang chart and defective gang charts were being prepared without application of mind on the part of the competent

authorities. Therefore, the Division Bench of this Court in the case of ***Rajeev Kumar @ Raju vs. State of U.P. and others; Criminal Misc. Writ Petition No. 9428 of 2024***, specifically directed the Principal Secretary (Home), Govt. of U.P. to issue appropriate direction to all the District Police Chiefs as well the District Magistrates to maintain a register for recording the minutes/resolutions of the joint meet held as per Rule 5(3)(a) of the Rules, 2021 and further direction was issued to all the District Police Chiefs, District Magistrates as well as Nodal Officers that while signing the gang chart they should mention the date just below their signatures. The judgement passed in ***Rajeev Kumar @ Raju (supra)*** is quoted as under:-

> *"Heard learned Counsel for the petitioner and learned AGA on behalf of the State.*
>
> *This Court by order dated 04.06.2024 directed the learned AGA to produce the register relating to joint meeting held in accordance with the U.P. Gangsters and Anti Social Activities (Prevention) Rules, 2021 (in short Gangster Rules, 2021) in original but today learned AGA has produced a copy of Resolution signed by the District Magistrate and S.P. concerned. It was also informed by the learned AGA that there is no provision for maintaining a register for the purpose of recording the Resolution of the joint meeting as required by Section 5 (3)(a) of the Gangster Rules, 2021.*
>
> *Upon a perusal of the gang chart it appears that the District Magistrate, while approving the same, did not mention any date just below his signature and, therefore, this fact also causes doubt about the joint meeting. However, from a perusal of the entire gang chart, this Court is of the view that the required satisfaction was recorded by the Superintendent of Police as well as by the District Magistrate. Therefore, this Court does not find any illegality in the impugned FIR or the gang chart annexed.*
>
> *It would be appropriate to refer to our holding in Sanni Mishra @ Sanjayan Kumar Mishra v. State Of U.P. and Other: Neutral Citation No. - 2023:AHC:235826-DB, where this Court observed that the material must be produced before the Court regarding the joint meeting. However, in the present case only a Resolution signed by the Superintendent of Police and the District Magistrate was produced before the Court, which could be prepared even after approving the gang chart.*
>
> *In this circumstances, this Court directs the Principal Secretary (Home), Government of U.P., Lucknow to issue an appropriate direction to all the SPs, SSPs, Commissioners of Police as well as District Magistrates that a register should be maintained for recording Resolutions of joint meetings held as per Rule 5 (3)(a) of the Gangsters Rules, 2021. It is further directed that all the SPs, SSPs, Commissioners of Police and also the District Magistrates as well as the Nodal Officers while signing a gang chart, shall mention the date below their signatures.*

*In this view of the matter, this petition fails and is dismissed.*

*Let this order be communicated to the Principal Secretary (Home), Government of U.P., Lucknow through the Chief Judicial Magistrate, Lucknow by the Registrar (Compliance) today. "*

29. This Court again found that several police officers/District Magistrates are still not following the guidelines issu ed by different judgements of this Court, though same were duly circulated by the State Government by circular dated 21.1.2024. Thereafter, this Court in the case of ***Mohd. Arif @ Guddu v. State of U.P. and others; Criminal Misc. Writ Petition No. 10980 of 2024***, observed that several Nodal Officers/District Police Chiefs were not following the directions issued by the State Government by the circular dated 21.1.2024 and directed the Chief Secretary as well as Additional Chief Secretary (Home), Govt. of U.P. to look into this matter and take appropriate action against the negligent State officers. Paragraph Nos. 11 & 12 of the aforesaid judgement are quoted as under:-

*"11. It is very surprising that Nodal Officer as well as Superintendent of Police, Jaunpur has prepared and recommended the gang chart in the month of March, 2024 by signing the pre-typed satisfaction and District Magistrate-Jaunpur, has approved the same on 30.04.2024 again by signing the pre-typed satisfaction despite issuance of circular dated 19.01.2024 by the Director General of Police, U.P. and also the circular dated 21.01.2024 by the Chief Secretary, Government of U.P. regarding compliance of the direction issued in Sanni Mishra (supra) and Asim @ Hassim (supra) case for recommending and approving the gang chart. This fact shows the sheer negligence on the part of these officers.*

*12. Therefore, this court is of the view that Chief Secretary, U.P. as well as Additional Chief Secretary (Home), U.P. should look into this matter and take appropriate action."*

30. This Court again found in the present cases that the gang charts of the impugned FIRs have been prepared in utter violation of the Rules, 2021 as well as directions issued by this Court in ***Sanni Mishra (supra), Asim @ Hassim (supra), Rajeev Kumar @ Raju (supra), Anil Mishra (supra)*** and also in violation of circular dated 19.1.2024 issued by the Director General of Police as well as circular dated 21.1.2024 issued by the Chief Secretary, Govt. U.P.

31. **Therefore, this Court feels it appropriate to direct the State Government to send the District Police Chiefs, District Magistrates/Police Commissioners as well as Nodal Officers, who are the competent authorities under the Gangsters Act, for training or crash course so that they could learn how to prepare a gang chart, strictly in accordance with the Rules, 2021 as well as several directions issued by this Court and also to apprise them about appropriate cases where the Gangsters Act can be invoked. This training on the one hand will reduce the scope of getting away of the gangsters from the clutches of the Gangsters Act and on the other it**

**will save innocent persons who are merely involved in petty, one or two cases, though they would not come within the definition of the gangsters as per Section 2(b) of the Gangsters Act, from getting booked under the Gangsters Act. Such training or crash course can be conducted in a phased manner in the Judicial Training and Research Institute, Lucknow (J.T.R.I.) which can be arranged by the Principal Secretary Law/LR, Govt. of U.P. or at any other place where the State govt. may feel it appropriate.**

32. For ready reference, guidelines, issued by this Court in several judgements regarding preparation of gang chart as well as for invocation of Gangsters Act, are being summarised as under:-

> *"(i). While forwarding or approving the gang chart, the competent authorities must record their satisfaction as required by Rule 16 of the Rules, 2021 by writing in clear words and not by simply signing printed/pre-typed satisfaction.*
>
> *(ii). Satisfaction of the competent authorities should reflect that they have applied their minds not only on the gang chart but also the documents/forms annexed with the gang chart.*
>
> *(iii). Date of filing the charge sheet under the base case must be mentioned in Column-6 of the gang chart except in cases under Rule 22(ii) of the Rules, 2021 where Gangsters Act can be imposed during investigation.*
>
> *(iv). Before approving the gang chart, the District Magistrate should conduct due discussion for invocation of the Gangsters Act in a joint meeting with the District Police Chief as per Rule 5(3)(a) of the Rules, 2021 and minutes/resolutions of the meeting must be recorded in a register maintained for that purpose. That register should be made available to the court for its perusal if it so requires.*
>
> *(v). While signing their satisfaction competent authorities (District Police Chiefs, District Magistrates and Nodal Officers) should mention the date just below their signatures.*
>
> *(vi). While approving the gang chart, the District Magistrate/Commissioner of Police should also verify whether the Nodal Officer and District Police Chief have properly recorded their satisfaction as per the Rules, 2021 as well as the guidelines issued by the State Government in pursuance of the directions issued in several judgements by the High Court.*
>
> *(vii). Before invocation of the Gangsters Act, competent authorities should also record satisfaction that offence of base case/cases has/have been committed by a person who comes within the definition of "Gangster" as per Section 2(c) of the Gangsters Act and there must be material for such satisfaction. This satisfaction must be mentioned in the minutes of the joint meeting conducted as per Rule 5(3)(a) of the Rules, 2021."*

33. On perusal of the gang chart of the impugned F.I.R. in **Criminal Misc. Writ Petition no. 9930 of 2024** and also considering the submission of learned

counsel for the parties, this Court finds that there is no proper satisfaction recorded by the competent authorities because they simply signed pre-typed satisfaction which is against the guidelines issued in ***Sanni Mishra (supra)*** as well as Circular dated 21.01.2024 of the State government. It is also clear that while recording the satisfaction for approval, the District Magistrate, Mahoba has not mentioned the date below his signature which is against the guidelines issued by the Division Bench of this Court in the case of ***Rajeev Kumar @ Raju (supra).***

34. Apart from this, it also appears from the impugned FIR that only the section, provided for the penalty, has been mentioned without mentioning the corresponding provision of Section 2(b) of the Gangsters Act, regarding his anti social activities on the basis of which the petitioner was termed as gangster, which is against the direction issued by the Division Bench of this Court in the case of ***Asim @ Hassim (supra)***. Therefore, the impugned F.I.R. dated 2.5.2024, registered as Case Crime No. 236 of 2024, under Section 3(1) of the Gangsters Act, P.S. Kotwali Nagar Mahoba, District Mahoba along with its gang chart is hereby quashed.

35. On perusal of the gang chart of the impugned F.I.R. in **Criminal Misc. Writ Petition Nos. 10379 of 2024 and 10852 of 2024** as well as after considering the submission of learned counsel for the parties, it appears that the Senior Superintendent of Police, Etawah did not record any satisfaction while forwarding the gang chart to the District Magistrate and thereafter the District Magistrate again did not record his proper satisfaction as required by the Rule 16(3) of the Rules, 2021 and there is also no material showing that any joint meeting was conducted between the District Magistrate as well as the District Police Chief, Etawah, who were approving the gang chart. Therefore, the impugned F.I.R. dated 31.5.2024, registered as Case Crime No. 116 of 2024, under Sections 2 & 3 of the Gangsters Act, P.S. Friends Colony, District Etawah along with its gang chart is hereby quashed.

36. On perusal of the gang chart of the impugned F.I.R. in the **Criminal Misc. Writ Petition No. 10916 of 2024**, it is clear that the Nodal Officer while signing his satisfaction did not mention any date below his signature which is against the decision of ***Rajeev Kumar @ Raju (supra)***. The gang chart in the present case also shows that while recording his satisfaction, the Superintendent of Police, Bijnor did not mention that he had perused forms / enclosures annexed with the gang chart and he simply relied upon the facts mentioned in the gang chart and recommended the gang chart to the District Magistrate but the District Magistrate, Bijnor also did not look into this aspect and approved the gang chart. Therefore, the impugned F.I.R. dated 2.6.2024, registered as Case Crime No. 274 of 2024, under Sections 2(b)(i) and 3(1) of the Gangsters Act, P.S. Chandpur, District Bijnor along with its gang chart is hereby quashed.

37. On perusal of the gang chart of the impugned F.I.R. in the **Criminal Misc. Writ Petition No. 10968 of 2024**, it is clear that the satisfaction was not recorded by the competent authorities in the gang chart but they simply signed pre-typed satisfaction which is against the Rules, 2021 as well as the directions issued by this Court in ***Sanni Mishra (supra)***. Therefore, the impugned F.I.R. dated 14.5.2024, registered as Case Crime No. 108 of 2024, under Sections 2/3

of the Gangsters Act, P.S. Alau, District Mainpuri along with its gang chart is hereby quashed.

38. It is relevant to mention here that in view of the judgement of the Apex Court in the case of ***State of Punjab vs. Davinder Pal Singh Bhullar and others; 2011 (14) SCC 770***, all the consequential proceedings of the impugned FIRs in all the above five writ petitions are also quashed.

39. With the aforesaid observation, all the above five writ petitions are **allowed**.

40. However the competent authorities are at liberty to proceed against the petitioners afresh in accordance with the Rules, 2021 as well as the guidelines issued by this Court.

41. Registrar (Compliance) is directed to send a copy of this judgement to the Chief Secretary, Govt. of U.P. and the Principal Secretary (Home), Govt. of U.P. for compliance within 24 hours. 42. Registrar (Compliance) will also send a copy of this judgement to the Principal Secretary Law/L.R., U.P. for placing the same before the Chief Minister, Uttar Pradesh for his perusal.

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**(2024) 7 ILRA 1230**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 09.07.2024**

**BEFORE**

**THE HON'BLE VIVEK KUMAR BIRLA, J.**
**THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.**

Crl. Misc. W.P. No. 10980 of 2024

**Mohd. Arif @ Guddu ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Opp. Parties**

**Counsel for the Petitioner:**
Sri Md. Zakir Husain, Sri Md. Nuruddin Khan

**Counsel for the Opp. Parties:**
G.A., Sri Sarve Nazir, Sri Zafar Abbas

**A. (Criminal Law-The U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986, Section 3(1)-** A person can be prosecuted under Section 3 of Gangsters Act only after he falls under the definition of "gangster" being part of the gang which is involved in anti social activities as mentioned in Section 2(b)(i) to (xxv) of the Act. The purpose of making special provisions of Gangsters Act for dealing with gangsters and for preventing their anti social activities. The provision of this Act are stringent and are therefore required to be interpreted strictly so as to prevent their misuse on the part of State authorities.

**B. Rule 17(2) of the U.P. Gangster and Anti Social Activities (Prevention) Rules, 2021-**That signing pre-typed satisfaction amounts to violation of Rule 17(2) and non application of mind on the part of the competent authorities. Impugned F.I.R. as well as the gang chart are hereby quashed**.** (Para6, 7 & 13)

**Writ petition allowed.** (E-15)

**List of Cases cited:**

1.Sanni Mishra @ Sanjayan Kumar Mishra Vs St. of U.P. & ors. 2024 (1) ADJ 231 (DB).

2. Asim @ Hassim Vs St. of U.P. & anr. 2024 (1) ADJ 125 (DB)

(Delivered by Hon'ble Vivek Kumr Birla, J. & Hon'ble Arun Kumar Singh Deshwal, J.)

1. Supplementary affidavit filed today is taken on record.

2. Heard learned counsel for the petitioner and learned A.G.A. for the State.

3. The present writ petition has been preferred with the prayer to quash the impugned First Information Report dated 01.05.2024, registered as Case Crime No.100 of 2024, under Sections 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as 'Gangsters Act'), P.S. Khetasarai, District-Jaunpur and for a direction to the respondents not to arrest the petitioners in pursuance of impugned First Information Report.

4. The contention of learned counsel for the petitioners is that while recommending and approving the gang chart of the FIR in question, no satisfaction was recorded by the competent authorities as the competent authority has signed pre-typed satisfaction which is against the law laid down by the Division Bench of this Court in ***Sanni Mishra @ Sanjayan Kumar Mishra vs. State of U.P. and others*** reported in ***2024 (1) ADJ 231 (DB)***. It is further submitted by learned counsel for the petitioner that the impugned FIR is itself illegal as same was registered u/s 3(1) of the Gangsters Act without mentioning the corresponding provision in which the petitioner was named as Gangster which is also against the law laid down by the Division Bench of this court in ***Asim @ Hassim vs. State of U.P. and another*** reported in ***2024 (1) ADJ 125 (DB).***

5. Learned A.G.A. could not dispute the aforesaid fact.

6. After hearing learned counsel for the parties and on perusal of the record, it is clear that the gang chart, prepared before lodging the impugned F.I.R., was recommended and approved by the competent authorities by simply signing a pre-typed proforma regarding their satisfaction. This Court in the case of ***Sanni Mishra (supra)*** has observed that signing pre-typed satisfaction amounts to violation of Rule 17(2) of the U.P. Gangster and Anti Social Activities (Prevention) Rules, 2021 (hereinafter referred to as 'Rules, 2021') and non application of mind on the part of the competent authorities. Paragraphs No. 16, 17, 18 and 19 of ***Sanni Mishra (supra)*** case is quoted as under:-

> *"16. Rule 17 of the Gangster Rules, 2021 further provides that competent authorities, before forwarding the gang-chart must apply an independent mind to the information mentioned in the gang-chart as well as evidence annexed therewith. Rule 17(2) of the Gangster Rules, 2021 further provides that pre-printed rubber seal gang-chart should not be signed by the competent authorities because the same shall amount to not exercising independent mind. Rule 17 of the Gangster Rules, 2021 is being quoted as under:*
>
> *"**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. The purpose of prohibiting the signing of pre-*

*printed rubber seal under Rule 17(2) of the Gangster Rules, 2021 is to bind the competent authorities to apply independent mind by mentioning their satisfaction in clear words. Therefore, signing the pre-typed satisfaction will also be prohibited under Rule 17(2) of the Gangster Rules, 2021.*

*18. In the present case, all the competent authorities simply signed just below the printed proforma regarding their satisfaction. Therefore, it clearly violates Rule 17 of the Gangster Rules, 2021.*

*19. This court is also of the view that while forwarding and approving the gang-chart, it is the duty of the competent authorities to see whether gang-chart has been prepared as per the Gangster Rules, 2021 and all the formalities as required by the Gangster Rules, 2021 have been fulfilled. If from the record, it appears that competent authorities forwarded or approved the gang-chart without looking into the facts that the gang-chart was itself not prepared as per the Gangster Rules, 2021, then this fact will itself amount to non-application of independent mind on the part of competent authority."*

7. From the perusal of the impugned F.I.R. it also appears that this F.I.R. was lodged under Section 3(1) of the Gangsters Act, without mentioning the corresponding provision of the Gangsters Act for anti social activities in which the accused was involved and on the basis of which he was named as a gangster. This issue was considered by the Division Bench of this Court in ***Asim @ Hassim*** (**supra**) case. In that case the Court quashed the F.I.R. on the ground that corresponding provision in which the accused was named as gangster. The relevant provision of Section-2(b) of the Gangsters Act is required to be mentioned because a person cannot be punished without specifying the offence committed by him which would justify his classification as a gangster. Paragraphs No. 5, 6, 7 and 9 of the ***Asim @ Hassim (supra)*** case are quoted as under:-

*"5. From the provisions, quoted as above as well as from the perusal of other provisions of Gangsters Act, it is clear that a person can be prosecuted under Section 3 of Gangsters Act only after he falls under the definition of "gangster" being part of the gang which is involved in anti social activities as mentioned in Section 2(b)(i) to (xxv) of the Act. The purpose of making special provisions of Gangsters Act for dealing with gangsters and for preventing their anti social activities. The provision of this Act are stringent and are therefore required to be interpreted strictly so as to prevent their misuse on the part of State authorities.*

*6. Hon'ble Supreme Court, in the case of **Gulam Mustafa vs. State of Karnataka; 2023 SCC OnLine SC 603**, observed in paragraph-38 as under:-*

*"38. This Court would indicate that the officers, who institute an FIR, based on any complaint, are duty-bound to be vigilant before invoking any provision of a very stringent statute, like the SC/ST Act, which*

*imposes serious penal consequences on the concerned accused. The officer has to be satisfied that the provisions he seeks to invoke prima facie apply to the case at hand. We clarify that our remarks, in no manner, are to dilute the applicability of special/stringent statutes, but only to remind the police not to mechanically apply the law, dehors reference to the factual position."*

*7. With regard to enactments which have a stringent provisions of law, which effecting personal liberty under Article-21 of the Constitution of India, Hon'ble Apex Court in the case of* ***Icchu Devi Choraria vs. Union of India and others; (1980) 4 SCC 531*** *has observed about personal liberty as under:-*

*"Article 21 of the Constitution provides in clear and explicit terms that no one shall be deprived of his life or personal liberty except in accordance with procedure established by law. This constitutional right of life and personal liberty is placed on such a high pedestal by this Court that it has always insisted that whenever there is any deprivation of life or personal liberty, the authority responsible for such deprivation must satisfy the court that it has acted in accordance with the law."*

*9. In the present case, the impugned F.I.R. was registered u/s 3(1) Gangsters Act, without mentioning the corresponding provision, mentioning the anti social activities in which the accused is involved and on the basis of which he was named as gangster. A person cannot be punished without specifying the offence committed by him which would justify his classification as a Gangster. "*

8. Pursuant to the judgement of this court in ***Sanni Mishra (supra)*** and ***Asim @ Hassim (supra)***, the Director General of Police has issued a circular dated 19.01.2024 for compliance of the direction issued by this court. Subsequently, the Government has also issued circular dated 21.01.2024 for compliance of the direction issued by this court.

9. The circular dated 19.01.2024 issued by D.G.P., U.P. is being quoted as under:

*विजय कुमार,*
*आई०पी०एस*

*डीजी परिपत्र सं०-04/2024*

*पुलिस महानिदेशक, उत्तर प्रदेश। पुलिस मुख्यालय, गोमती नगर विस्तार,*
*लखनऊ-226002*
*दिनांक: जनवरी 19,2024*

*विषयः उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) नियमावली-2021 के प्राविधानों के अनुपालन के सम्बन्ध में दिशा निर्देश।*

*प्रिय महोदय महोदया,*

*1. पत्र संख्याः डीजी-साल-एस-14 (15)/2023 दि० 02.01.2024*

*2. पत्र क्रमांक DG-SAT-S-14(09)/2021 दिनांक*

*3. पत्र क्रमांक: डीजी सेवन-एस-14(09)/2021 दिनांक*

*4. डीजी परिपत्र सं०-40/22 दि० 09.12.2022*

*उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) अधिनियम 1986 के अन्तर्गत अभियुक्तों के विरुद्ध कार्यवाही के दौरान अभियुक्तों का सम्पूर्ण एवं त्रुटिहीन आपराधिक इतिहास अंकित किये जाने तथा इस सम्बन्ध में उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) नियमावली 2021 के प्राविधानों के अनुपालन के सम्बन्ध में इस मुख्यालय स्तर से पाश्वींकित यॉक्स में अंकित पत्र तथा डीजी परिपत्र पूर्व में निर्गत किये गये हैं किन्तु इन निर्देशों का कमिश्नरेट / जनपद स्तर पर कड़ाई से अनुपालन नहीं किया जा रहा है।*

*श्री आशुतोष कुमार सण्ड, शासकीय अधिवक्ता, मा० उच्च न्यायालय इलाहाबाद ने अपने पत्र दिनांकित 18.12.2023 (छायाप्रति संलअ) द्वारा अवगत कराया है कि मा० उच्च न्यायालय में गिरोहवन्द अधिनियम के अभियुक्तों द्वारा प्रथम सूचना रिपोर्ट को चुनौती देते हुये रिट याचिकायें योजित की जा रही है, जिसमें गिरोहबन्द नियमावली में दी गयी विभिन्न व्यवस्थाओं का पालन न किये जाने को आधार बनाया जा रहा है। विद्वान शासकीय अधिवक्ता ने उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) अधिनियम 1986 के अन्तर्गत की जा रही कार्यवाहियों में विवेचनाधिकारियों, प्रभारी निरीक्षकों, नोडल अधिकारियों, पुलिस अधीक्षकों तथा जिला मजिस्ट्रेटों द्वारा सामान्य रूप से की जा रही त्रुटियों का निम्नवत उल्लेख अपने पत्र में किया है-*

*a- Under Rule 5(3)a there must be a joint meeting of the District Magistrate/ Commissioner of Police with the District Police Chief.*

*b- Under Rule 8(3) the Status of each case on the date of the approval of the Gang chart should be strictly mentioned.*

*c-According to Rules the Addl. Superintendent of Police (Nodal Officer) must record his satisfaction in clear words as required under Rule16(1) of the Rules.*

*d- Under Rule 16(2) Senior Superintendent of Police/ Superintendent of Police after going through the recommendation of the Addl. Superintendent of Police under Rule 16(1) shall record his satisfaction for approving the same and will forward the same to the District Magistrate or the Commissioner of Police.*

*e- Under Rule 17(2) clearly prohibits the use of the pre-printed rubber stamp for all gang chart for its approval as such, the satisfaction etc. should be seen after recorded due application of mind; and as such, the signature of the concerned authority on the printed form elearly shows of non application of mind.*

*f- According to Rule 20(3) before submitting the charge sheet before the concerned special court the Addl. Superintendent of Police shall obtained the opinion from the concerned prosecuting officer in order to ascertain that there is no illegality/irregularity either in conducting of the investigation or with regard to outcome of the document collected during course of investigation and after that approval the Addl. Superintendent of Police shall forward the same to Senior Superintendent of Police or Superintendent of Police for its approval as required under Rule20(4).*

*g-Under Rule 26(1) the Commissioner of Police/Senior Superintendent of Police/Superintendent of Police as the case may be, will peruse the entire record whenever the*

*aforesaid Charge sheet is forwarded before him for the grant of the approval as required under Rule20.*

*h- Rule 5, the gang-chart which is prepared prosecuting the gang member shall only contained the number of the cases which are considered for invoking the provision but excluding the cases on the basis of which earlier any proceeding under the Gangster Act was initiated. However, the list of the aforesaid cases shall be annexed along with the gang chart as provided under Rule 5D in form prescribed under the Rule.*

*विद्वान शासकीय अधिवक्ता ने अपने पत्र में क्रिमिनल मिस. रिट पिटीशन संख्या- 18729/2023 आसिम उर्फ हासिम बनाम उ०प्र० राज्य व अन्य सम्बन्धित मु.अ.सं. 307/2023 अन्तर्गत धारा-3(1) उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) अधिनियम 1986, थाना-मुंडापांडे, जनपद-मुरादाबाद तथा क्रिमिनल मिस. रिट पिटीशन संख्या-16258/2023 सन्नी मिश्रा उर्फ संजयन कुमार मिश्रा बनाम उ०प्र० राज्य व अन्य सम्बन्धित मु.अ.सं. 366/2023 अन्तर्गत धारा-3 (1) उत्तर प्रदेश गिरोहवन्द तथा समाज विरोधी क्रियाकलाप (निवारण) अधिनियम 1986, थाना-राजघाट, जनपद-गोरखपुर का उल्लेख किया है, इन रिट याचिकाओं में मा० उच्च न्यायालय इलाहाबाद द्वारा जनपद मुरादाबाद तथा गोरखपुर में पंजीकृत प्रथम सूचना रिपोटों को रद्द कर दिया गया हैक्रिमिनल मिस. रिट पिटीशन संख्या-16258/2023 उपरोक्त में मा० उच्च न्यायालय इलाहाबाद द्वारा पारित आदेश दिनांकित 13.12.2023 में गिरोहबन्द अधिनियम के अन्तर्गत की जा रही कार्यवाहियों में सामान्य रूप से इस प्रकार की तकनीकी त्रुटियों पर अप्रसन्नता व्यक्त करते हुये निम्नवत टिप्पणी की गयी है-*

*25. At last, this court feels it appropriate to express its displeasure about the manner of preparing the gang-charts in Gangster Act, 1986. This court finds in number of cases that the police authorities as well as District Magistrate forwarded/ approved the gang-chart without application of mind and contrary to Rules, 2021. This negligence on the part of police officials as well as of District Magistrate on the one hand fails to protect the innocent person and on the other hand, hardcore criminals and gangsters get benefit of such technical lacuna in Court.*

*26. Therefore, the Chief Secretary of U.P. is directed to issue necessary guidelines to all the District Magistrate/Commissioner of Police/SSP/SP Additional St" regarding the preparation, forwarding and approval of the gangchart in accordance with the Gangster Rules, 2021 in light of observations made above.*

*मा० उच्च न्यायालय द्वारा की गयी उपरोक्त टिप्पणी से उ०प्र० पुलिस की व्यवसायिक दक्षता पर प्रश्नचिन्ह लगता है, यह स्थिति कदापि स्वीकार्य नहीं है। दुर्दांत अपराधियों के विरुद्ध की जा रही कार्यवाहियों में प्रारम्भिक स्तर पर लगातार की जा रही त्रुटियों के कारण मा० उच्च न्यायालय में राज्य का पक्ष प्रस्तुत करने वाले शासकीय अधिवक्ता/अपर शासकीय अधिवक्ता की स्थिति मा० न्यायालय में असहज होती है तथा उनके द्वारा राज्य का पक्ष सशक्त रूप से रखना सम्भव नहीं हो पाता, जिसका लाभ अंततः अभियुक्तों को ही मिलता है।*

*अतः आप सभी को निर्देशित किया जाता है कि शासकीय अधिवक्ता द्वारा उनके पत्र में इंगित की गयी त्रुटियों के सम्बन्ध में अपने अधीनस्थ अधिकारियों / विवेचकों को विस्तृत रूप से अवगत करायें तथा भविष्य में गिरोहबन्द अधिनियम के अन्तर्गत की जा रही कार्यवाहियों में उत्तर प्रदेश गिरोहबन्द तथा समाज विरोधी क्रियाकलाप (निवारण) नियमावली-2021 में*

*दी गयी व्यवस्था का अक्षरशः अनुपालन सुनिश्चित किया जाए तथा इस मुख्यालय स्तर से पूर्व में निर्गत परिपत्रों एवं निर्देशों का कड़ाई से अनुपालन सुनिश्चित कराया जाये। यदि किसी अधिकारी या कर्मचारी द्वारा इन निर्देशों के अनुपालन में शिथिलता बरती जाती है तो उसके विरुद्ध नियमानुसार कठोर कार्यवाही की जायेगी तथा पर्यवेक्षण अधिकारियों का भी दायित्व निर्धारण किया जायेगा।*

*भवदीय,*

*(विजय कुमार)*

*1 समस्त पुलिस आयुक्त उत्तर प्रदेश।*

*2. समस्त बरिह पुलिस अधीक्षक पुलिस अधीक्षक प्रभारी जनपद / रेलवेज, उत्तर प्रदेश*

*प्रतिलिपिः निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु :-*

*1. पुलिस महानिदेशक (कानून एवं व्यवस्था), उ०प्र० लखनऊ।*

*2. अपर पुलिस महानिदेशक, अभियोजन, उ०प्र० लखनऊ।*

*3. अपर पुलिस महानिदेशक, रेलवेज, उ०प्र० लखनऊ।*

*4. अपर पुलिस महानिदेशक, अपराध, उ०प्र० लखनऊ।*

*5. समस्त जोनल अपर पुलिस महानिदेशक, उ०प्र० ।*

*6. समस्त क्षेत्रीय पुलिस महानिरीक्षक/पुलिस उप महानिरीक्षक, उ.प्र.*

10. For ready reference, circular issued by Chief Secretary, U.P. is also being quoted as under:

***महत्वपूर्ण मा० उच्च न्यायालय प्रकरण***

***संख्या- 4705/छः-पु०-9-2023***

*प्रेषक,*

*दुर्गा शंकर मिश्र,*

*मुख्य सचिव,*

*उत्तर प्रदेश शासन।*

*सेवा में,*

*1. पुलिस महानिदेशक, उत्तर प्रदेश, लखनऊ।*

*2. अपर पुलिस महानिदेशक, अभियोजन, अभियोजन निदेशालय, लखनऊ।*

*3. समस्त मण्डलायुक्त, उत्तर प्रदेश।*

*4. समस्त जिला मजिस्ट्रेट, उत्तर प्रदेश।*

*5. समस्त पुलिस आयुक्त/ जनपदीय वरिष्ठ पुलिस अधीक्षक पुलिस अधीक्षक, उत्तर प्रदेश*

*गृह (पुलिस) अनुभाग-9*

*लखनऊ दिनांक 21 जनवरी, 2024*

*विषय: उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के प्राविधानों के पूर्ण अनुपालन के संबंध में।*

*महोदय,*

*उपर्युक्त विषयक शासनादेश संख्या-1208/७० पु०-9-22-31(43)/2013 टीसी दिनांक 18.04.2022 एवं शासनादेश संख्या-3421/5:-पु०-9-22-31(43)/2013 टीसी दिनांक 24.07.2023 का कृपया संदर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा उत्तर प्रदेश गिरोहबन्द और समाज विरोधी क्रिया कलाप (निवारण) अधिनियम, 1986 (उत्तर प्रदेश अधिनियम संख्या 7 सन् 1986) के प्रभावी प्रवर्तन तथा राज्य में गिरोहबन्दों की सम्पत्ति तथा उनके द्वारा अपराधों आदि के माध्यम से अर्जित प्रसुविधाओं के संबंध में दक्ष वसूली प्रणाली स्थापित करके गिरोहबन्दों को दण्डित करने की त्वरित एवं पारदर्शी प्रक्रिया का उपबन्ध करने के लिए उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 दिनांक 27.12.2021 को राज्य सरकार द्वारा अधिसूचित किये जाने के दृष्टिगत उक्त के प्राविधानों के अनुसार गैंग चार्ट तैयार करने में पूर्ण सावधानी बरतने तथा नियमावली के प्राविधानों का अक्षरशः अनुपालन सुनिश्चित करने के निर्देश दिये गये हैं। 2. उत्तर प्रदेश गिरोहबन्द और*

*समाज विरोधी क्रिया कलाप (निवारण) अधिनियम, 1986 के प्राविधानों हेतु स्पष्ट नियमों का प्राविधान उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 में किये जाने तथा उक्त के अनुपालन के संबंध में मुखरित शासनादेशों के बावजूद शासन के संज्ञान में यह तथ्य आया है कि कतिपय मामलों में उक्त नियमावली द्वारा गैंग चार्ट बनाये जाने, गैंग चार्ट अनुमोदित किये जाने तथा आरोप पत्र प्रेषित किये जाने से पूर्व सम्बंधित अभियोजन अधिकारियों से परीक्षण कराये जाने संबंधी नियमों का अनुपालन नहीं किया जा रहा है, जिसके कारण जहाँ एक ओर संगठित अपराधियों को अनुचित लाभ प्राप्त हो रहा है, वहीं दूसरी ओर शासन को मा० उच्च न्यायालय के समक्ष असहज परिस्थिति का सामना करना पड़ रहा है, जो एक गम्भीर विषय है। मा० उच्च न्यायालय द्वारा रिट याचिका (क्रिमिनल) संख्या-14042/2023 दीपू यादव उर्फ दीपू सिंह बनाम उत्तर प्रदेश राज्य में पारित आदेश दिनांक 21.09.2023, रिट याचिका (क्रिमिनल) संख्या-18729/2023 असीम उर्फ हसीम बनाम उत्तर प्रदेश राज्य में पारित आदेश दिनांक 02.12.2023, रिट याचिका (क्रिमिनल) संख्या-16528/2023 सन्नी मिश्रा उर्फ संजयन कुमार मिश्रा बनाम उत्तर प्रदेश राज्य में पारित आदेश दिनांक 13.12.2023 जैसे विभिन्न मामलों में इस संबंध में चिन्ता व्यक्त की गयी है।*

*3. अतः उपर्युक्त दृष्टिगत मुझे यह कहने का निदेश हुआ है कि उत्तर प्रदेश गिरोहबन्द और समाज विरोधी क्रिया कलाप (निवारण) अधिनियम, 1986 (उत्तर प्रदेश अधिनियम संख्या 7 सन् 1986) के अन्तर्गत गैंग चार्ट तैयार करने तथा उक्त के अनुमोदित किये जाने एवं विवेचनोपरान्त विधिक संवीक्षा तथा अन्य सुसंगत कार्यवाहियों के संबंध में निम्नलिखित निर्देशों का तत्परता एवं प्रभावी ढंग से अनुपालन सुनिश्चित की जाए: 1. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 5(3) क के अनुसार गैंग चार्ट संक्षिप्त रूप से नहीं बल्कि जिला मजिस्ट्रेट पुलिस आयुक्त / वरिष्ठ पुलिस अधीक्षक / पुलिस अधीक्षक की संयुक्त बैठक में सम्यक रूप से विचार विमर्श करने के पश्चात अनुमोदित किया जायेगा, अतः यह सुनिश्चित किया जाय कि गैंग चार्ट के अनुमोदन हेतु जिला मजिस्ट्रेट / पुलिस आयुक्त की जिला पुलिस प्रमुख के साथ एक संयुक्त बैठक अपरिहार्य रूप से आहूत की जाय।*

*2. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 8(3) के अनुसार गैंग चार्ट में दर्शाये गये गिरोह के विरुद्ध मामलों और दोषसिद्धियों या न्यायालय में स्थित तत्संबंधी प्रक्रम की नवीनतम प्रास्थिति (स्टेटस) का स्पष्ट रूप से उल्लेख किया जाना आवश्यक है। अतः तद्नुसार गैंग चार्ट के अनुमोदन की तिथि पर प्रत्येक मामले की अद्यतन स्थिति के उल्लेख संबंधी उक्त नियम का कड़ाई से अनुपालन किया जाए।*

*3. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 16 (1) में अपर पुलिस अधीक्षक द्वारा गैंग चार्ट के अग्रसारण संबंधी नियम उल्लिखित है। अतः नियमानुसार अपर पुलिस अधीक्षक (नोडल अधिकारी) को नियमों के नियम 16 (1) के अन्तर्गत गैंग चार्ट के संबंध में अपनी संतुष्टि स्पष्ट शब्दों में अभिलिखित की जाए।*

*4. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 16(2) के के अन्तर्गत जनपदीय पुलिस प्रभारी, वरिष्ठ*

*पुलिस अधीक्षक/पुलिस अधीक्षक द्वारा नियम 16 (1) में प्रदत्त अपर पुलिस अधीक्षक की संस्तुति का अध्ययन करने के पश्चात् गैंग चार्ट को अनुमोदन दिये जाने हेतु अपनी संतुष्टि दर्ज करते हुए इसे जिला मजिस्ट्रेट या पुलिस आयुक्त को प्रेषित किया जाए।*

*5. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 17 (2) के अन्तर्गत पूर्व मुद्रित रबर की मोहर पर अंकित गिरोह चार्ट पर हस्ताक्षर प्रतिषिद्ध किये गये हैं। तद्बसार गैंग चार्ट पर स्वतंत्र मस्तिष्क के उचित उपयोग के बाद ही सक्षम अधिकारी द्वारा गैंग चार्ट पर अनुमोदन दर्ज किया जाएगा और पूर्व मुद्रित रबर की मोहर कदापि प्रयोग में नहीं लायी जायेगी।*

*6. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 20 (3) के अनुसार गिरोहबन्द से संबंधित विवेचना पूर्ण होने परन्तु आरोप पत्र या अंतिम रिपोर्ट न्यायालय को प्रेषित किये जाने से पूर्व, उक्त अन्वेषण संबंधी दस्तावेज, अपर पुलिस अधीक्षक द्वारा संबंधित अभियोजक को प्रेषित किये जाएंगे। अतः यह सुनिश्चित किया जाए कि गिरोहहन्द की समस्त विवेचनाओं संबंधी अभिलेखों का परीक्षण संबंधित अभियोजन अधिकारी से करा लिया जाए। यदि अभियोजन अधिकारी द्वारा विवेचना के संचालन में या विवेचना के दौरान एकत्र किए गए दस्तावेज़ के परिणाम के संबंध में कोई अवैधता /अनियमितता इंगित की जाती है तो उक्त का निराकरण कराने के पश्चात् जब अभियोजन अधिकारी द्वारा यह सुनिश्चित कर दिया जाए कि कोई अवैधता /अनियमितता शेष नहीं है, तब ही अपर पुलिस अधीक्षक उक्त अभिलेखों को वरिष्ठ पुलिस अधीक्षक या पुलिस अधीक्षक को नियमावली, 2021 के नियम 20 (4) के अन्तर्गत अनुमोदनार्थ अग्रसारित करेंगे।*

*7. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 26 (1) के अन्तर्गत, यथास्थिति पुलिस आयुक्त/वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, नियम 20 के अधीन आवश्यक अनुमोदन के अनुदान के लिए जब भी उपरोक्त आरोप पत्र उनके समक्ष भेजा जाएगा, तो उनके द्वारा समस्त अभिलेखों का अपरिहार्य रूप से पुनः अनुशीलन किया जाए।*

*8. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 5, के प्राविधानों का पूर्ण अनुपालन किया जाए। गैंग चार्ट जो गिरोह के सदस्य पर मुकदमा चलाने के लिए तैयार किया जाता है, उसमें केवल उन मामलों को शामिल किया जाएगा जिनके आधार पर अधिनियम के अन्तर्गत कार्यवाही हेतु विचार किया गया है, लेकिन गैंग चार्ट में उन मामलों को का उल्लेख नहीं किया जाएगा जिनके आधार पर पहले भी गैंगस्टर अधिनियम के तहत कोई कार्यवाही शुरू की गई थी। हालांकि, उपरोक्त मामलों की सूची नियम 5 डी के अन्तर्गत निर्धारित प्रपत्र में दिए गए गैंग चार्ट के साथ संलग्न की जाएगी।*

*9. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम 36 में यह प्रावधान है कि गिरोहबंद की चल एवं अचल सम्पत्तियों और उनके अर्जित किये जाने के स्त्रोत का सम्यक अन्वेषण किया जाय। उक्त अन्वेषण में उक्त नियमावली के नियम 64 के अधीन जिला स्तरीय, मण्डल स्तरीय तथा राज्य स्तरीय समितियों से भी सूचनाओं का आदान-प्रदान किये जाने का प्रावधान किया गया। अतः गिरोहबंद अधिनियम की धारा 14 के अधीन अधिहरण हेतु सम्पूर्ण सम्पति के विवरणों और दस्तावेजी साक्ष्य सहित रिपोर्ट*

अनिवार्य रूप से पुलिस आयुक्त/ जिला मजिस्ट्रेट के समक्ष प्रस्तुत की जायेगी और पुलिस आयुक्त / जिला मजिस्ट्रेट द्वारा पारित गिरोहबंद की सम्पत्ति अधिहरण के आदेश की प्रति भी अन्वेषण में सम्मिलित की जाय।

10. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम-64 के अधीन गिरोहबन्द अधिनियम के अंतर्गत कार्यवाहियों के पर्यवेक्षण तथा पुनरीक्षण और उनसे आनुषंगिक मामलों के निस्तारण एवं प्रबंधन के सम्बन्ध में जिला स्तरीय, मण्डल स्तरीय एवं राज्य स्तरीय समिलियों का गठन किया गया है। जिला मजिस्ट्रेट / पुलिस आयुक्त की अध्यक्षता वाली जिला स्तरीय पर्यवेक्षण समिति की प्रत्येक त्रैमास बैठक सुनिश्चित की जाय। इसी प्रकार मण्डलायुक्त की अध्यक्षता में गठित मण्डल स्तरीय पर्यवेक्षण समिति की बैठक प्रत्येक छः माह में अपरिहार्य रूप से आहूत की जाये।

11. उत्तर प्रदेश गिरोह बंद और समाज विरोधी क्रिया कलाप (निवारण) नियमावली, 2021 के नियम-64 के अधीन गठित जिला स्तरीय एवं मण्डल स्तरीय एवं राज्य स्तरीय पर्यवेक्षण समिति को ऐसे समस्त आदेश जारी करने का प्राधिकार प्राप्त है, जिसके द्वारा गिरोह या अपराधी द्वारा किन्ही सरकारी सेवाओं कारोबारों, संविदाओं, पट्टों, राजकीय योजनाओं आदि की प्रसुविधा को निवारित किया जा सके और यदि उनके द्वारा ऐसी प्रसुविधा प्राप्त की गयी है, तो उनकी वसूली की जाय। तदनुसार यह सुनिश्चित किया जाय कि किसी भी गिरोहबंद को किसी भी दशा में किसी राजकीय सेवाओं, कारोबारों, पट्टों एवं राजकीय योजनाओं का कोई लाभ प्राप्त न हो तथा उक्त की कुर्की, प्रशासक की नियुक्ति, जब्ती, अनुज्ञप्तियों का निलंबन एवं निरस्तीकरण एवं प्रत्युद्धरण आदि माध्यमों का प्रयोग यथावश्यकता किया जाय।

4. उक्त के अतिरिक्त मुझे यह भी कहने का निदेश हुआ है कि उक्त निर्देशों के अनुपालन में किसी भी प्रकार की शिथिलता क्षम्य नहीं होगी तथा उक्त में उपेक्षावान तथा दोषी पाये जाने वाले अधिकारियों/ कर्मचारियों का उत्तरदायित्व निर्धारित किया जाएगा। संलग्नक : यथोक्त ।

भवनिष्ठ,

Digitally Signed by
दुर्गा शंकर मिश्र
Date: 21-01-2024 12:24:53
मुख्य सचिव

**संख्या एवं दिनांक तदैव**

प्रतिलिपि सूचना एवं आवश्यक कार्यवाही हेतु निम्नलिखित को भेजी गयी है

1-विशेष पुलिस महानिदेशक, कानून एवं व्यवस्था, उत्तर प्रदेश।

2-अपर पुलिस महानिदेशक, अपराध, उत्तर प्रदेश लखनऊ।

3-श्री आशुतोष कुमार सण्ड, शासकीय अधिवक्ता, मा० उच्च न्यायालय, इलाहाबाद को उनके पत्र संख्या क्रिम 0/19316/इलाहाबाद दिनांकित18.12.2023 के क्रम में।

4- समस्त जोनल अपर पुलिस महानिदेशक, उत्तर प्रदेश।

5- समस्त परिक्षेत्रीय पुलिस महानिरीक्षक, उत्तर प्रदेश।

6- समस्त परिक्षेत्रीय अपर निदेशक अभियोजन, उत्तर प्रदेश।

7- समस्त जनपदीय संयुक्त निदेशक अभियोजन वरिष्ठ अभियोजन अधिकारी, उत्तर प्रदेश।

8-गार्ड फाईल।

आज्ञा से,
(राजेश कुमार राय)
विशेष सचिव।

11. It is very surprising that Nodal Officer as well as Superintendent of Police, Jaunpur has prepared and recommended the gang chart in the month of March, 2024 by signing the pre-typed satisfaction and District Magistrate-Jaunpur, has approved the same on 30.04.2024 again by signing the pre-typed satisfaction despite issuance of circular dated 19.01.2024 by the Director General of Police, U.P. and also the circular dated 21.01.2024 by the Chief Secretary, Government of U.P. regarding compliance of the direction issued in ***Sanni Mishra (supra)*** and ***Asim @ Hassim (supra)*** case for recommending and approving the gang chart. This fact shows the sheer negligence on the part of these officers.

12. Therefore, this court is of the view that Chief Secretary, U.P. as well as Additional Chief Secretary (Home), U.P. should look into this matter and take appropriate action.

13. From the above analysis, it is clear that not only the gang chart of the impugned F.I.R. itself is prepared contrary to the Rules, 2021 but the impugned F.I.R. is also illegal, being contrary to the provisions of the Gangsters Act. Therefore, the gang chart as well as the impugned F.I.R. are liable to be quashed.

14. As this Court is entertaining the present petition only on the technical ground, therefore, instead of keeping the petition pending, the petition is being finally disposed of by quashing the impugned F.I.R. as well as gang chart.

15. Accordingly, the writ petition is **allowed**. The impugned F.I.R. dated 01.05.2024 as well as the gang chart dated 30.04.2024 are hereby quashed.

16. However, the authority concerned is at liberty to lodge fresh F.I.R. after preparing the gang chart of the impugned F.I.R. as per the Rules, 2021 as well as in view of the direction issued by the Division Bench of this Court in ***Sanni Mishra (supra)*** and ***Asim @ Hassim (supra)***.

17. Registrar (Compliance) is directed to send a copy of this order to Chief Secretary, U.P. as well as Additional Chief Secretary (Home) U.P., for information and necessary compliance.

**----------**

**(2024) 7 ILRA 1240**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 02.07.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**

First Appeal from Order Defective No. 425 of 2013

**State of U.P. & Ors. ...Appellants**
**Versus**
**M/s Harish Chandra (India) Ltd. ...Respondent**

**Counsel for the Appellants:**
Sri Rishi Kumar, Sri R.K. Chaubey, Sri S.K. Mehrotra

**Counsel for the Respondent:**
Sri Mohd. Arish, Sri Ashish Mishra, Sri Ambrish Shukla

**A. Civil Law-(The Arbitration & Conciliation Act, 1996-Section 37)-** The time limit for filing appeals under Section 37 is 90 days, and a delay can only be condoned up to a period of 30 days, an appeal filed after 120 days, no matter how sufficient the cause for delay is, cannot be allowed under any circumstance by the Court. The rationale behind such stringent timelines is rooted in the principles of finality and efficiency, which are paramount in arbitration. The limitation period serves as a deterrent against undue delays and encourages parties to act promptly, thereby ensuring that the arbitration process remains expeditious.

B. By setting a clear and rigid timeframe, the law seeks to prevent the arbitration process from becoming protracted and bogged down by procedural delays, which would undermine its core advantage over traditional litigation. This approach aligns with the broader legislative intent to make arbitration a preferred method of dispute resolution by offering a faster and more efficient alternative to court proceedings. The 90-day period, followed by a maximum 30-day extension for condonation of delay, is thus a carefully calibrated timeframe that balances the need for promptness with a limited degree of flexibility to accommodate genuine hardships. **(Para 10, 11 & 18)**

**Appeal dismissed as time barred.** (E-15)

**<u>List of Cases cited:-</u>**

1.N.V. International Vs St. of Assam (2020) 2 SCC 109

2.St. of Mah. Vs Borse Bros. Engineers & Contractors (P) Ltd. (2021) 6 SCC 460

3.Esha Agarwal & ors. Vs Ram Niranjan Ruia 2023 SCC OnLine Cal 98

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

1. This is an application under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') preferred against the order dated August 1, 2012 passed by the District Judge, Agra.

**<u>FACTS</u>**

2. I have laid down the factual matrix of the instant lis below:

a. An agreement was entered into by the State of Uttar Pradesh (hereinafter referred to as the 'Appellant No. 1') and M/s Harish Chandra India Limited (hereinafter referred to as the 'Respondent') for 'excavation of foundation of supporting structures of second stage pump house of Chambal Dal Project, Pinahat Agra'.

b. Disputes and differences arose between the parties in relation to the aforesaid agreement which were referred to arbitration. The Arbitrator gave an award of Rs. 67,42,240/- in favour of the Respondent on July 19, 2009. If the award remained unpaid beyond four months from the date of delivery of the award, the same was to carry simple interest @ 16% from the date of award to the date of actual payment.

c. On May 17, 2010, the Appellants filed an application under Section 34 of the Act challenging the aforesaid award dated July 19, 2009 along with an application for condonation of delay under Section 5 read with Article 137 of the Limitation Act,

1963 (hereinafter referred to as the 'Limitation Act').

d. The District Judge, Agra vide order dated August 1, 2012 rejected the application filed by the Appellants under Section 5 read with Article 137 of the Limitation Act along with the application under Section 34 of the Act.

e. Aggrieved by the order dated August 1, 2012, the Appellants have preferred the instant appeal under Section 37 of the Act before this Court on March 13, 2013.

**CONTENTIONS BY THE APPELLANTS**

3. Learned counsel appearing for the Appellants has made the following submissions before this Court:

a. Delay if any is beyond the control and is procedural in natural. The delay is not deliberate and intentional and is liable to be condoned in the interest of justice.

b. In the facts and circumstances, it is therefore necessary in the interest of justice that this Court may be pleased to condone the delay filing the instant appeal before this Court and treat the same within time.

**CONCLUSION AND ANALYSIS**

4. I have heard the learned counsel appearing for the parties and perused the materials on record.

5. It is evident from the factual matrix of the instant appeal that the same has been filed with a delay of more than 120 days. The impugned order was passed on August 1, 2012 while the instant appeal has been filed on March 13, 2013 that is beyond the period of 120 days.

6. The Hon'ble Supreme Court in **N.V. International v. State of Assam** reported in **(2020) 2 SCC 109** espoused on the period of limitation for filing of an appeal under Section 37 of the Act. Relevant paragraphs are extracted below:

*"3. Having heard the learned counsel for both sides, we may observe that the matter is no longer res integra. In Union of India v. Varindera Constructions Ltd. [Union of India v. Varindera Constructions Ltd., (2020) 2 SCC 111] , this Court, by its judgment and order dated 17-9-2018 [Union of India v. Varindera Constructions Ltd., (2020) 2 SCC 111] held thus:*

*"1. Heard the learned counsel appearing for the parties.*

*2. By a judgment dated 19-4-2018 in Union of India v. Varindera Constructions Ltd. [Union of India v. Varindera Constructions Ltd., (2018) 7 SCC 794] , this Court has in near identical facts and circumstances allowed the appeal of the Union of India in a proceeding arising from an arbitral award.*

*3. Ordinarily, we would have applied the said judgment to this case as well. However, we find that the impugned Division Bench judgment dated 10-4-2013 [Union of India v. Varindera Constructions Ltd., 2013 SCC OnLine Del 6511] has dismissed the appeal filed by the Union of India on the ground of*

*delay. The delay was found to be 142 days in filing the appeal and 103 days in refiling the appeal. One of the important points made by the Division Bench is that, apart from the fact that there is no sufficient cause made out in the grounds of delay, since a Section 34 application has to be filed within a maximum period of 120 days including the grace period of 30 days, an appeal filed from the selfsame proceeding under Section 37 should be covered by the same drill.*

*4. Given the fact that an appellate proceeding is a continuation of the original proceeding, as has been held in Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri [Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri, 1940 SCC OnLine FC 10 : AIR 1941 FC 5] , and repeatedly followed by our judgments, we feel that any delay beyond 120 days in the filing of an appeal under Section 37 from an application being either dismissed or allowed under Section 34 of the Arbitration and Conciliation Act, 1996 should not be allowed as it will defeat the overall statutory purpose of arbitration proceedings being decided with utmost despatch.*

*5. In this view of the matter, since even the original appeal was filed with a delay period of 142 days, we are not inclined to entertain these special leave petitions on the facts of this particular case. The special leave petitions stand disposed of accordingly.*

*Pending applications, if any, also stand disposed of."*

*4. We may only add that what we have done in the aforesaid judgment is to add to the period of 90 days, which is provided by statute for filing of appeals under Section 37 of the Arbitration Act, a grace period of 30 days under Section 5 of the Limitation Act by following Lachmeshwar Prasad Shukul [Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri, 1940 SCC OnLine FC 10 : AIR 1941 FC 5] , as also having regard to the object of speedy resolution of all arbitral disputes which was uppermost in the minds of the framers of the 1996 Act, and which has been strengthened from time to time by amendments made thereto. The present delay being beyond 120 days is not liable, therefore, to be condoned.*

7. In **State of Maharashtra v. Borse Bros. Engineers & Contractors (P) Ltd.** reported in **(2021) 6 SCC 460**, the Hon'ble Supreme Court propounded that a delay under the Act can only be condoned by way of an exception and not by way of rule. Relevant paragraph is extracted herein:

*"63. Given the aforesaid and the object of speedy disposal sought to be achieved both under the Arbitration Act and the Commercial Courts Act, for appeals filed under Section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or Section 13(1-A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or*

*60 days, respectively, is to be condoned by way of exception and not by way of rule. In a fit case in which a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired both in equity and justice, what may now be lost by the first party's inaction, negligence or laches."*

8. What emerges from the wisdom of the Hon'ble Supreme Court is that being a legislation for speedy disposal delay under the Act can only be condoned if sufficient cause is made out and not otherwise. The principle that delays in arbitration matters under the Act can only be condoned on sufficient cause and as an exception is rooted in the very essence of why arbitration is chosen as a method of dispute resolution. The need for timely resolution is paramount in arbitration, especially given its primary objective to provide a faster and more efficient alternative to traditional litigation. The Act was legislated with the intent to streamline the process, minimize court interference, and facilitate quick resolution of disputes, particularly in commercial contexts where time is often a critical factor. Delaying arbitration can have profound consequences, disrupting business operations, causing financial loss, and undermining the trust in the arbitration process. The Hon'ble Supreme Court of India, through various landmark judgments, has underscored that the timelines prescribed under the Act are to be adhered to strictly.

9. Arbitration is designed to be a time-efficient process, which is a significant advantage over traditional court proceedings that are often bogged down by procedural formalities and backlogs. This efficiency is crucial in the commercial world, where prolonged disputes can lead to uncertainty, financial losses, and a significant waste of resources. The Act aims to provide a framework that ensures disputes are resolved swiftly, reducing the time parties spend in litigation and allowing them to focus on their business operations. By setting strict timelines, the Act seeks to prevent the arbitration process from becoming as protracted as court cases. However, the Act also recognizes that there can be genuine circumstances where adhering to these timelines might not be possible. In such cases, the provision for condoning delays exists, but it is clearly stated that this can only happen if sufficient cause is shown. This balance between rigidity and flexibility ensures that while the process remains fast, it does not become unjustly stringent.

10. The term "sufficient cause" is not explicitly defined in the Act, which means its interpretation has largely been shaped by judicial pronouncements. In general, sufficient cause refers to a legitimate reason that prevents a party from acting within the prescribed time limits. This reason must be beyond the control of the party and not due to negligence or inaction. Courts, when determining whether sufficient cause exists, consider various factors such as the nature of the delay, the reasons provided, the conduct of the parties, the impact of the delay on the arbitration process and the other party, and whether the delay was beyond the control of the party seeking condonation.

11. However, since the time limit for filing appeals under Section 37 of the Act is 90 days, and a delay can only be condoned up to a period of 30 days, an appeal filed after 120 days, no matter how sufficient the cause for delay is, cannot be allowed under any circumstance by the Court. The rationale behind such stringent timelines is rooted in the principles of finality and efficiency, which are paramount in arbitration. The limitation period serves as a deterrent against undue delays and encourages parties to act promptly, thereby ensuring that the arbitration process remains expeditious. By setting a clear and rigid timeframe, the law seeks to prevent the arbitration process from becoming protracted and bogged down by procedural delays, which would undermine its core advantage over traditional litigation. This approach aligns with the broader legislative intent to make arbitration a preferred method of dispute resolution by offering a faster and more efficient alternative to court proceedings. The 90-day period, followed by a maximum 30-day extension for condonation of delay, is thus a carefully calibrated timeframe that balances the need for promptness with a limited degree of flexibility to accommodate genuine hardships.

12. In the instant case, the Appellants had filed the instant appeal under Section 37 of the Act on March 13, 2013 while the impugned order was passed on August 1, 2012. There is a delay of 224 days in filing the instant appeal which is beyond the prescribed period of 90 days, and also the extendable period of 30 days, and thus the instant appeal sacrifices itself on the altar of limitation.

13. For the sake of argument, even otherwise, if the instant appeal had been filed within the time period, the same would have failed on merits since the application under Section 34 of the Act filed by the Appellants was evidently time barred and as such was rightly dismissed by the District Judge, Agra.

14. While the award in the instant case was passed on July 19, 2009, the application under Section 34 of the Act was filed only on May 17, 2010 that is beyond the statutory time limit.

15. The District Judge, Agra had squarely dealt with the issue of limitation in its order dated August 1, 2012 as follows:

> *"I am not in agreement with the submission of the learned counsel for the applicants because the said Act is applicable to those proceedings where no limitation is provided.*
>
> *On the contrary, under Section 34 (3) of the Act, the following law has been embodied to make it clear:-*
>
> *"34(3). An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:*
>
> *Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."*

*The Hon'ble Apex Court in 'A.I.R. 2001 Supreme Court 4010, Union of India vs. M/s Popular Construction Co.' dealt the situation in detail and has observed as under:-*

*"The provisions of Section 5 Limitation Act, 1963, are not applicable to an application challenging an award, under Section 34 and as such there was no scope for assessing sufficiency of the cause for the delay beyond the period prescribed in proviso to Section 34. The crucial words in Section 34 are 'but not thereafter' used in the proviso to sub- section (3). This phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act and would, therefore, bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the Court could entertain an application to set aside the Award beyond the extended period under the proviso would render the phrase 'but not thereafter' wholly otiose. Apart from the language, 'express exclusion' may follow from the scheme and object of the special or local law. The history and scheme of the 1996 Act support the conclusion that the time limit prescribed under Section 34 to challenge an Award is absolute and unextendable by Court under Section 5 of the Limitation Act."*

*It has been further observed as under:-*

*"By virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasized by the provision of Section 36. It is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow." Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act."*

*The above observation of the Hon'ble Apex Court makes it clear that Section 5 of the Limitation Act is not applicable to these proceedings and that they are to be governed by section 34(3) of the Arbitration and Conciliation Act, 1996.*

*In the circumstances, the application to condone the delay in filing the objections against the arbitral Award is not legally maintainable and this court is not competent to condone the delay occasioned in filing the objections against the arbitral Award.*

*Coming to the factual side of the controversy, it is evident that the delay has occasioned due to the latches and inaction and lethargy of the applicant himself. They had*

*the knowledge of the award within time but failed to file the petition in time rather they wasted their time in consultation and departmental proceedings.*

*In the circumstances, the application 4C under Section 5 read with Article 137 of the Limitation Act is liable to be rejected and is rejected accordingly."*

16. In **Esha Agarwal and Ors. -v- Ram Niranjan Ruia** reported in **2023 SCC OnLine Cal 98**, I had dealt with the question of limitation under Section 34(3) of the Act as follows:

*"6. The question of limitation takes centre stage in the present application and needs to be adjudicated upon first and foremost. With respect to limitation for filing a challenge to an arbitral award, Section 34(3) of the Arbitration and Conciliation Act, 1996 provides that an application under the section cannot be made after 'three months have elapsed from the date on which the party making that application had received the arbitral award'. The courts can condone the delay within a further period of thirty days, provided sufficient cause is present, but not 'thereafter'. I believe the term 'thereafter' used in the section does not need any further interpretation. A plain reading of the said section and the proviso makes it as clear as the sky on a summer morning that courts cannot condone a delay beyond the extendable period of thirty days provided in the section.*

*7. It is necessary at this point to make reference to the recent decision of the apex court in Mahindra and Mahindra Financial Services Limited v. Maheshbhai Tinabhai Rathod reported in (2022) 4 SCC 162 wherein the restricted scope of the courts' power to condone the delay in case of an application under Section 34 was reiterated by the Supreme Court. Relevant portions have been extracted below –*

*9. The scope available for condonation of delay being self-contained in the proviso to Section 34(3) and Section 5 of the Limitation Act not being applicable has been taken note by this Court in its earlier decisions, which we may note. In Union of India v. Popular Construction Co. [Union of India v. Popular Construction Co., (2001) 8 SCC 470] it has been held as hereunder:*

*"12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result.*

*14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimise the supervisory role of courts in the arbitral process" [Para 4(v) of the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996.]. This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:*

*'5. Extent of judicial intervention.-Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.'*

*16. Furthermore, Section 34(1) itself provides that 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). Subsection (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, subsection (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which reads as under:*

*'36. Enforcement.-Where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Civil Procedure Code, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.'*

*This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act.'*

*8. While I express my sympathy towards the petitioner, my judicial hands are curtailed by the law, as mentioned above. There is no runway of merit for the present application to land on. The present application has been filed forty-two days after the prescribed period of limitation under the Act, and given*

> *that the court has the power to condone a delay of only up to thirty days, the present application fails and is bound to be sacrificed at the altar of limitation."*

17. What is evident is that the language used in Section 34(3) of the Act leaves no room for condoning the delay beyond what is permissible. The Applicants' application under Section 34 of the Act having been filed beyond the statutory limitation period (prescribed period of 3 months + extendable period of 30 days) could not have been admitted by the District Judge, Agra. Therefore, even on merits, the Appellants had no case before this Court.

18. In light of the aforesaid, the instant appeal under Section 37 of the Act is dismissed as time barred. There shall be no order as to the costs.

19. Before I part with this judgment, I would like to sound a word of caution.

20. The government often cites bureaucratic and procedural delays as reasons for not filing an appeal within the prescribed time limits. While these reasons might seem compelling due to the complex and often cumbersome nature of governmental operations, the law applies to all parties in the same manner, and any delay by the government cannot be treated as special or condoned beyond what is permissible under the Act. This principle is crucial for maintaining the rule of law, ensuring equality before the law, and preserving the integrity and efficiency of the arbitration process. The idea that the government should not be given preferential treatment in legal matters is fundamental to the concept of justice, which dictates that all parties, regardless of their status or resources, must adhere to the same legal standards and timelines. Bureaucratic and procedural delays are a common issue within government bodies due to various factors such as the hierarchical decision-making processes, the need for multiple approvals, and the often extensive internal review procedures. While these factors can indeed slow down the process of filing appeals, they cannot be accepted as valid reasons for extending the statutory time limits prescribed under the Act. The law is designed to ensure that arbitration remains a swift and efficient method of dispute resolution, and allowing exceptions for governmental delays would undermine this objective.

21. The justice system is based on the notion that all individuals and entities, regardless of their status, should be treated equally. Granting the government special privileges in the form of extended time limits would violate this principle and create a perception of bias. Such a perception could undermine public confidence in the legal system, as it would suggest that the government is above the law and not subject to the same rules as everyone else. Treating government delays differently would set a dangerous precedent. If the courts were to condone delays by the government based on bureaucratic and procedural reasons, it would open the door for other parties to seek similar leniency, thereby eroding the strict timelines established by the Act. This would defeat the purpose of having a clear and rigid timeframe for filing appeals and could lead to a significant increase in delayed appeals, ultimately undermining the efficiency and finality of the arbitration process.

22. While the government may face certain administrative and procedural challenges, it must take adequate measures to ensure that appeals are filed within the prescribed time limits. Private parties, who often operate with fewer resources and less bureaucratic infrastructure than government entities, are required to comply with the same strict timelines. If the government were allowed to bypass these timelines due to internal delays, it would place private parties at a distinct disadvantage, undermining the principle of fairness that is central to the arbitration process. This would also create an environment where private parties might lose faith in the arbitration process, viewing it as biased in favor of the government.

23. Therefore, it is incumbent upon the government to create a specialized procedure to expedite the filing of appeals within the prescribed time period. It is the taxpayers' money that the government deals with, and such a cavalier and lackadaisical approach in preferring appeals cannot be allowed. The efficient handling of legal matters, including the timely filing of appeals, is a crucial aspect of governance that directly impacts public trust and the proper utilization of public resources. Given the significant volume of legal cases that government departments and agencies are involved in, it is essential that the government establishes robust mechanisms to ensure compliance with statutory timelines, particularly under the Act.

24. One of the key elements of such specialized procedures could be the creation of dedicated legal teams within each government department. These teams can be responsible for monitoring legal matters and ensuring that all necessary actions, including the filing of appeals, are taken within the prescribed time limits. By having a dedicated team in place, the government can ensure that there is a clear line of accountability and that legal matters are handled with the urgency they deserve. These teams should consist of experienced legal professionals who are well-versed in the relevant laws and procedures. They should also have the authority to make quick decisions and act promptly to avoid unnecessary delays.

25. In addition to dedicated legal teams, the government could also implement robust tracking and monitoring systems to oversee the progress of legal cases. These systems could provide real-time updates on the status of each case, including key deadlines and any actions that need to be taken. By having a centralized tracking system, the government can ensure that all stakeholders are aware of the critical timelines and can take timely action to comply with them. Such systems can also help identify any potential bottlenecks or delays in the process, allowing for swift corrective action to be taken.

26. Furthermore, the government can also establish clear guidelines and protocols for the handling of legal matters. These guidelines should outline the steps that need to be taken at each stage of the process, including the filing of appeals, and should provide clear instructions on how to comply with statutory timelines. By having standardized procedures in place, the government can reduce the risk of errors and ensure that all legal matters are handled in a consistent and efficient manner. These guidelines can also include provisions for regular training and capacity-building programs for government officials involved in legal matters, ensuring that they are fully

aware of their responsibilities and the importance of adhering to statutory deadlines.

27. Accordingly, a direction is issued upon the Principal Secretary (Law), Government of Uttar Pradesh, to take necessary steps, in order to avoid the filing of appeals beyond the statutory time limits, by the Government. The Principal Secretary (Law) is also directed to submit a report before this Court on the action taken in this regard within 6 months from the date of this judgment. The Principal Secretary (Law) may take assistance of a committee of experts as may be required.

28. Registrar (Compliance) is directed to communicate this order to the Principal Secretary (Law) forthwith.

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**(2024) 7 ILRA 1251**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 29.07.2024**

**BEFORE**

**THE HON'BLE RAJIV GUPTA, J.**
**THE HON'BLE SURENDRA SINGH-I, J.**

Government Appeal No. 3087 of 1986

**State of U.P. ...Appellant**
**Versus**
**Rajdeo Singh & Ors. ...Respondents**

**Counsel for the Appellant:**
A.G.A., G.D. Mekavi

**Counsel for the Respondent:**
Uttar Kumar Goswami, Pulak Ganguly, Ravi Bhushan Singh, Sharda Chauhan, Praveen Kumar Singh

**Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149, 395, 436, 323, 325 & 506 - The Code of Criminal Procedure, 1973 - Sections 82, 83, 145, 161 & 313 - Appeal against acquittal - According to prosecution case, deceased was going to his School, respondents assaulted him - Incident witnessed by P.W.-1, P.W.-2 - Gun used for attracting witnesses, two shots fired, no injury caused to deceased, injuries are lathi injuries - P.W.-2, reached house of deceased for complaining about damage, not earlier mentioned, first time in court - P.W.-2 reached place of incident alongwith P.W.-1, highly doubtful, showed himself as an eyewitness - Pending civil and criminal litigations, enmity between respondents and family of deceased - P.W.-1, highly inimical and interested witness, chances of false implication of respondents can't be ruled out - Testimony of P.W.-1 suffers from inconsistencies, embellishments - FIR lodged by P.W.-1 himself, in his testimony, he denied the version, but narrated as his father told him after the incident - Not mentioned in FIR - In the entire testimony of P.W.-1, bringing police constables at his house, action taken by police personnels, not explained by him, police constables has not been examined - P.W.-1 St.d assailants after assaulting his father, looted jewelleries, set house on fire - Before trial court, he St.d that this was not personally viewed by him, but narrated to him by his sister-in-law, mother and father, not mentioned in FIR - Post-mortem report doesn't corroborate prosecution story - After receiving injuries, particularly on head, difficult to believe that on narration of incident given by injured, the prosecution case has been developed as St.d by PW-1 - Ornaments not disclosed nor recovered during investigation. (Para 61, 64, 68, 71, 76, 77, 79, 83, 84, 97, 100, 101)**

**Appeal dismissed.** (E-13)

**List of Cases cited:**

1. Darshan Singh Vs St. of Pun., (2024) 3 SCC 164

2. Rohtash Vs St. of Har.a, (2012) 6 SCC 589

3. Sunil Kumar Shambhudayal Gupta & ors. Vs St. of Maharashtra, (2010) 13 SCC 657

4. Rudrappa Ramappa Jainpur & ors. Vs St. of Karn., (2004) 7 SCC 422

5. Vimal Suresh Kamble Vs Chaluverapinake Apal S.P. & anr., (2003) 3 SCC 175

6. Sadhu Saran Singh Vs St. of U.P., (2016) 4 SCC 397

7. Harljan Bhala Teja Vs St. of Guj., (2016) 12 SCC 665

8. Rajesh Prasad Vs St. of Bihar & anr., (Criminal Appeal No. 111113 of 2015)

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Shri Jitendra Kumar Jaiswal, learned AGA assisted by Shri Virendra Kumar Shukla, learned counsel for the State/ appellant, Shri Pulak Ganguly, learned counsel assisted by Shri Ravi Bhushan Singh, learned counsel for the accused-respondents and perused the record.

2. This government appeal has been preferred against the judgment and order dated 18.08.1986 passed by Sessions Judge, Ghazipur in Sessions Trial No. 175 of 1986 (State of U.P. Vs. Raj Deo Singh and 4 Others), arising out of Case Crime No. 79 of 1985, under Sections 147, 148, 149, 395, 436, 323, 325, 506 IPC, Police Station Sadat, District Ghazipur, by which, the accused-respondents have been acquitted of all the charges framed against them.

3. During the pendency of the said government appeal, accused-respondent nos. 3 and 4 Raj Narain Singh and Ram Ashrey Singh has already passed away and as such, the instant government appeal qua accused-respondent nos. 3 and 4 Raj Narain Singh and Ram Ashrey Singh has been abated vide order dated 19.04.2018 and now, it survives only for accused-respondent nos. 1, 2 and 5, Raj Deo Singh, Vikrama Singh and Radhey Shyam Singh.

4. The prosecution story as unfurled in the FIR is that on the day of incident at about 9:30 AM, Buddhi Ram, father of the first informant was going towards Ghazipur and when, he reached near the Bawli, accused persons Raj Deo, Vikrama, Raj Narain, Ram Ashrey and Radhey Shyam suddenly emerged from the willow. Witnessing them, Buddhi Ram went into the field of Shiv Pujan, Raj Deo then caught hold of him and immediately thereafter, Vikrama, Raj Narain, Ram Ashrey and Radhey Shyam also reached there. Radhey Shyam and Ram Ashrey fired a shot.

5. The accused persons thereafter started assaulting Buddhi Ram with lathi-danda and twisted his hands and legs causing fracture injuries. Vikrama and Raj Narain gave 50 blows on the knees of Buddhi Ram and twisted his legs whereas Radhey Shyam assaulted him by kicks and fists. On alarm being raised by Buddhi Ram, first informant and number of other villagers from Harijan Basti reached at the place of incident. The accused persons chased them armed with guns. After assaulting Buddhi Ram, accused Vikrama snatched his two passbooks and a wrist watch.

6. It is further alleged that accused persons reached at the house of Buddhi Ram and snatched the ornaments of inmates of house and thereafter, set his house on fire. Consequent to which, several

articles of his house were burnt. Thereafter, the inmates of the house ran away from there. The accused persons are alleged to have chased Deo Nath, elder son of Buddhi Ram and one Lacchan, with their guns, however, they made their escape good.

7. According to the prosecution own case, it is further stated that PW-1 Shiv Prasad, after witnessing the incident of assault on his father in the field of Shiv Pujan, straight away went to the Police Outpost Bahariyabad, where he met two police Constable and one Head Constable and brought them to his home, where he was informed by his sister-in-law that his father has been taken away to the Police Station, as such, he alone left for the Police Station, however, on the way near the temple, met his father lying on a cot, who told him that when he reached in the field of Shiv Pujan, then the assailants emerged from the willow and started assaulting him.

8. It is further stated that PW-1 scribed the first information report near the temple and thereafter, injured Buddhi Ram is said to have been taken to the Police Station Sadat, where written report (Exhibit Ka-1) was handed over to the Moharrir by Shiv Prasad (PW-1), on the basis of which, chik first information report (Exhibit Ka-2) was registered at Police Station Sadat vide Case Crime No. 79 of 1985, under Sections 147, 148, 149, 395, 436, 323, 325, 506 IPC, the corresponding G.D. Entry of which was also drawn vide G.D. Report No. 17 at 11:45 hours, which has been proved and marked as Exhibit Ka-3.

9. After registration of the FIR, the victim was sent to the Primary Heath Centre (P.H.C.), Sadat for medical examination and the investigation of the said case was taken over by PW-9 S.I. Brij Mohan Singh.

10. On 11.09.1985 at 1:00 PM, injured Buddhi Ram was medically examined by Dr. Virendra Pal Singh at P.H.C., Sadat, who noted following injuries on his person :-

> *(i) Contusion 1 x 1/2 cm x 1 cm over the right elbow joint posterior aspect surrounded by diffuse swelling around right elbow. Direction oblique, colour red, Kept under observation, advised X-Ray right elbow with its lower part and upper par of right fore-arm.*
>
> *(ii) Abrasion with contusion 4 cm x 1 cm over right knee joint lateral aspect direction oblique, colour red, surrounded by diffuse swelling. Kept under observation. Advised X-Ray right knee joint.*
>
> *(iii) Abrasion 1 x 1/2 cm x 1 cm over root of right toe on anterior aspect. No scab seen.*
>
> *(iv) Contusion with abrasion 9 cm x 2 cm over lateral aspect of left knee joint extending upwards 6 x 1/2 cm above the left knee joint, surrounded by diffuse swelling. Kept under observation. Direction vertical, advised X-Ray lower part of left thigh including left knee joint.*
>
> *(v) Contusion 3 x 1/2 cm x 2 cm over anterolateral aspect of left leg 6 cm below left knee joint surrounded by diffuse swelling colour red, direction oblique. Kept under observation, advised X-Ray left leg upper part.*
>
> *(vi) Traumatic swelling 4 cm x 2 x 1/2 cm on the lower part*

*of left leg 7 cm above the lateral malleolus on lateral aspect. Kept under observation, advised X-Ray lower part of left leg.*

*(vii) He kept injuries nos. 1, 2 and 4 to 6 under observation and advised X-Ray. In his opinion, injury no. 3 was simple and that all the injuries were fresh at the time of medical examination.*

11. After medical examination, Doctor advised the victim to be taken to the District Hospital, Ghazipur for higher treatment and further management. The victim was accordingly brought to the District Hospital, Ghazipur and admitted there, however, he succumbed to his injuries on 12.09.1985 at 3:50 AM. The information about his death was accordingly sent to the Police Station Kotwali, District Ghazipur.

12. On the basis of the said information, Hari Shankar Verma (PW-7) reached the District Hospital and conducted the inquest on the person of the deceased and prepared the inquest report (Exhibit Ka-8). The relevant documents, namely, challan nash, photo nash, letter to C.M.O., etc. were also prepared by PW-7, which has been proved and marked as Exhibit Ka-10 to Exhibit Ka-12.

13. After the inquest, the dead body was sealed in a cotton cloth by preparing the sample seal and handed over to the constable for taking it to the mortuary for post-mortem examination.

14. The Medical Officer (PW-7) Dr. Maan Bahadur Mal, thereafter, conducted an autopsy on the person of the deceased on 12.09.1985 at 4:00 PM and has found following injuries on his person :-

*(i) Abrasion 3 cm x 1cm above right eye ball.*

*(ii) Abrasion 1 cm x 0.5 cm, 4 cm above left eye ball.*

*(iii) Abrasion 15 cm x 1 cm right elbow with multiple fracture underlying bone.*

*(iv) Abrasion 7 cm x 4 cm right knee.*

*(v) Abrasion 8 cm x 5 cm left knee with fracture.*

*(vi) Abrasion 1.5 cm x 0.5 cm left elbow joint.*

*(vii) Abrasion 3 cm x 2 cm, 4 cm below left nipple.*

*(viii) Abrasion 10 cm X 2 cm left lower abdomen.*

*(ix) Abraded contusion 2 cm x 1.5 cm, 11 cm below right knee.*

*(x) In the opinion of the Doctor, death was caused due to shock and haemorrhage as a result of anti-mortem injuries mentioned above.*

15. After lodging of the first information report, the Investigating Officer (PW-9) reached the place of incident and tried to trace out the accused persons, however, they were not traceable. The Investigating Officer thereafter recorded the statement of the witnesses Deo Nath and Smt. Sharda and inspected the place of incident and prepared the site plan, which has been proved and marked as Exhibit Ka-13.

16. From the place of incident, the Investigating Officer had also found a live cartridge, which was taken in his possession and its fard recovery memo was prepared, which has been proved and marked as Exhibit Ka-14. He also collected the ashes of burnt Chhappar and kept it in a

container and prepared its fard recovery memo, which has been proved and marked as Exhibit Ka-14-A.

17. After inspecting the place of incident, the Investigating Officer (PW-9) reached the Primary Health Centre (P.H.C.), Sadat, where he was informed that victim Buddhi Ram has already been sent to the District Hospital, Ghazipur for further treatment. Further on 12.09.1985, he reached the place of incident, where he was informed by Deo Nath that Buddhi Ram had already passed away on 12.09.1985. On the said date, he had shown to have arrested the accused Raj Narain and recorded his statement and then, reached the Mortuary, where he recorded the statement of first informant Shiv Prasad and his mother Budhiya and examined the other relevant witnesses.

18. Thereafter, on the basis of the post-mortem report, converted the case under Section 302 IPC and accordingly, the necessary G.D. Entry was made vide G.D. Entry No. 22 on 13.09.1985. He is said to have recorded the statement of Lacchan and thereafter, initiated the proceedings under Sections 82/83 CrPC against the absconding accused persons and after being informed of their surrender in District Jail, reached there and recorded their statements on 17.09.1985 and after concluding the investigation, submitted the charge-sheet, which has been proved and marked as Exhibit Ka-29 on 18.09.1985.

19. On the basis of the said charge-sheet, learned Magistrate had taken cognizance, however, since the case was triable by the court of Sessions, committed the same to the court of Sessions for trial, where it was numbered as Sessions Trial No. 175 of 1985 (State of U.P. Vs. Raj Deo Singh and 4 Others). The trial court thereafter framed charges against the accused-respondents vide order dated 24.01.1986, which was read out and explained to them, who abjured the charges, did not plead guilty and claimed to be tried.

20. In order to prove the guilt against the accused persons, the prosecution has examined as many as 9 witnesses. Shiv Prasad (PW-1), son of the deceased as well as first informant of the incident and Lachhan Ram (PW-2) has been examined as witnesses of fact. Head Constable Girja Shankar Tripathi, who has drawn the first information report and proved the G.D. Entries, has been examined as PW-3. Constable Surendra Kumar Singh is the police personnel, who took the dead body to the Mortuary for post-mortem examination. PW-5 Dr. Virendra Pal Singh is the Medical Officer, who examined the injuries of the victim. PW-6 Dr. Maan Bahadur Mal is also the Medical Officer, who conducted an autopsy on the person of the deceased and proved the post-mortem report. PW-7 S.I. Hari Shankar Verma, who conducted the inquest on the person of the deceased and proved the same. PW-8 Constable Ajay Kumar Singh, who had taken the victim to the P.H.C., Sadat for medical examination. PW-9 S.I. Brij Mohan Singh is the Investigating Officer, who investigated the case and submitted charge-sheet against the accused persons, on the basis of which, they were put to trial.

21. After recording of the entire evidence, the statement of the accused persons were recorded under Section 313 CrPC. The accused persons did not produce any oral evidence in their defence but they filed some documents, marked as Exhibit

Kha -1 to Kha-8, thereafter, the trial court vide impugned judgment and order dated 20.03.1984, has acquitted all the accused persons of all the charges framed against them, against which, present government appeal has been preferred with the prayer to reverse the acquittal of the accused-respondents and to convict them for the offence charged with.

22. In order to appreciate the controversy, in question, involved in the present government appeal, it would be apt to discuss the statements of the witnesses, in brief, recorded during the course of trial.

23. PW-1 Shiv Prasad is the son of the deceased as well as first informant of the incident. He, in his statement, has stated that his father Buddhi Ram (deceased) was a teacher in Basic Primary Pathshala and at the relevant time, he was discharging his duties as a teacher. He further stated that Prabhu Nath Singh is the Pradhan of the Village, who are five brothers, namely, Deo Nath Singh, Bihari Singh, Gauri Shankar Singh and Sadhu Singh. Accused Raj Deo and Vikrama are the real brothers and sons of Jamadar Singh. Accused Ram Ashrey and Raj Narain are also real brothers and Deo Nath and Prabhu Nath are their uncles. Deo Nath's wife Indrawati and Jamadar Singh's wife Chandri are real sisters. It is thus stated that Vikrama, Ram Ashrey, Raj Narain, Raj Deo are related to each other.

24. It is further stated that Pradhan Prabhu Nath Singh had given plot nos. 29 and 36 of Village Hartara to Buddhi Ram on lease, however, he could not get possession over the said land. It is further stated that a complaint under Section 420 IPC was instituted by Pradhan Prabhu Nath Singh against Buddhi Ram and his sons, Deo Nath and Shiv Prasad alleging therein that they had obtained lease of the said plots by fraud and cheating, as such, a case under Section 420 IPC was instituted against them, in which, accused Radhey Shyam was a witness, however, they were acquitted in the said case.

25. It is further stated that Sehan of the house of Buddhi Ram fell in the plot no. 29 and they were in possession over that land. It is also stated that on plot no. 36, Jamadar Singh, father of the accused Raj Deo and Vikrama, had installed a Pumping Set, for which, a civil suit was also filed, in which, they had succeeded. A case under Section 145 CrPC was also instituted between Jamadar Singh and Buddhi Ram etc. regarding plot no. 36.

26. It is further stated that about 4-5 years back, accused Raj Deo, Vikrama and Naresh had beaten Smt. Budhiya, wife of Buddhi Ram and mother of the first informant Shiv Prasad, for which, they were prosecuted and convicted.

27. It is further stated that on account of said litigations between the parties, accused persons had become inimical with Buddhi Ram. Buddhi Ram had given applications to the higher authorities for the protection of his life and property. It is further stated that on the date and time of the incident, he was present at his house alongwith Lacchan (PW-2). At about 9:30 AM on 11.09.1985, his father left the house for his school. After some time, he heard a noise of firearm and cries of his father, consequent to which, he reached near the Bawli alongwith Lacchan, where he saw Raj Deo, Vikrama, Raj Narain, Ram Ashrey and Radhey Shyam assaulting his father by lathi. On their raising alarm, villagers also reached there and then, Ram Ashrey and Radhey Shyam

are said to have fired and when, he reached in the field of Shyam Singh, he saw the assailants assaulting his father and started breaking his hands and legs. Seeing the incident, he left for Police Outpost Bahariyabad. On reaching there, he met two police Constables and a Head Constable and brought them to the place of incident, where he was told by his sister-in-law that his father had already been taken to the Police Station, thereafter, he proceeded towards the Police Station but on the way near the temple, met his father, who disclosed him that when he reached in the field of Shiv Pujan, then the assailants emerged from the willow and Raj Deo caught hold of him, thereafter, other assailants forcibly threw him on the ground and assaulted him. He was also informed by his father that they had snatched a wrist watch and two passbooks. On the basis of the information given by his father and the incident witnessed by he himself, he lodged the first information report, which has been marked as Exhibit Ka-1. Thereafter, his father has been brought to the P.H.C., Sadat, where his injuries were examined and thereafter, he was referred to the District Hospital, Ghazipur for further treatment. He was then brought at District Hospital and admitted there, where during treatment, he succumbed to his injuries on 12.09.1985.

28. During cross-examination, PW-1 stated that the field of Shiv Pujan is in the north side of the Bawli. He further stated that first information report of the said incident was scribed by him near the temple, which is a distance of about 200 meters from his house. He further stated that whatever he had seen and what was narrated to him by his father, was scribed in the first information report, however, he has not stated in the first information report that being attracted by the cries of his father and noise of guns, he had reached the place of incident. Even the factum of visiting the Police Outpost Bahariyabad is not mentioned in the first information report and on being confronted, he stated that due to shortage of time, he could not mention it, though, the factum of visiting the Police Outpost Bahariyabad was in his knowledge. He further stated that after being attracted by cries of his father and noise of guns, he had reached the place of incident alongwith Lacchan and had witnessed the incident.

29. On being specifically confronted as to which of the assailants were having guns in their hands at the time of incident, he categorically stated that at the time of assault, none of the assailants had gun in their hands, rather, it was kept on the ground. The guns were with the assailants Radhey Shyam and Ram Ashrey, who also chased the witnesses, however, the said factum was not mentioned in the first information report.

30. It is further stated that he did not make any attempt to save his father. He stayed in the field of Shyam Singh for a minute and thereafter, left for Police Outpost Bahariyabad on foot and thereafter, on a bicycle. At the Bahariyabad Police Outpost, he met two Police Constables and Head Constable, however, he does not know their names. The said police personnels were on bicycle and they first reached his house, however, at the relevant time, neither his brother Deo Nath nor his father was present in the house and thereafter, he reached near the temple and scribed the report. When he saw his father near the temple, he was badly injured and lying on a cot and was in a serious condition but could understand the

conversation. On the basis of the disclosure made by his father, he scribed the first information report, however, in his first information report, he did not mention the fact that on the information given by his father, he had scribed the first information report.

31. PW-1 further stated that prior to his statement in the court, he had not disclosed the factum of assailants setting his house on fire and committing loot of jewelleries, however, it is wrong to state that since he suspected the truthfulness of the said fact, as such, earlier he did not disclose the said fact. He also did not question his mother and sister-in-law as to the ornaments snatched in the dacoity. He further stated that he did not think it fit to first take his father to the hospital, as such, he reached the Police Station and thereafter, went to the hospital for treatment. He stayed with his father at P.H.C., Sadat for half an hour and thereafter, he was referred to the District Hospital, Ghazipur for further treatment. He further stated that while taking his father from P.H.C., Sadat to District Hospital, Ghazipur, no further injury was caused to him.

32. He further denied the suggestion that incident has not taken place at the time and in the manner as stated. He further denied the suggestion that his father was of loose character. He further denied the suggestion that on the day of the incident in the morning, there has been a quarrel in his house. He further denied the suggestion that in the morning, his brother Deo Nath had assaulted his father because of his loose character and on the date of the incident, Deo Nath's wife also suffered injuries. He further denied the suggestion that just to conceal the actual incident of fight between his family members, he had set his house on fire and lodged the false report against the assailants. He further denied the suggestion that on account of inimical terms with the assailants, he had lodged the false report.

33. PW-2 Lacchan Ram is another eye-witness of the incident and is next door neighbour of PW-1. He, in his examination-in-chief, stated that on the date of the incident, the goats of Buddhi Ram, had damaged his crops, as such, to reproach him, he had reached the house of Buddhi Ram, who was leaving for the School. At the relevant time, Shiv Prasad, son of Buddhi Ram was also present there, while he was conversing with Shiv Prasad, he heard cries of Buddhi Ram and noise of gun shots, consequent thereto, he alongwith Shiv Prasad reached the Bawli and saw the assailants assaulting Buddhi Ram. P.W.-1 Shiv Prasad thereafter ran away, however, they went near the injured Buddhi Ram, where his son Deo Nath and wife had also reached. They then brought Buddhi Ram at his house, where they saw his hamlet being set on fire.

34. During cross-examination, he stated that though he was not having visiting terms with the family of Buddhi Ram but had gone there only to complain about the damage caused to him by the goats of Buddhi Ram. He was interrogated by the Investigating Officer and had disclosed him that in order to complain about the damage caused to him by the goats of Buddhi Ram, he had gone to reproach him at his house, however, if the said factum has not been recorded by the Investigating Officer in his statement under Section 161 CrPC, then he can not assign any reason as to why the Investigating Officer has not recorded the said factum in his statement.

35. He further stated that no appreciable damage was caused to his crops by the goats of Buddhi Ram. He further stated that he is Harijan by caste and Buddhi Ram was also Harijan and both of them are Chamar by caste. He further stated that he never attended the marriage of sons of Buddhi Ram nor Buddhi Ram was ever invited by him in their marriages. After Buddhi Ram had left for his school, he remained in conversation with Shiv Prasad and on hearing the noise of guns, he had reached the place of incident and witnessed the same alongwith Shiv Prasad. He further stated that the incident took place in the field of Shiv Pujan, which lasted for 5-6 minutes and Deo Nath, son of the deceased, had also reached there alongwith other villagers and had witnessed the incident.

36. He further stated that after the incident, he had taken the injured to the doorstep of his house on a cot and thereafter, he went to his house and remained there. He further denied the suggestion that since he is next door neighbour of Buddhi Ram and as such, he is falsely deposing in the case. He further denied the suggestion that on account of enmity with co-accused Vikrama regarding fixing of pegs, he is falsely deposing. He further denied the suggestion that one day prior to the incident, he had gone to visit his relatives.

37. PW-3 Girja Shankar Tripathi is the Head Moharrir and had drawn the chik FIR, on the basis of the written report given by the first informant, which has been marked as Exhibit Ka-2. Its corresponding G.D. Entry has also been drawn vide G.D. Report No. 17 at 18:45 hours on 11.09.1985, which has been marked as Exhibit Ka-3. The Investigating Officer on 12.09.1985 had converted the said case under Section 302 IPC vide G.D. Report No. 22 on 12.09.1985, which has been marked as Exhibit Ka-4. He stated that Buddhi Ram (deceased) was brought at the Police Station and his chitthi majroobi was prepared by Constable Harvansh Mishra, which has been proved and marked as Exhibit Ka-5.

38. During cross-examination, he stated that after registration of the said case, the Investigating Officer had proceeded for its investigation. He further stated that chitthi majroobi are usually prepared in the prescribed form being Form No. 33 but the chitthi majroobi of the instant case is not prepared in the prescribed form. He further denied the suggestion that Buddhi Ram was admitted in the Sadat Hospital as a 'private case' and as such, on the chitthi majroobi, 'private case' has been scribed. He further stated that since prescribed form of chitthi majroobi is not available, as such, it was prepared on a plain paper.

39. PW-4 Constable Surendra Kumar Singh, at the relevant time, was posted at the Police Station Kotwali, District Ghazipur. He stated that on 12.09.1985 at about 8:30 hours, the Investigating Officer, after conducting the inquest, had handed over the corpse alongwith relevant papers for taking it to the Mortuary for post-mortem, which was taken to the Mortuary and handed over to the doctor for post-mortem.

40. PW-5 Dr. Virendra Pal Singh is the Medical Officer, who conducted the medical examination and noted the injuries of injured Buddhi Ram on 12.09.1985 at about 1:00 PM and prepared the injury report mentioning therein that seven

injuries have been found on the person of the victim. He further stated that injury no.3 was simple, whereas injury nos. 1, 2, 4, 5 and 6 were kept under observation and advised for X-Ray. The said injuries could have been caused on 11.09.1985 at about 9:30 AM. He further stated that for further treatment and X-Ray, the victim was referred to the Sadat Hospital. The said injuries have been proved and marked as Exhibit Ka-6.

41. During cross-examination, he stated that there is an Injury Register maintained at his hospital, in which, both police case as well as private case are registered. In case of private examination, private case is mentioned, whereas in police cases, police case is mentioned. In the injury report, proved as Exhibit Ka-6, he has written private case, which is correct. When Buddhi Ram reached the hospital, he was given some medical treatment for about half an hour and administered injection. The medical examination of Buddhi Ram, being a private case, has been prepared on a plain paper, however, further stated that while conducting the medical examination, when he had already written a line of the injury report, a police constable reached there and informed that instant case is a police case and as such, his name was written in the second line. He further stated that he found only seven injuries on the person of the injured Buddhi Ram. He further stated that injuries of Buddhi Ram could also be caused in between 4:00 - 5:00 AM on 11.09.1985. He further stated that none of the injuries of the victim were smeared with mud. He further denied the suggestion that under the influence of the police and the first informant, he has manipulated the injury report.

42. PW-6 Dr. Maan Bahadur Mal is the Medical Officer, who conducted an autopsy on the person of the deceased on 12.09.1985 at 3:50 AM and has noted nine injuries on his person, which has already been discussed above. In internal examination, scalp has been found to be congested and extra dural haematoma was found to be present. The said post-mortem report has been proved and marked as Exhibit Ka-7.

43. During cross-examination, he stated that he can not state the duration of the injuries, noted in the post-mortem report. At the time of post-mortem, he had noted nine injuries on the person of the deceased. Injury nos. 1 and 2 were on the face of the deceased and above the left eye. He further stated that by the assault of lathi, injuries may be either be a lacerated wound or contusion or an abraded contusion. He further stated that by the assault of lathi, only abrasion could not be caused. He further stated that if the head of the person is forcibly dashed against the wooden part of the cot, then injury nos. 1 and 2 could be caused. The extra dural haematoma was only due to injury nos. 1 and 2. He has not found any dislocation in the feet or arm of the deceased. The injuries could at most be caused by 15 blows and not as a result of 50 blows as stated. There was no gun shot injury on the person of deceased. He further stated that injury nos. 1 and 2, noted in the postmortem, have not been mentioned in the injury report (Exhibit Ka-6). He can not state if, at the time of medical examination, these injuries were there or not. The injuries, caused on the head, could be fatal because of blood clotting haematoma would result and the victim may lose his consciousness. Haematoma caused by injury nos. 1 & 2

was on the front of head. The head injury may paralyse its corresponding area.

44. PW-7 S.I. Hari Shankar Verma, at the relevant time, was posted as Sub-Inspector at the Police Station Kotwali, District Ghazipur and had conducted the inquest on the person of the deceased on 12.09.1985 at 7:30 AM on the basis of death memo sent by the District Hospital and prepared the inquest memo, which has been proved and marked as Exhibit Ka-8. He also prepared the challan nash, photo nash and other relevant documents, which has been proved and marked as Exhibit Ka-9, Ka-10 and Ka-17. After conducting the inquest, the corpse was wrapped in a plain cloth and after preparing the sealed sample, it was handed over to the constable for taking it to the Mortuary for an autopsy.

45. During cross-examination, he stated that said case was not registered at his Police Station, however, on the basis of death memo sent by the District Hospital, he had gone to conduct the inquest. At the time of inquest, Shiv Prasad and Deo Nath, both sons of the deceased Buddhi Ram, were present and witnessed the inquest.

46. PW-8 Ajay Kumar Singh is the Constable, who had taken Buddhi Ram to the Sadat Hospital for medical examination, who was in a conscious state and was medically examined by the doctor.

47. During cross-examination, he stated that because of lapse of time, he does not remember if he had handed over the medical examination report at the Police Station. He further denied the suggestion that he did not went to the hospital alongwith Buddhi Ram and is falsely deposing.

48. PW-9 S.H.O. Brij Mohan Singh is the Investigating Officer of the instant case. He stated that on the day of incident, he was posted as S.H.O, at the Police Station Sadat, District Ghazipur. On the day of the incident i.e. 11.09.1985, first information report of the instant case was registered in his presence and on the basis of which, chik first information report has been prepared, which has been marked as Exhibit Ka-2 and the corresponding G.D. Entry was also prepared, which has been marked as Exhibit Ka-3. He further stated that injuries of Buddhi Ram was noted in the General Diary and thereafter, he was sent through Constable Ajay Kumar Singh to P.H.C., Sadat for medical examination, however, he did not record the statement of the first informant or his brother at the Police Station as they had gone to the hospital alongwith his father. He reached the place of incident on that very day but the accused persons could not be traced. He recorded the statement of Deo Nath and Smt. Sharda and thereafter, he inspected the place of incident and prepared the site plan, which has been proved and marked as Exhibit Ka-13. From the place of incident, a live cartridge was found, which was taken in his possession and its fard recovery memo has been prepared, which has been proved and marked as Exhibit Ka-14. At the place of incident, chhappar was found in a burnt state and its ashes were taken in his possession and its fard recovery memo was prepared, which has been marked as Material Exhibit Ka-1. Thereafter, he reached the P.H.C., Sadat, where he was informed that injured Buddhi Ram had already been referred to the District Hospital, Ghazipur. On 12.09.1985, he reached the place of incident, where he was informed that injured Buddhi Ram has already passed away and thereafter, he converted the case under Section 302 IPC.

On 13.09.1985, he recorded the statement of PW-2 Lacchan Ram. He initiated the proceedings under Sections 82/83 CrPC against the accused persons and thereafter, accused-assailants surrendered before the court. On 18.09.1985, the Investigating Officer concluded the investigation and submitted charge-sheet against the accused persons.

49. During cross-examination, he stated that on 11.09.1985 in the morning, he was present at the Police Station, when injured Buddhi Ram reached there, he was brought by the first informant and his brother, who had taken him to the hospital, however, Buddhi Ram was not interrogated at the Police Station as he was crying with pain. On 11.09.1985, he recorded the statement of Deo Nath and Smt. Sharda. The statement of the first informant Shiv Prasad was recorded on 12.09.1985. The site plan was prepared by him, wherein the incident of assault is said to have seen by Shiv Prasad and Lacchan from the distance of 60 paces and further, from the distance of 100 paces. The place of incident, where assault had taken place, is at a distance of 120 paces from the house of Buddhi Ram and the place of incident is not visible from the house of Buddhi Ram. He further stated that he recorded the statement of Lacchan Ram on 13.09.1985 at 8:00 AM. He further categorically stated that Lacchan Ram had not informed him of going to the doorstep of Buddhi Ram for complaining about the loss being caused by the goats of Buddhi Ram. He further did not disclose to him that Buddhi Ram had told him that it is time for his school and therefore, he is leaving. PW-2 Lacchan Ram also did not inform him that accused persons assaulted Buddhi Ram and broke his arms and legs and thereafter, he reached at the doorstep of Buddhi Ram. To be precise the exact statement of the Investigating Officer, recorded during trial, is being quoted herein below :-

> "गवाह लछन का ब्यान मैनें 13.09.85 को करीब 8 बजे सुबह ग्राम हरवरा में लिया था। गवाह लछन नें मुझे बुधिराम के दरवाजे पर जाने के बावत नही बताय था कि बकरी के विषय में ओलहना देने गया था। उसने यह भी नही बताया था कि बुधिराम की बकरी ने मेरा नुकसान किया था। मुझे यह भी नही बताया था कि बुधिराम मास्टर ने उससे बताया था कि मेरा स्कूल का समय हो रहा है और मै स्कूल जा रहा हूँ। लछन गवाह ने मुझे यह ब्यान दिया था कि "मुल्जिमान मास्टर का हाथ पैर बुरी तरह तोड़ दिये और उत्तर पूरब की तरफ भाग गये।" लछन गवाह ने मुझे यह नही बताया था कि "मुल्जिमान बुधिराम को मारे और हाथ पैर तोड़ दिये इसके बाद जय बोलते हुये बुधिराम के दरवाजे पहुँचे।"

50. he trial court, on the above evidence led by the prosecution and the defence version given by the accused-respondents, has come to the conclusion that the prosecution has miserably failed to prove the case against the accused-respondents of all the charges framed against them.

51. Being aggrieved by the said judgment and order, the present government appeal has been preferred by the State.

52. Learned AGA for the State/ appellant has submitted that evidence of P.W.-1 Shiv Prasad and P.W.-2 Lacchan Ram coupled with medical evidence would show that the prosecution has proved its case beyond all reasonable doubt, yet the trial court, on the basis of surmises and conjectures, has illegally recorded the finding of acquittal against the accused-respondents, which is bad in law and is liable to be reversed.

53. Learned AGA has further submitted that from the evidence adduced during the course of trial, it is proved beyond all reasonable doubt that the accused-respondents in furtherance of their common object with all the accused persons, had committed the instant offence and therefore, they are liable to be convicted for the offence charged with, however, the trial court completely misjudged the evidence and material available on record and has illegally recorded the finding of acquittal against the accused-respondents, which is bad in law and is liable to be reversed.

54. Learned AGA has further submitted that present incident had occurred in broad day light and a prompt first information report has been lodged. Date, time and place of the incident has been established. He further submitted that both the eye-witnesses, PW-1 Shiv Prasad and PW-2 Lacchan Ram, are reliable witnesses, however, the trial court, on the basis of surmises and conjectures, has rejected their testimony and has illegally recorded the finding of acquittal against the accused-respondents, which is bad in law an is liable to be set aside.

55. Per contra, learned counsel for the accused-respondents has submitted that trial court has appreciated the material and evidence available on record in right perspective. He has further submitted that from the entire evidence adduced during the course of trial, PW-2 Lacchan Ram is a wholly unreliable witness and his presence on the date and time of the incident is highly doubtful and as such, he can not said to be an eye-witness of the incident. His testimony therefore is liable to be discarded. The finding, given by the trial court that P.W.-2 Lacchan Ram is a got up witness, is just, proper and legal and do not call for any interference by this Hon'ble Court.

56. Learned counsel for the accused-respondents has further submitted that PW-1 Shiv Prasad is the son of the deceased Buddhi Ram and is highly inimical and interested witness. If we critically analyse the evidence adduced by PW-1 Shiv Prasad, he can not said to be a wholly reliable witness. His presence at the time of the incident, being an eye witness, is also not clearly and cogently established by the prosecution. He is said to have lodged the first information report primarily on the information given to him by his father, however, the said factum has not been stated in the first information report and the same is completely missing, which renders the prosecution story highly doubtful.

57. Learned counsel for the accused-respondents has next submitted that on analysing the evidence adduced by PW-2 Lacchan Ram, he can not be said to be a reliable witness at all but is, in fact, a got up witness as rightly held by the trial court. He has next submitted that prosecution case solely rests on the testimony of PW-1 Shiv Prasad, however, by no stretch of imagination, he too can be said to be a wholly reliable witness and therefore, only on the basis of his testimony, the order of acquittal recorded by the trial court can not be reversed.

58. Learned counsel for the accused-respondents has further submitted that conduct of the first informant in the instant case also creates serious dent in the prosecution story and therefore, he can not held to be a wholly reliable witness. Moreover, his testimony can not said to be

of a sterling quality and therefore, the finding of acquittal recorded by the trial court can not be said to be perverse, illegal or impossible as held by the Hon'ble Apex Court in several of its decisions.

59. Learned counsel for the accused-respondents has further submitted that even according to the prosecution own case, there has been daggers drawn enmity between the family of the deceased and the accused persons. Both civil as well as criminal litigations have been pending between them and in the backdrop of the said circumstances, false implication of the accused-respondents can not be ruled out and as such, the impugned judgment and order passed by the trial court is just, proper and legal and do not call for any interference by this Court and as such, the instant appeal is liable to be dismissed.

60. Having considered the rival submissions made by learned counsel for the parties and having gone through the record, we find that the instant case is a result of a dispute between the two parties and number of civil and criminal litigations were pending between them and both of them were on highly inimical terms.

61. According to the prosecution own case, at the time of the incident, Buddhi Ram was going to his School, when he was attacked by the accused-respondents, who are alleged to have assaulted him. The said incident is said to have witnessed by his son PW-1 Shiv Prasad and PW-2 Lacchan Ram.

62. As per the prosecution story, the said witnesses are said to be attracted on hearing the cries of victim and noise of gun-shots, which is alleged to be used by the accused-assailants before the actual incident of assault.

63. When we go through the testimonies of the witnesses adduced during the course of trial, we find that though the accused persons are said to have fired shot from the gun but none of the injuries, found on the person of the deceased, could be caused by the firearm.

64. As per the prosecution own case, use of gun has been alleged to be made only for the purposes of attracting the witnesses and two shots are said to have been fired by the gun, which has been assigned to the accused-respondents Ram Ashrey and Radhey Shyam, however, no injury whatsoever has been caused by the said gun-shots to the deceased as all the injuries on the person of the deceased are lathi injuries.

65. If we critically examine the trustfulness of this part of the incident from testimonies of PW-1 and PW-2, we find that at the relevant time, when the incident is said to have taken place, both the witnesses PW-1 Shiv Prasad and PW-2 Lacchan Ram are said to be present at their house, which is pointed out to be at a distance of 125 paces from the place of incident. It is admitted case of prosecution that place of the incident was not visible from the house of the deceased Buddhi Ram, where both the witnesses are said to be present. It is quite possible that only on hearing of cries of the victim at the time of incident, the witnesses could not have been reasonably attracted to reach the place of incident and to facilitate their reaching at the place of incident, firing by gun has been introduced just to justify the prosecution story that the witnesses were attracted after hearing the noise of gun-shots, however, in our opinion, use of gun in the present incident does not inspire much confidence, particularly, for obvious reasons (i) that no

gun-shot injury has been found on the person of the deceased and (ii) No spent cartridge has been recovered by the Investigating Officer from the place of incident, though, a live cartridge is said to be recovered, furthermore, none of the two guns, which are said to be used in the incident, has been recovered by the Investigating Officer during investigation, which makes the prosecution story highly doubtful as regards the presence of the witnesses at the time of the incident being attracted on hearing the noise of gun-shots. This particular circumstance, in our opinion, creates serious dent in the prosecution story and makes the presence of witnesses at the place of incident highly doubtful.

66. Now, to test the reliability of two prosecution witnesses, who are said to be eye-witnesses of the incident, it would be pertinent to discuss the evidence adduced by them.

67. First, we would like to discuss the testimony of PW-2 Lacchan Ram, who has been held to be a got up witness by the trial court. According to the statement of P.W.-2 Lacchan, he is alleged to have reached at the house of Buddhi Ram to lodge a complaint and to reproach him for the damage caused to him by his goats, where he is alleged to have met P.W.-1 Shiv Prasad and was conversing with him, when the incident is said to have taken place. On hearing the cries of Buddhi Ram and the noise of gun-shots, he along with Shiv Prasad is said to have been attracted to the place of incident, where it is alleged that the accused-respondents were seen assaulting the deceased by the lathies and on reaching there, they are said to have been chased away by Shamsher Singh and Radhey Shyam, however admittedly, even according to the prosecution own case, none of the two witnesses have suffered any injuries. Moreover, even as per the statement of P.W.-2 Lacchan Ram, he was not on visiting terms with the deceased family.

68. However, it is germane to note here that while recording the statement of PW-2 Lacchan Ram by the Investigating Officer under Section 161 Cr.P.C., factum of P.W.2 Lacchan Ram reaching at the house of Buddhi Ram for complaining about the damage caused to him by his goats, has not at all been mentioned and only for the first time in the court, the said factum finds place in the testimony of P.W.2 Lacchan Ram.

69. On being cross-examined on the said aspect, P.W.2 Lacchan Ram in his statement categorically stated that "बुधिराम मास्टर के परिवार से मेरा उठना बैठना नहीं है। अगर ओलहना न देना होता तो मैं उनके दरवाजे पर नही जाता। मुकदमे मे दरोगा जी ने मुझसे पूछताछ किया था। मैंने दरोगा जी को यह बतला दिया था कि बकरी के विषय मे मै ओलहना देने गया था। मैं नहीं कह सकता कि बकरी के बारे मे ओलहना देने वाली बात दरोगा जी ने मेरे बयान में क्यो नही लिखा। (Statement U/S 161 Cr.P.C. Read over) बुधिराम की बकरी ने मेरा नुकसान किया था यह भी बात मैने दरोगा जी को बतलाया था। मैं इस बात की कोई वजह नही बता सकता कि दरोगा जी ने मेरे बयान में यह बात क्यो नही लिखी।"

70. It is further germane to point out here that when the said factum was put to the Investigating Officer while recording his testimony, he has categorically stated that "गवाह लछन का बयान मैने 13.09.1985 को करीब 8 बजे सुबह ग्राम हरबरा मे लिया था। गवाह लछन ने मुझे बुधिराम के दरवाजे पर जाने के वावत नही बताया था कि बकरी के विषय मे ओलहना देने गया था। उसने यह भी नही बताया था कि बुधिराम की बकरी ने मेरा नुकसान किया था। मुझे यह भी नही बताया था कि बुधिराम मास्टर ने उससे यह भी बताया था कि मेरा स्कूल का समय हो रहा है और मै स्कूल जा रहा हूॅं। लछन गवाह ने मुझे यह

नही बताया था कि "मुलजिमान बुधिराम को मारे और हाथ पैर तोड दिये इसके बाद जय बोलते हुये बुधिराम के दरवाजे पहुंचे।"

71. Thus, from the said testimony of P.W.-2 Lacchan Ram, it is clear that factum of P.W.-2 Lacchan Ram reaching at the house of the deceased Buddhi Ram, from where, he is said to have reached the place of incident alongwith P.W.-1 Shiv Prasad becomes highly doubtful and is, in fact, an improvement made by P.W.-2 Lacchan Ram just in order to show himself to be an eye-witness of the incident, which, in the instant circumstance, appears to be highly doubtful.

72. It is well settled principle of law that if a particular fact, which goes to the root of the case, has been mentioned in the testimony of the accused but does not find place in his previous statement, his subsequent statement before the court can not be relied upon.

73. The Hon'ble Apex Court in a recent decision reported in ***(2024) 3 SCC 164 (Darshan Singh Vs. State of Punjab)*** has held that if the prosecution witnesses fail to mention in their statement under Section 161 Cr.P.C. about the involvement of an accused, their subsequent statement before the court during trial, regarding involvement of that particular accused can not be relied upon and similarly, prosecution cannot seek to prove a fact during trial through eye-witness, which such witness had not stated to police during investigation and thus, evidence of that witness regarding the said improved fact is of no significance as held by the Hon'ble Apex Court in the cases reported in ***(2012) 6 SCC 589 (Rohtash Vs. State of Haryana), (2010) 13 SCC 657 (Sunil Kumar Shambhudayal Gupta and Others Vs. State of Maharashtra), (2004) 7 SCC 422 (Rudrappa Ramappa Jainpur and Others Vs. State of Karnataka), (2003) 3 SCC 175 (Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. And Another).***

74. Thus, from the said testimony of P.W.-2 Lacchan Ram, his presence at the house of the deceased Buddhi Ram becomes highly doubtful. Further, his subsequent testimony to the extent that from the house of Buddhi Ram, he reached the place of incident alongwith PW-1 Shiv Prasad becomes highly doubtful. In the backdrop of the said circumstances, we are also of the opinion that presence of P.W.-2 Lachhan Ram at the place of incident in the given circumstance becomes highly doubtful and he is, in fact, a got up witness as held by the trial court, which finding can not be said to be perverse or illegal in any manner and is, therefore, reiterated.

75. Now, when we test the reliability of testimony of P.W.-1 Shiv Prasad, we find that even his testimony can not be said to be of a sterling quality being the sole reliable eye-witness of the incident. Admittedly, from the evidence of P.W.-1 Shiv Prasad adduced during the course of trial, it is evident that he is son of the deceased and is highly inimical with the accused-respondents. From his testimony, it is evident that number of civil and criminal litigations have been contested between the parties. In an earlier case, accused-respondents Raj Deo and Vikrama had assaulted Budhiya, mother of P.W.1 Shiv Prasad, in which, both of them were convicted. Further, in a case under Section 420 IPC, lodged by Prabhu Nath, accused-respondent Radhey Shayam was a witness. Another criminal case of assaulting Deo Nath (brother of P.W.1 Shiv Prasad) by accused-respondents Raj Deo and Vikrama was also pending between the parties prior to the instant case.

76. Thus, we find that on account of pending civil and criminal litigations, there was daggers drawn enmity between the accused-respondents, on one hand and the family of the first informant including Buddhi Ram (deceased), on the other. Thus, it is evident that P.W.-1 Shiv Prasad is a highly inimical and interested witness in the backdrop of which, chances of false implication of the accused-respondents in the instant case can not be ruled out.

77. It is well settled principle of law that testimony of inimical and interested witness is to be examined with great care and circumspection. The enmity between the parties is a double edged sword and it is quite possible that on account of enmity, he may falsely implicate the accused-respondents. It has further been held that the evidence of inimical witness can not be accepted without corroboration. The witnesses, found to be interested and inimical, are likely to falsely implicate one or the other accused and therefore, it is essential to seek independent corroboration regarding each one of the accused.

78. Now, if we analyse the testimony of P.W.-1 Shiv Prasad in the backdrop of the said settled principle of law, we find that P.W.-1 Shiv Prasad also does not appears to be a wholly reliable witness and therefore, on the basis of his uncorroborated testimony, the accused-respondents can not be convicted by reversing the finding of the trial court.

79. It is further germane to point out here that if we test the reliability of testimony adduced by P.W.-1 Shiv Prasad, we find that it suffers from various inconsistencies, embellishments and exaggerations. In the instant case, the first information report has been lodged by P.W.-1 Shiv Prasad himself, however, when we go through the contents of the first information report, we find that from the narration made therein, it is borne out that the manner of the incident, as mentioned in the first information report, has been disclosed on the basis of what he has seen at the place of incident, however subsequently, in his testimony, he improved his version and stated that he had narrated the version in the first information report not only on the basis of his own perception of the incident but primarily on the basis of what had been disclosed to him by his father after the incident. The factum of lodging the first information report on the disclosure made by his father has not at all been mentioned in the first information report.

80. It is further germane to point out here that from the narration of the incident made by PW-1 Shiv Prasad, admittedly the initial part of the incident of coming out of the accused persons from the willow chasing his father and the factum of Rajdeo catching hold of his father and initial assault could not have been witnessed by him, which clearly establishes the fact that said witness, in order to lend credence to the prosecution case, started making improvements in his version and stated that on the basis of disclosure made by his father, he had lodged the first information report, though, the said facts do not find place in the first information report and thus, makes his testimony doubtful and raises a big question mark over the truthfulness of the testimony of the said witness.

81. Further, when we go through the narration of PW-1 Shiv Prasad made in the first information report, we find that even second part of the incident of loot of

the jewelleries and setting his house on fire has been narrated in the first information report on the basis of his eye-witness account, however subsequently, he has resiled from the said testimony and has stated that factum of making loot of the jewelleries and setting his house on fire was mentioned in the first information report on the basis of the information given to him by his mother and sister-in-law as well as disclosure made by his father, which clearly establishes the fact that P.W.-1 Shiv Prasad has been making marked improvement in his testimony from time to time, which further makes his testimony doubtful.

82. It is further germane to point out here that from the testimony of P.W.-1 Shiv Prasad, it is evident that he is said to have been attracted at the place of incident after hearing cries of his father and the noise of gun-shots made at the place of incident. Admittedly, P.W.-1 Shiv Prasad is said to have firstly witnessed the incident from a distance of 60 paces and then, from a distance of 100 paces. However, even according to the prosecution own case, after the incident of assault had taken place, accused-respondents proceeded to his house, where the incident of loot and setting his house on fire is said to have been alleged. P.W.-1 Shiv Prasad, even as per his own testimony, had not followed the accused-respondents to his house, however, it is surprising to note that even after the accused-respondents had left the initial place of incident, he not even went near his father to enquire about the injuries suffered by him, rather, from the said place, left for Police Outpost Bahariyabad, which was at a distance of about 3 Kms. from the place of incident and on reaching there, he is said to have met two Police Constables and one Head Constable, who are said to have accompanied P.W.-1 Shiv Prasad to his house, where he was informed by his sister-in-law that his injured father has been taken to the Police Station Sadat, whereupon he left his house and reached near the temple, where he is said to have written the first information report.

83. Subsequently, in the entire testimony of P.W.-1 Shiv Prasad, factum of bringing the police constables at his house and the action taken by the three police personnels on reaching his house, has not at all been explained by him and even, none of the said police constables has been examined during the course of trial to corroborate this version of the incident, which clearly shows that P.W.-1 Shiv Prasad is not coming out with true narration of the incident and trying to suppress the actual genesis of the prosecution case.

84. The exaggerated version given by P.W.-1 Shiv Prasad is also evident from the fact that in the first information report, he has categorically stated that assailants after assaulting his father, proceeded to his house and thereafter, they looted jewelleries of the womenfolk and set his house on fire. Subsequently, in his statement before the trial court, he has stated that this part of the incident, discussed above, was not personally viewed by him but was narrated to him by his sister-in-law, mother and father, which fact has not at all been mentioned in the first information report.

85. Even, during the course of the investigation, factum of loot of the jewelleries and setting his house on fire has not been stated by him in his statement recorded under Section 161 Cr.P.C. and during his cross-examination, he has categorically stated that "आज के पहले मैने

मुलजिमान द्वारा आग लगाने वाली बात व डकैती डालने वाली बात मैने अपने बयान मे नही कहा था। चूकि मुझसे यह बाते पूछी नही गई इसलिए नही कहा।"

86. Thus, it is evident that said part of the prosecution story has not been narrated in his statement recorded under Section 161 Cr.P.C. and thus, it is a clear improvement during the course of trial, which further creates a serious dent in the veracity of testimony of the said witness and makes him a doubtful witness and therefore, the trial court, doubting the veracity of his statement, has rightly acquitted all the accused-respondents, which finding, by no stretch of imagination, can be said to be perverse, illegal or impossible and as such, the finding of acquittal recorded by the trial court can not be reversed as submitted by learned AGA for the State/ appellant.

87. Apart from the said factum, there are more circumstances, which makes the prosecution story further doubtful. We further find that the post-mortem report also does not corroborate the prosecution story in its material particulars.

88. It is further germane to point out here that at the time of medical examination of the victim Buddhi Ram at Sadat Hospital, only seven injuries have been found on his person and all of which are either on the legs or on the arms. However, while conducting the post-mortem on the person of the deceased, P.W.-6 Dr. Man Bahadur Mal, had found two other injuries on his person. The nature of which has been noted to be (i) Abrasion 3 c.m. x 1 c.m above right eye-ball (ii) Abrasion 1 c.m. x 0.5 c.m., 4 c.m. above left eye-ball.

89. During cross-examination, P.W.-6 Dr. Man Bahadur Mal, who conducted an autopsy on the person of the deceased, has categorically stated that the said two injuries has not been mentioned in the injury report and he can not state as to whether at the time of his medical examination, the said injuries were present or not. It appears that the said injuries are, in fact, responsible for the death of the deceased. He has further stated that "चोट नं0 1 वो 2 जो पोस्टमार्टम मे लिखी है यह दोनो चोटे मृतक के चेहरे पर सामने की ओर दाहनी व वाई आंख के ऊपर थी। लाठी से मारने पर जो चोट आती है। वह ऊपर से देखने मे या तो फटा हुआ घाव दूसरा कन्टूजन तथा तीसरे प्रकार की चोट एब्रेडेड कन्टूजन हो सकती है। सिर्फ लाठी से मारने पर केवल एब्रेजन नही आयेगा। चारपाई के पाटी पर अगर बहुत जोर से सर को पटक दिया जाय तो उससे चोट नं0 1 व 2 आ सकती है।"

90. However, the witnesses, nowhere in the prosecution story, had stated that head of the victim was dashed against the wooden part of the cot and therefore, noting of the said injuries in the post-mortem report further creates a serious dent in the prosecution story and makes it doubtful.

91. It is further germane to point out here that even according to the prosecution own case, Deo Nath, other son of the deceased Buddhi Ram, was present at the house at the time of the incident and also, at the scene of the incident and further, at his house, when incident of loot of the jewelleries and setting his house on fire is alleged to have been committed, however, despite him being an eye-witness of the incident, he has not been produced to adduce his evidence, which further creates a doubt in our mind that the prosecution is not coming out with true version of the incident and is suppressing the incident,

which further makes the prosecution story doubtful.

92. Another very important circumstance emerges from the fact that as per the prosecution story, victim Buddhi Ram, after receiving the injuries, is said to have been taken straight away to the Police Station for lodging the first information report, however, it has come in the evidence that while going from the place of incident to the Police Station, where the first information report is said to have been lodged, P.H.C., Sadat falls in the way but he was not medically examined at P.H.C., Sadat, though, he is said to have been in a serious medical condition, which further creates dent in the prosecution story as narrated by the witnesses.

93. Apart from this, if we carefully go through the medical examination report of the victim Buddhi Ram, prepared at P.H.C., Sadat, we find that said medical examination has been done as a "private case", though, it is a specific case of the prosecution that victim was first taken to the Police Station, Sadat, where the first information report of the incident was lodged and chitthi majroobi was prepared, which was handed over to Constable Ajay Singh, who accompanied him to the Sadat Hospital for medical examination, however, when we peruse the injury report of the victim, he is shown to have been examined as a "private case". Had the Constable Ajay Singh accompanied the victim and been present at the P.H.C., Sadat for medical examination alongwith chitthi majroobi, then certainly in the medical examination report, the victim would have been examined as a "police case" and not as a "private case" as mentioned in the injury report, this factum further creates serious dent in the prosecution story and renders it wholly doubtful. The explanation tendered by the doctor in this respect is inconclusive and as an after thought just to explain the ambiguity.

94. There is one more factor, which further creates serious dent in the prosecution story. As per the prosecution story, deceased Buddhi Ram was going to his School, when the incident is said to have been taken place and he is alleged to have been assaulted, however, subsequent to his death, when PW-7 S.I. Hari Shankar Verma conducted the inquest on the person of the deceased Buddhi Ram, only Baniyan and Underwear on his person was found, which has been mentioned in the inquest report. Even, PW-6 Dr. Man Bahadur Mal, while conducting an autopsy on the person of deceased, had found only Baniyan and Underwear on his person. There is nothing on record to show that any of his clothes had been taken off from his body, either before the inquest or post-mortem or medical examination by the doctor nor the same was handed over to the constable nor any of the said clothes has been produced during the course of trial, which further creates a serious doubt in the prosecution story that the murder of the victim Buddhi Ram has been committed in the manner as alleged by the prosecution, while he was going to his School.

95. We further find that even place of the incident in the instant case has not been cogently & clearly established. According to the prosecution own story, it is alleged that victim Buddhi Ram was assaulted in the field of Shiv Pujan, which had already been ploughed but no crops were sown. Even, Investigating Officer, while investigating the case, had found that the field of Shiv Pujan had been ploughed, on which, the victim is said to have been

repeatedly given innumerable blows by lathis, causing injuries on his person, after throwing him forcibly on the ground, however, at the time of his medical examination by PW-5 Dr. Virendra Pal Singh, no dust or soil was found in any of his injuries. PW-5 Dr. Virendra Pal Singh clearly stated that "बुधिराम के शरीर पर कुल 6 चोटें मिली थी बुधिराम की चोटे 10.09.1985 को सुबह 4-5 बजे के बीच की भी हो सकती है बुधिराम की किसी भी चोट मे मुझे मिट्टी नही लगी हुई मिली बुधिराम के साथ आये हुए व्यक्तियों से किसी ने यह नही बताया कि बुधिराम पढ़े लिखे अध्यापक हैं।"

Thus from the said circumstances, even the place of incident becomes doubtful.

96. Another very important fallacy, which we find in the prosecution case that even according to the prosecution own case, the victim Buddhi Ram is said to be mercilessly beaten by the accused persons and in the first information report itself, it is stated that Vikrama and Raj Narayan gave as many as 50 blows on both of his knees and other parts of his body. Consequent to such merciless beating, the victim, as per the post-mortem report, has also suffered two serious injuries; one over right eye and the other is marked to be 4 cm above the left eye. Consequent to which, the Doctor has noted congestion in the scalp region below injury nos. 1 and 2. His membranes has been noted to be congested and in the brain, extra dural haematoma has been detected. The victim is said to have succumbed to his injuries in the night itself on the day of the incident. He is said to have straight away been taken to the Police Station Sadat, where his first information report has been registered in presence of the Investigating Officer, in an injured state, however, the Investigating Officer neither interrogated him nor recorded his statement as he was in intense pain. P.W.-9 S.I. Brij Mohan Singh in his statement clearly stated that "मुकदमा कायमी के बाद मैने थाने पर किसी का ब्यान नही लिया। बुधिराम मजरूब का ब्यान इसलिए नही लिया गया कि उस समय वह पीड़ा से कराह रहा था और उनके लड़को को उन्हें अस्पताल ले जाने की जल्दी थी बुधिराम का इस मुकदमें के सम्बन्ध मे कही ब्यान नही लिया गया।"

97. Thus, from the said circumstance, it is evident that after receiving the injuries, particularly on his head, the victim was in a very serious condition and therefore, it is very difficult for us to believe that on the narration of the incident given by injured Buddhi Ram, the prosecution case has been developed as stated by PW-1 Shiv Prasad. This circumstance again creates a serious dent in the prosecution case and do not inspire our confidence and makes the prosecution story as well as testimony of PW-1 Shiv Prasad further doubtful.

98. There is another important circumstance, which also makes the prosecution story doubtful. It is alleged in the first information report that after the incident of assaulting Buddhi Ram in the field of Shiv Pujan, the accused-respondents reached the house of the first informant and looted the ornaments of the inmates of the house and set the house on fire but even the said factum has not been proved by the prosecution.

99. It is germane to point out that during the course of investigation, no material could be collected to substantiate the said allegations, an such, the Investigating Officer, while concluding the investigation, did not file the charge-sheet in the said offences. Even during the course of trail, though the charge under section 436 IPC was framed but no cogent or clinching evidence could be adduced by the witnesses to establish the said charge. None

of the inmates of the house, who are said to have been present at the time of alleged loot and setting the house on fire, has been produced. Neither Deo Nath, brother of PW-1 Shiv Prasad, nor mother of PW-1, nor his sister-in-law has been produced to prove the said part of the incident.

100. It is further germane to point out here that none of the ornaments alleged to have been looted in the incident have been disclosed nor it has been recovered during investigation, which further creates serious dent in the prosecution story and makes it doubtful.

101. Thus, in the backdrop of the aforesaid facts and circumstances of the case, when we take a holistic view of the evidence adduced during the course of trial and test the veracity of the prosecution story as mentioned by the witnesses, we find that prosecution has miserably failed to prove its case beyond all reasonable doubt against the accused-respondents. The trial court in its impugned judgment and order has vividly discussed each and every aspect of the matter in the light of the evidence adduced during the course of trial, testing the veracity of the statements of the witnesses and has rightly come to the conclusion that prosecution has failed to prove its case beyond all reasonable doubt against the accused-respondents and as such, in our considered opinion, has rightly acquitted all the accused-respondents, which finding can not be said to be perverse, illegal or impossible.

102. The law with regard to interference by the appellate court is very well crystallized. Unless the finding of acquittal is found to be perverse or impossible, interference with the same would not be warranted. Though, there are a catena of judgments on the issue, we will only refer to two judgments, which are as reproduced below:-

> (i). In the case of ***Sadhu Saran Singh Vs. State of U.P. (2016) 4 SCC 397***, the Hon'ble Apex Court has held that:-
>
> *"In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate Court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. Appellate Court, while enunciating the principles with regard to the scope of powers of the appellate Court in an appeal against acquittal, has no absolute restriction* in law to review and re-look the entire evidence on which the order of acquittal is founded."
>
> (ii). Similarly, in the case of ***Harljan Bhala Teja Vs. State of Gujarat (2016) 12 SCC 665***, the Hon'ble Apex Court has held that:-
>
> *"No doubt, where, on appreciation of evidence on record, two views are possible, and the trial court has taken a view of acquittal, the appellate court should not interfere with the same. However, this does not mean that in all the cases where the trial court has recorded acquittal, the same*

*should not be interfered with, even if the view is perverse. Where the view taken by the trial court is against the weight of evidence on record, or perverse, it is always open far the appellate court to express the right conclusion after re-appreciating the evidence if the charge is proved beyond reasonable doubt on record, and convict the accused."*

103. The Hon'ble Apex Court in ***Criminal Appeal No. 111113 of 2015 (Rajesh Prasad Vs. State of Bihar and Another)*** has encapsulated the legal position covering the field after considering various earlier judgments and held as under:-

*"29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: (Chandrappa case [Chandrappa v. State of Karnataka, (2007) 4 SCC 415].*

*"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:-*

*(i) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.*

*(ii) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*

*(iii) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.*

*(iv) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*

*(v) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."*

104. Thus, it is beyond the pale of doubt that the scope of interference by an appellate court for reversing the judgment of acquittal recorded by the trial court in favour of the accused has to be exercised within the four corners of the following principles:-

(i). That the judgment of acquittal suffers from patent perversity;

(ii). That the same is based on a misreading/omission to consider material evidence on record;

(iii). That no two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record.

105. The appellate court, in order to interfere with the judgment of acquittal, would have to record pertinent findings on the above factors, if it is inclined to reverse the judgment of acquittal rendered by the trial court.

106. In our considered opinion, the trial court has passed a well reasoned and detailed order, which, in view of settled principle of law regarding reversal of acquittal, needs no interference by this Court. The view taken by the trial court can not be said to be perverse, impossible and illegal and as such, present government appeal filed by the State has no force and is accordingly **dismissed**.

107. Let a copy of this judgment and order be forwarded to the court concerned alongwith trial court record for information and necessary compliance.

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**(2024) 7 ILRA 1274**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 05.07.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE OM PRAKASH SHUKLA, J.**

P.I.L. No. 35231 of 2018

**Satya Narain Shukla & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
S.N. Shukla In Person, G.N. Pandey-In Person

**Counsel for the Respondents:**
C.S.C., A.S.G., Sudhanshu Chauhan

**Reservation-The Constitution (103rd ) Amendment Act, 2019- Article 15 (6) & 16 (6)-**Petition seeking extension of benefit of existing beneficiary oriented schemes meant exclusively for SCs/STs/OBSc and minorities to Below Poverty Line persons – which fulfil the eligibility criteria-during pendency Constitution 103rd Amendment Act was passed –enables St. to make special provisions for advancement of economically weaker section- such changes are policy matter-within the domain of Executive or Legislature-matter of policy-open for the Petitioners to represent before the concerned Government. (E-9)

**<u>List of Cases cited</u>:**

1. St. of Himachal Pradesh & ors. Vs Satpal Saini : (2017) 11 SCC 42

2. Census Commissioner & ors.Vs R. Krishnamurthy: (2015) 2 SCC 796,

3. U.O.I. Vs M. Selvakumar : (2017) 3 SCC 504

4. Rachna Vs U.O.I.: (2021) 5 SCC 638

5. Lily Thomas Vs U.O.I.: AIR 2000 SC 1650.

6. Indira Sawhney Vs U.O.I.: [1992 Suppl. (3) SCC. 217]

7. Janhit Abhiyan Vs U.O.I.: 2022 SCC OnLine SC

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Shri S.N.Shukla and Shri G.N. Pandey, petitioners-in-person, Shri Sudhanshu Chauhan, learned Counsel representing the respondents no. 3, 4 and Shri V.P. Nag, learned Standing Counsel representing the State/respondents no. 1 and 2.

(2) This petition styled as Public Interest Litigation was filed in the year 2018 seeking the following reliefs :-

> 1. issue a writ, order or direction in the nature of Mandamus to the respondents that the benefit of existing beneficiary oriented schemes meant exclusively for SCs/STs/ OBCs and minorities be extended to below the poverty line (BPL) persons of all other communities/castes also who fulfill the eligiblity criteria applicable to persons of SCs/STs/OBCs/Minorities.
>
> 2. Issue a writ, order or direction in the nature of Mandamus to the respondents that henceforth benefit of all beneficiary oriented State assistance be given uniformly to poor citizens of all communities/castes also on the basis of economics and/or other verifiable objective criteria.
>
> 3. Issue such other writ, order or direction as may be deemed fit and proper in the facts and circumstances of the case to fulfill the constitutional mandate contained in the preamble, Article 14 and 21 and Part IV of the Constitution."

(3) Petitioners, who appear in person, have submitted that the concept of the social and economic justice is to build a welfare state and the same has been recognised as a basic feature of our Constitution. According to them, without social and economic justice, there cannot be political justice and as a corollary, a just social order cannot be established without removing inequalities in income and status.

(4) To the aforesaid regard, petitioners have stressed on the wordings of Article 37 of the Constitution of India and have stated that Article 37 of the Constitution of India makes it clear that Directive Principles of the State Policies are fundamental in the governance of the country and it shall be duty of the State to apply these principles in making laws. Petitioners have also drawn our attenion to Article 38 of the Constitution of India and have urged that since Article 38 of Constitution of India clearly mandates the State to secure a social order for the promotion of welfare of the people and the State shall strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also amongst group of people residing in different areas or engaged in different vocations. Thus, their submission is that the denial of State economic assistance under the beneficiary oriented schemes for persons belonging to SCs/STs/OBCs and Miniority Communities to indigent persons/families of general category meeting the eligibility criteria of these schemes, solely on the basis of caste/community, is in violation of their

right to equality under Article 14 of the Constitution of India and as such, the same cannot be sustained in view of Article 13 of the Constitution.

(5) Petitioners have also urged that apart from violation of the fundamental rights guaranteed under Article 14 and 21 of the Constitution, denial of State assistance being provided by the beneficiary oriented schemes for SCs/Stc/OBCs and miniorities to the poor general category persons fulfilling the same eligibility criteria is also contrary the Preamble of the Constitution as well as the Directive Principles of State Policy contained in Article 37 and 38 of the Constitution of India. Thus, petitioners have prayed that the benefit of existing beneficiary oriented schemes meant exclusively for SCs/ STs/ OBCs and minorities be extended to below the poverty line (BPL) persons of all other communities/castes also who fulfil the eligibility criteria applicable to persons of SCs/STs/OBCs/Minorities.

(6) On the other hand, placing reliance upon the decisions of the Apex Court in **State of Himachal Pradesh & Others V/s Satpal Saini** : (2017) 11 SCC 42 and **Census Commissioner and Others V/s R. Krishnamurthy**: **(2015) 2 SCC 796**, learned Standing Counsel stated that this petition styled as Public Interest Litigation is not maintainable. According to the learned Standing Counsel, the State of Uttar Pradesh is running several schemes for the upliftment of socially, economically and educationally backward classes, citizens and action is being taken for the same according to law. He stated that Samajwadi Pension Scheme, which was primarily based on caste and minority status of an individual, was abolished by the State Government and presently, State is operating the income ceiling based schemes for the welfare and development of the citizen of all sections of the Society through various schemes including 'Vridhavastha Pension Scheme, Widow Pension Scheme, Divyangjan Pension Scheme, Leprosy Pension Scheme etc'. He further submits that the State Government is also running 'Mukhyamantri Kishan evan Sarvhit Bima Yojna', in which financial assistance is also being provided without any relation to any caste or community and to all those bread earner farmers of the State, who become temporarily/permanently disabled or in case of death, subject to fulfilling financial criteria. Further, various other schemes have also been initiated by the State Government, including 'Mukhyamtri Krihsak Durghatana Kalyan Yojna, National Family benefit scheme (Rashtreey Parivarik Labh Yojna), Chief Minister Abhyudaya Yojna etc. It has been also contended that the State Government is continuously working for the welfare of the citizen of the State and various beneficiary schemes are being operated for the upliftment of peoples of all section of the Society and the benefits of beneficiary schemes are being provided to all the sections of the society as far as possible.

(7) Elaborating his submission, learned Standing Counsel has stated that sustainable development goals in the State are based on 16 Goals, 169 Targets and their related indicators. In this regard, a Committee has been constituted under the chairmanship of the Additional Chief Secretary/Principal Secretary, Social Welfare Department, Government of UP for reducing inequalities in the State as per the SDG Goal No.10 and the said Committee would complete the action through inter-

departmental coordination for achieving target of Goals. According to the learned Standing Counsel, the State is also running several Schemes for the upliftment and development of weaker sections of the society and reducing the inequalities in the State and actions are being taken by the respective departments of the State Government of UP for the same according to law.

(8) Placing reliance upon the decisions of the Apex Court in **Union of India Vs. M. Selvakumar** : (2017) 3 SCC 504, and **Rachna Vs. Union of India** : (2021) 5 SCC 638, learned Counsel representing the respondent no.3 has submitted that in the present petition styled as Public Interst Litigation, no mandamus could be issued to frame a policy in a particular manner. It has been submitted that there is no averment of any breach of fundamental rights of any individual. According to the respondent no.3, relief sought is very vague and very generalized in nature. In this regard, he also placed reliance upon the decision of the Apex Court in **Lily Thomas Vs. Union of India** : AIR 2000 SC 1650.

(9) Learned Counsel for the respondent No.4/NITI Ayog has submitted that it is settled law that no mandamus can be issued to frame a policy and it is not the domain of this Court to embark upon such an exercise. It has also been contended that the present petition styled as Public Interst Litigation and relief sought therein is vague as there is no mention of any specific scheme, which the petitioners have sought for the below poverty line and are already in existence for the SCs/STs/OBCs or minority communities. According to them, there are several scheme of the Government of India for economically weaker section of the society irrespective of the caste or creed for the benefit of the poor, like Mahatma Gandhi National Rural employment Guarantee Scheme, Ayushman Bharat Pradhan Mantri Jan Arogya Yojana, National Social Assistance Program, Prime Minister Avas Yojna, Deendayal Antyodaya Yojna etc. It has also been stated that vide 103rd amendment published on 12.01.2019 of the Constitution of India, Article-15(6) and Article 16(5) have been incorporated in the Constitution of India and the benefit of reservation to the economically weaker sections of Citizens has also been extended for the purpose of admission in educational institutions including private educational institutions and in matters of public employment. It has also stated that the validity of the said amendment was also upheld by the Apex Court. Thus, according to them, the benefit of reservation in the field of education and public employment has already been extended to economically weaker sections of the society. It has been submitted that the States and the Union of India are implementing various schemes irrespective of caste or creed for benefit of poor communities. There are several schemes which are being implemented exclusively for SC, ST and OBC, which are primarily based on caste because it is indeed undisputed that the large chunk of population so excluded are also economically backward along with being socially and educationally backward.

(10) Having regard to the submissions of the parties and going through the record available before us in this petition styled as Public Interest Litigation, what we find is that the relief sought by the petitioners at first blush appears to be an effort towards the achievement of objects of a welfare State and to do away any distribution of State

largesse based on caste rather it should be based on economic criteria.

(11) However, the present petition was filed in the year 2018 and noticeably on 9th January, 2019, the Parliament of India enacted the Constitution (One Hundred and Third Amendment) Act, 2019 which enabled the State to make reservations in higher education and matters of public employment on the basis of economic criteria alone, a path taken averse to the judgment passed by the Hon'ble Supreme Court in ***Indira Sawhney v. Union of India*** : [1992 Suppl. (3) SCC. 217], which says that reservations cannot be based solely on economic criteria.

(12) The 103rd Amendment Act amended Articles 15 and 16 of the Constitution by inserting 15(6) and 16(6), wherein Article 15(6) enables the State to make special provisions for the advancement of any economically weaker section of citizens, including reservations in educational institutions. It provided for reservations in any educational institution, including both aided and unaided private institutions, except minority educational institutions covered under Article 30(1) to the extent of 10% and this ceiling was to be independent of ceilings on existing reservations. Similarly, Article 16(6) enabled the State to make provisions for reservation in appointments for economical weaker section to the extent of 10% ceiling, in addition to the existing reservations. The said amendments were subject to challenge before the Hon'ble Supreme Court in **Janhit Abhiyan v. Union of India** : 2022 SCC OnLine SC, wherein the Hon'ble Supreme Court declared that the Amendment and EWS Reservations were constitutionally valid.

(13) During the course of hearing, the aforesaid change in circumstances was brought to the notice of the petitioners, however, they persistently argued that the issue raised by them is of a larger aspect and not covered by the 103rd amendment and raised the issue as to why the benefit of existing beneficiary oriented schemes meant exclusively for SC/ST/OBC and minorities cannot be extended exclusively to the below poverty line persons of all other communities, without any discrimination of caste or creed.

(14) Admittedly, the PIL filed by the petitioners appears to be for the sole objective of putting forth a narrative that the provisions of all State assistance should be based on economic criteria only instead of on the basis of caste/community. However, in the entire petition or in the submission before this Court, neither any endeavour was made nor any material was produced before this Court as to which scheme already existing for the SCs/STs/OBCs/Minorities, the petitioner wants this Court to extend to the below poverty lines and as to how the said scheme was beneficial to the below poverty lines and not to the SCs/STs/OBCs/Minorities or as to how the present writ could be maintainable, which primarily seeks an issuance of mandamus for devising of policy or rule making, which essentially is in the domain of the Executive/Legislature, as the case may be. Howsoever avowed the objective behind filing of this petition, the issues raise fall in the domain of the Executive/Legislatiure as they inovlve policy matters having far reaching consequences, threfore, the petitioners should pursue the same before the Executive/Legislature. We find ourselves handicapped considering the limits of the

judicial review by Constitutional Courts in such matters.

(15) In view of the consistent view of the Hon'ble Supreme Court on this issue, there can be no doubt that seeking changes in an existing policy or law of beneficiary oriented scheme meant exclusively for SCs/ STs/ OBCs and Minorities, so as to be extended to below the poverty line (BPL) persons of all other communities/castes including BPLs who belong to SCs/STs/ OBCs/Minorities lies within the exclusive domain of the Executive or the Legislature and is a matter of policy.

(16) It shall be open for the petitioners to give representations to the Central/State Government espousing their cause with relevant data and materials, which may assist the concerned Government in taking an objective view on the issues raised in the present petition or to canvass the same before the elected representatives of the Parliament or State Legislature, as the case may be.

(17) With these observations, we **dispose of** this petition.

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**(2024) 7 ILRA 1279**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 30.07.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

Second Appeal No. 80 of 1985

**Smt. Laxminiya** ...**Appellant**
**Versus**
**Deena Nath** ...**Respondent**

**Counsel for the Appellant:**
A.N. Bhargava, R.P. Srivastava, R.S. Srivastava, Raghvendra Shankar Srivastava

**Counsel for the Respondent:**
Chandra Prakash, Jai Prakash Rai, Kalindra Kumar Rai, Pramod Kumar Srivastava, Tripathi B.G. Bhai

**Hindu Widow's Remarriage Act, 1856 - Section 2 - Rights of widow in deceased husband's property to cease on her remarriage. Upon remarriage, a widow ceases to have any right in the property left by her deceased husband, and she is treated as though she had died immediately after her second marriage. Estate left by her deceased husband devolves upon the next heirs of the deceased husband. In the event of remarriage, a widow loses even the limited interest in the property, and the next heirs of the deceased husband succeed to the same. (Para 19)**

**Hindu Widow's Remarriage Act, 1856 - Section 2 -Plaintiff's case that Bhagirathia, w/o Algu, after Algu's death, started living with plaintiff's father Hira, and thus plaintiff's father, and after his death, the plaintiff became the owner of the disputed land to the divestment of all the defendants. Defendants' case that Bhagirathia, after the death of Algu, performed a second marriage with Mahadeo, and out of the said wedlock, one son, Doodh Nath (defendant No. 2), was born. Trial court observed that since Doodh Nath (defendant No. 2), the son of Bhagirathia, is in possession of the disputed property, he would be deemed the owner thereof. Lower appellate court held that since the defendants had taken the plea of adverse possession of Bhagirathia over the estate left by her first deceased husband Algu, she would not retain it as an absolute owner, and hence the plaintiff's possession would be deemed to be proved.** ***Issue in Second Appeal*:**

**What rights did Bhagirathia succeed from her deceased first husband Algu, and what is the effect of her remarriage to Mahadeo**

**in 1919? What rights does the plaintiff have to obtain a decree for injunction in respect of the estate left by Algu? *Held*: Bhagirathia lost her title in the estate left by her deceased husband Algu after she remarried Mahadeo in 1919. Algu's estate then devolved upon his other natural successors as per the law prevailing at that time. No successor of the deceased Algu was impleaded as a party to the suit. It was incumbent upon the plaintiff to claim an injunction against the natural successors of Algu. Even if it is presumed or accepted that Algu and Bhagirathia had no issue, the succession would still continue and revert to the successors in law as per the family tree, from bottom to top through reversion of rights. Mere divestment of interest in the deceased Algu's property would not be sufficient to prove the plaintiff's case for title and possession to grant an injunction, particularly when the plaintiff failed to prove his case of coming into possession through his father Hira, based on an unproven relationship between Bhagirathia and his father. Plaintiff's plea that he acquired ownership and possession due to the relationship between Bhagirathia and plaintiff's father Hira was not substantiated by any cogent oral or documentary evidence. (Para 22, 24, 25)**

**Allowed.** (E-5)

**List of Cases cited:**

1. Anathula Sudhakar Vs P. Buchi Reddy (dead) by Lrs. & ors., 2008 (4) SCC 594

2. Lurkhur Vs Jhuri & ors., 1972 RD 271

3. Kizhakke Vattakandiyil Madhavan (Dead) through LRs. Vs Thiyyurkunnath Meethal Janaki & ors., 2024 (1) ARC 688 (SC).

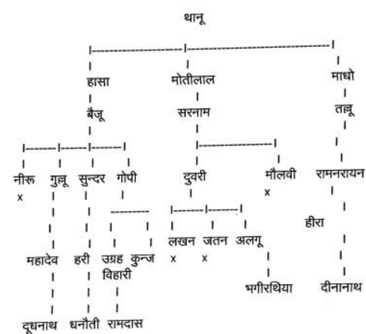
(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri H.N. Singh, learned Senior Counsel assisted by Shri Raghvendra Shankar Srivastava for the appellant and Shri Tripathi B.G. Bhai, learned counsel for the contesting respondents.

2. The instant second appeal has been filed by the defendants-appellants of Original Suit No. 132 of 1979 challenging the judgment and decree dated 11.10.1984, whereby the learned Special Judge, Ghazipur has set aside the trial court's judgment dismissing the suit and has, consequently, granted a decree in favour of the plaintiff-respondent permanently restraining the defendants-appellants from causing interference in the possession of the plaintiff over the disputed portion of the land.

3. During the course of hearing, the Court found that narration of facts contained in the judgments of the trial court and the first Appellate Court, when compared to the original pleadings, was found lacking and, therefore, the Court is narrating the relevant facts after perusing the original record.

4. Since shares of the respective parties, their entitlement and divestment is the issue directly involved in the present case, it is necessary to draw a family tree of one Thanu, as pleaded in first paragraph of the plaint. It depicts as follows:



PLAINT CASE

5. As per the plaintiff Deena Nath, a partition took place amongst the aforesaid family members in or about year 1881, according to which, parties started residing as per the shares separately allotted to them. Plot No. 213, area 6 biswa, 16 dhurs, was the joint property of Baiju, Sarnaam and Tallu, recorded as such in the settlement year 1981-82. The property, on account of its location and proximity, was jointly used by all the three branches. Bhagirathia wife of Algu, after the death of Algu, resided in the house in the capacity of his widow and the plaintiff's father took possession over the share succeeded by Bhagirathia in the disputed property, which was surrounded by a boundary wall after the death of Bhagirathia. Consolidation operations began in the village and the land covered by gatas No. 213/2 and 213/3, having been declared as Abadi, was chaked out from the consolidation operations under the order dated 12.02.1962 and it was allotted a new number 114. In paragraph No. 6 of the plaint, it was stated that Bhagirathia had started living with plaintiff's father and, hence, the plaintiff's father came in possession over her estate, which was succeeded by the plaintiff as owner thereof. The cause of action for filing suit was alleged on account of interference caused by defendants, i.e. Hari, Doodh Nath, Smt. Dhanauti and Ram Daras shown in the family tree, over the disputed portion described by alphabets mentioned in the prayer clause co-relating the same to the plaint map and, consequently, a decree for injunction was claimed. The plaintiff's claim, as such, was based upon the plea that Bhagirathia started living with plaintiff's father Hira and, hence, the plaintiff's father and, after his death, the plaintiff became owner of the disputed land to the divestment of all the defendants.

CONTEST BY DEFENDANTS

6. A joint written statement was filed by all the defendants stating that Bhagirathia, after the death of Algu, performed second marriage with Mahadeo and out of the said wedlock, one son namely, Doodh Nath (defendant No. 2) and a daughter namely, Phulmaniya were born. Phulmaniya was married to one Aditya and had two sons, namely, Indradeo and Ram Chander. The year of marriage between Bhagirathia and Mahadeo was pleaded through amendment as 1919. The plea of partition set up by the plaintiff was admitted with further statement that certain Neem tree was purchased by Bhagirathia for a sum of Rs.32/- on 20.02.1946 in an auction held pursuant to execution proceedings. It was further pleaded that Bhagirathia was never dispossessed by the plaintiff's side and continued to enjoy adverse possession over the estate left by her first deceased husband Algu, and settled the same during his life time in favour of her son Doodh Nath and children of her daughter Phulmaniya, who are in possession over the same. A plea of defeat of plaintiff's father as against Bhagirathia during consolidation operations was also taken and it was also alleged that the plaintiff's house was not over the disputed area, but was adjacent to the same and about which, a compromise had been facilitated by the Assistant Consolidation Officer during consolidation operations. The allegation of some manipulations made in the revenue records was also levelled and as far as the plea of the plaintiff that Bhagirathia joined the company of the plaintiff's father, the same was specifically denied and, in so many words at various

places in the written statement, second marriage with Mahadeo in the year 1919 and birth of offspring from the said wedlock was pleaded.

REPLICA

7. The plaintiff filed replica reiterating the plaint version and as regards consolidation operations, it was alleged that Bhagirathia did not get anything out of the said operations, but her share stood vested in Gram Sabha, the Pradhan whereof was inimical not only to the plaintiff's father, but also defendants.

TRIAL COURT'S JUDGMENT

8. After the parties led oral and documentary evidence, the trial court dismissed the suit by judgment and order dated 12.10.1982. It accepted the plea of defendants as regards performance of marriage between Bhagirathia and Mahadeo in the year 1919 and also birth of offsprings from the said wedlock. It observed that since Doodh Nath-defendant No. 2, son of Bhagirathia is in possession over the disputed property, he would be deemed to be the owner thereof. Other observations made in the trial court's judgment are not of much significance as far as the questions to be decided in the present appeal are concerned.

FIRST APPELLATE COURT'S JUDGMENT

9. The plaintiff filed Civil Appeal No. 481 of 1982 against the trial court's judgement. The appeal has been allowed by the judgment and order impugned and a decree for injunction has been granted against the present appellants.

10. The lower Appellate Court has also accepted the defence plea as regards marriage between Bhagirathia and Mahadeo, but, by a very lengthy deliberation made in the judgment, it dealt with succession of the estate left by late Bhagirathia, who died in the year 1956, as per the provisions of Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950. The lower Appellate Court held that since defendants had taken plea of adverse possession of Bhagirathia over the estate left by her first deceased husband Algu, she would not retain it in the capacity of absolute owner and, hence, plaintiff's possession would be deemed to be proved. As regards consolidation operations, issuance of Bhumindhari sanad in favour of defendant No. 2-Doodh Nath along with Bhagirathia, declaration of Abadi and chaking out of the same was also discussed by the lower Appellate Court.

ADMISSION ORDER PASSED IN INSTANT SECOND APPEAL

11. The instant second appeal was admitted by order dated 18.01.1985 on ground Nos. 2, 10 and 11 contained in the memo of appeal that are quoted as under and numbered as substantial questions of law No. 1, 2 and 3 for the sake of convenience:-

> (1) Because even according to the plaintiff's allegation, he would be a co-sharer (though the appellants do not admit the same) and the injunction as prayed for has illegally being (been) granted.
>
> (2) Because even if Smt. Bhagirathia had remarried, she would not lose her rights in the property nor was the (there) any evidence to hold the same.

(3) Because Algu had died and remarriage of Bhagirathia with Mahadeo took place in 1919, since then Bhagirathia remained in possession and prescribed new rights.

12. Though, the language used in grounds No. 2, 10 and 11, described as substantial questions law No. 1, 2 and 3, is not happily worded, the issues involved in the instant appeal revolve around the pivot as to what would be the position of the estate succeeded by Bhagirathia after death of her first husband Algu and what would be the effect of her second marriage with Mahadeo, which was solemnized in the year 1919.

SUBMISSION OF APPELLANTS

13. Shri H.N. Singh, learned Senior Counsel appearing for the appellants vehemently argued that there was no pleading in the plaint as regards second marriage performed in between Bhagirathia and Mahadeo and, therefore, the divestment of estate succeeded by Bhagirathia from her first deceased husband Algu, not being the plaint case, the lower Appellate Court has wrongly held that Bhagirathia lost her title and possession after performing marriage with Mahadeo; that there was no evidence to prove plaintiff's possession and, hence, the suit could not be decreed; that the suit was not filed for declaration that defendant Doodh Nath is not the owner and, hence, it was not maintainable; that title of plaintiff was under cloud, so decree of injunction is invalid; that if title is proved, but possession is not proved or vice-versa, in both the cases plaintiff would fail; that plaintiff's plea as regards relationship between his father Hira and Bhagirathia after the death of Algu was not established by any cogent evidence; that devolution of interest left by Bhagirathia after her death, which took place in the year 1956, as per the provisions of Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950, was not an issue involved in the present case and, therefore, the lower Appellate Court has committed a patent error in understanding the case; that once the plaintiff's father lost battle against the defendants in consolidation operations, the civil suit filed re-agitating the same issue was not maintainable, that bhumidhari sanad having been executed in the name of Bhagirathia and her son Doodh Nath (defendant No. 2), any discussion regarding divestment of interest in the estate left behind by Algu co-relating the same to remarriage of Bhagirathia was uncalled for; that even if there was some weakness in the defence case, the same was not sufficient to decree the suit as the plaintiff has to stand on his own legs, but he failed to establish the very factum of coming into possession based upon his plea of alleged relationship between Bhagirathia and his father Hira.

14. In support of his case, Shri Singh has placed reliance upon the judgement of Apex Court in ***Anathula Sudhakar vs P. Buchi Reddy (dead) by Lrs. And others***, 2008 (4) SCC 594 with special emphasis on paragraph No. 21 thereof laying down the following ratio:-

"21. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's

title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

<u>SUBMISSION OF RESPONDENT</u>

15. On the other hand, Shri Tripathi B.G. Bhai, learned counsel for the respondents, by referring to Section 2 of the Hindu Widow's Remarriage Act, 1856, vehemently argued that once the defendants themselves pleaded about remarriage by Bhagirathia with Mahadeo in the year 1919, which plea was accepted by both the courts below, whatever estate she succeeded from her deceased first husband Algu, she was left with no rights therein. He further argued that the disputed plot had

been declared as Abadi and, consequently, chaked out from the consolidation operations and, hence, the Appellate Court has rightly held that Bhagirathia was left with no rights. He submits that the Act of 1856 is not dependent upon the nature of land whether it is abadi or agricultural and once Bhagirathia was left with no rights and as per her own case that she joined Mahadeo's company after performing second marriage with him, the plaintiff's possession has been rightly found over the disputed property and, consequently, the defendants have been rightly injuncted. Shri Tripathi, however, concedes to the aspect that after the death of Bhagirathia in 1956, succession of her share would be of no consequence as her heirs would not get better rights then what she had succeeded from late Algu and, consequently, the discussion on succession based upon the provisions of U.P. Zamindari Abolition & Land Reforms Act, 1950, was uncalled for, but it would not affect the merits of the plaintiff's case.

16. Shri Tripathi has vehemently pressed Section 2 of the Act of 1956 in service and has also relied upon the following judgments:-

(1) ***Lurkhur vs. Jhuri and others***, 1972 RD 271.
(2) ***Kizhakke Vattakandiyil Madhavan (Dead) through LRs. vs. Thiyyurkunnath Meethal Janaki and others***, 2024 (1) ARC 688 (SC).

ANALYSIS OF RIVAL CONTENTIONS

17. Having heard the learned counsel for the parties, the main question that arises for consideration is as to what rights Bhagirathia succeeded from her deceased first husband Algu and what is the effect of performance of marriage by her with Mahadeo in the year 1919. The other question is as to what rights the plaintiff would get to obtain a decree for injunction in respect of estate left behind by Algu.

18. Once both the courts below have found performance of marriage between Bhagirathia and Mahadeo in 1919 as a fact proved, about which both the learned counsel have also no dispute, it is necessary to refer to Section 2 of the Hindu Widow's Remarriage Act, 1856 as argued by Shri Tripathi from the respondent side. The provision reads as under:

> "2. Rights of widow in deceased husband's property to cease on her remarriage- All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any Will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

19. A bare perusal of Section 2 would show that the widow shall, upon her remarriage, cease to have any right in respect of her deceased husband's property and she would be treated as dead soon after her second marriage. The estate left behind

by her deceased husband, then, shall devolve upon the next heirs of her deceased husband.

20. The Division Bench of this Court in ***Lurkhur*** (supra), by referring to a very old decision in the case of ***Mst. Parbati vs. Ram Prasad***, AIR 1933 Oudh 92 and judgment of Privy Council in ***Mt. Lajwanti vs. Safa Chand***, AIR 1924 Privy Council 121, held that when a hindu widow remains in possession of her first husband's property even after her remarriage for more than 12 years, the mere fact of a re-marriage, in the absence of any assertion of absolute ownership or change in the manner of her possession, cannot enlarge her estate into an absolute one. She thereby acquires title only to a widow's estate which inures to the estate of her deceased husband, and would, on her death, descend to his reversioner.

21. In ***Velamuri Venkata Sivaprasad (Dead) by LRs. vs. Kothuri Venkateswarlu (dead) by LRs. and Others***, 2000 (2) SCC 139, the Supreme Court has held that Section 2 of the Act of 1856 has taken away the right of a widow in the event of remarriage and the statute is very specific to the effect that the widow on remarriage would be deemed to be otherwise dead. The words "as if she had then died" are rather significant and the legislature intended that in the event of a remarriage, one loses the rights of even the limited interest in such property and the next heirs of her deceased husband shall succeed to the same. It is, thus, a statutory recognition of a well-reasoned pre-existing Shastric law. The judgment in ***Velamuri Venkata Sivaprasad (supra)*** has very recently been considered by the Supreme Court in the judgment of ***Kizhakke Vattakandiyil Madhavan*** (supra).

22. In view of above discussion, this Court is of the considered view that Bhagirathia lost her title in the estate left by her deceased husband Algu after she performed marriage with Mahadeo in the year 1919 and, to that extent, the finding of lower Appellate Court is in consonance with law and arguments of Shri Tripathi do have substance. On arriving at the said conclusion, the Court has now to see the impact of such finding on the claim for injunction and as to whether mere divestment of interest or title in the estate of deceased Algu would suffice passing of a decree in favour of plaintiff-respondent.

23. The specific plea of the plaintiff in paragraph 10 of the replica was that Bhagirathia's share succeeded by her from late Algu had vested in Gram Sabha, as also observed by the lower Appellate Court. Once it is so, a question would arise as to how, in absence of Gram Sabha being a party to the proceedings, the plaintiff could have succeeded to obtain a decree against the defendants. The plea of the plaintiff that he acquired ownership and possession on account of relationship between Bhagirathia and plaintiff's father Hira, does not stand substantiated by any cogent oral or documentary evidence. The lower Appellate Court has, while arriving at a conclusion that Bhagirathia did not retain her possession as absolute owner of the property on account of performance of remarriage with Mahadeo, immediately reached to a conclusion that the plaintiff's possession over the property had been proved by documentary evidence and circumstances of the case. The relevant portion of the Appellate Court's judgment in this regard reads as under:-

> "In my opinion, therefore, remarriage of Smt. Bhagirathia

with Mahadeo stands proved. After remarriage, Smt. Bhagirathia did not retain her possession over the disputed property and in a case she did not become absolute owner of the same, the plaintiff's possession over the property in dispute has been proved by documentary evidence and circumstances of the case."

24. In the opinion of this Court, mere divestment of interest in the deceased Algu's property would not be sufficient to prove the plaintiff's case for title and possession so as to grant a decree for injunction, particularly when he failed to prove his plaint case of coming in possession through his father Hira out of unproved relationship between Bhagiratia and his father. A plaintiff cannot get strength from the defence case, but has to succeed on his own legs and merits of his claim.

25. There is another very significant aspect as to why the decree of injunction could not be passed. Once it was held that Bhagirathia ceased to have an interest or rights in Algu's property after she performed remarriage, Algu's estate would, then, devolve upon his other natural successors as per the law prevailing at that time. No successor of the deceased Algu was impleaded as a party to the suit, either initially or after the defendants put their defence. What the Court notices from the family tree is that Hari, Doodh Nath, Smt. Dhanauti and Ram Daras alias Ram Das, i.e. all the defendants, belonged to a different branch coming from Baiju, whereas Algu belonged to a different branch coming from Sarnaam. Therefore, in order to succeed, it was incumbent for the plaintiff to claim injunction against the natural successors of Algu. Even if it is presumed or accepted that Algu and Bhagirathia had no issue, in that event too, succession could not stop flowing and it would revert to the successors in law as per the family tree, may be from bottom to top through reversion of rights. It is well settled that claim for injunction intrinsically involves declaration of title and in absence of real successors of deceased Algu, plaintiff could not succeed against Bhagirathia or other persons belonging to different branch coming from Baiju, Gopi, Sundar, etc. The case of the plaintiff, therefore, was liable to fall as he himself alleged vesting of property in Gram Sabha on the one hand but even then proceeded against the persons, who did not succeed rights in the property. In fact, the plaintiff's case was based upon a plea of possession alone and though title was asserted in favour of the plaintiff's father Hira, no source thereof having been established on record, the suit was liable to be dismissed on this ground, if not on the grounds mentioned by the trial court in its judgment. Had the co-sharers, i.e. successors from late Algu been on record, a situation for claim for partition would also have arisen and, in that situation, the suit simplicitor for injunction could not have been maintainable; however the plaintiff very cleverly avoided real contest in the given facts of the case and proceeded on his plea of possession and alleged ownership by putting an unsuccessful story of alleged relationship in between Bhagirathia and his father Hira. Dislodging the plaintiff's claim for injunction is, therefore, found in consonance with the ratio laid down by the Supreme Court in paragraph 21 of ***Anathula Sudhakar*** (supra).

CONCLUSION

26. Consequently, the substantial questions of law framed by this Court are answered in the manner that though, after performance of remarriage by Bhagirathia with Mahadeo in the year 1919, she ceased to have any right or interest in the estate of her deceased husband Algu, the same was not sufficient to decree the suit for injunction and, consequently, the judgment of the lower Appellate Court granting a decree deserves to be set aside.

27. Accordingly, the second appeal succeeds and is allowed with above findings and observations.

28. The judgement of First Appellate Court dated 11.10.1984 passed in Civil Appeal No. 481 of 1982 (Deena Nath vs Lachhminia and others) is hereby set aside. The Original Suit No. 132 of 1979 (Shri Deena Nath vs Shri Hari and others) stands dismissed.

29. Office is directed to remit the record of first appellate court as well as trial court to the District Judge, Gazipur forthwith so as to facilitate return of original documents to the concerned parties by the District Court office in accordance with the provisions of General Rules (Civil).

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**(2024) 7 ILRA 1288**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 18.07.2024**

**BEFORE**

**THE HON'BLE RAJNISH KUMAR, J.**

Second Appeal No. 224 of 1986

**Chandra Bhan** **...Appellant**
**Versus**
**Aditya Prasad** **...Respondent**

**Counsel for the Appellant:**
H.S. Sahai, Avadhesh Kumar, Om Prakash Pandey

**Counsel for the Respondent:**
R.S. Pandey, Aditya Kumar Tiwari, Chandra Bhooshan, Suyash Dwivedi, Vaishali Mishra

**Civil Law - Civil Procedure Code, 1908 - Section 100 - O.41 R. 24, O.41 R. 27 - Evidence Act, 1872 - Sections 45 & 101 - Uttar Pradesh Consolidation of Holdings Act, 1953 – Sections 5(c), 5(1)(c) (ii), 9A - Plaintiff-respondents filed suit for specific performance with allegation that defendant no.1 was sirdar of disputed land - An agreement for sale had taken place in between plaintiff and defendant No.1 for Rs.8000/-. and Rs.6000/- was paid to defendant no.1 - Defendant No.1 executed Ikrarnama and agreed to execute a sale deed after becoming Bhumidhar - When the plaintiff asked defendant no.1 to pay remaining amount and get sale deed executed, she told that sale deed was executed in favour of defendants no. 2 to 5 – Defendants contended that she deposited twenty times land revenue, thereafter she became the Bhumidhar - Trial court decreed the suit of plaintiff, directed that defendant no.1 shall execute sale deed after receiving Rs.2000/- , failing which the plaintiff would executed on expenses of defendant – Defendant filed appeal, dismissed – Held, the Trial Court, after considering evidence found that P.W.1 to P.W.3 proved agreement to sale in accordance with law - In view of Section 101, the burden to prove that agreement was not made by her was on her - The trial court found that sale deed was executed during consolidation proceedings, therefore it is illegal and non effective - The plaintiff have proved their readiness and willingness of performance and get the sale deed executed. (Para 4, 6, 7, 16, 17, 22, 24)**

**Second Appeal Dismissed.** (E-13)

**List of Cases cited:**

1. Jagdish Prasad Patel (dead) through Legal representatives & anr. Vs Shivnath & ors., (2019) 6 SCC 82

2. U.N.Krishnamurthy (since Deceased) through LRs Vs A.M. Krishnamurthy, 2022 (40) LCD 2445

3. Smt. Ram Rati & ors. Vs Gram Samaj, Jehwa & ors., AIR 1974 Allahabad 106 Full Bench

4. Smt. Ram Dei Vs Joint Director of Consolidation & ors., 2020 (38) LCD 1455

5. Daulat Ram & ors. Vs Sodha & ors., AIR 2005 Supreme Court 233

6. Robins Vs National Trust Company, Limited, & ors., A.C. and Privy Council 515

7. Narendra Bahadur Singh & ors. Vs Ram Manorath Singh & ors., 2023 (41) LCD 2023

8. Suryakunwari Vs Nanhu & ors. 2019 (37) LCD 2346

(Delivered by Hon'ble Rajnish Kumar, J)

1. Heard, Shri Avadhesh Kumar, learned counsel for the appellant and Shri Aditya Kumar Tiwari, learned counsel for the respondents.

2. This Second Appeal under Section 100 of the Civil Procedure Code 1908 has been filed against the judgment and decree dated 28.02.1986 passed by II Addl. District Judge, Faizabad in Civil Appeal No.410 of 1980; Smt. Ram Sanehi and others Versus Aditya Prakash which has been dismissed with cost affirming the judgment and decree dated 24.09.1980 passed by the Munsif, Hawali, Faizabad in Regular Suit No.182 of 1979; Aditya Prakash Pandey Versus Srimati Ram Sanehi and others, by means of which the suit had been decreed providing therein that the defendant no.1 would execute the registered sale-deed within one month after taking Rs.2000/- from the plaintiff failing which the plaintiff would get it done from the court on the expenses of defendants.

3. The substantial questions of law formulated in this appeal are as under:-

> "(1) Whether the burden to prove that the transaction with an illiterate and infirm village lady was made, fairly, consciously and with independent advice of the lady or not was on the defendant-lady or on the plaintiff-respondents and as to whether without proof of the same, the courts below were justified in decreeing the suit?"
>
> (2) Whether the lower appellate court was justified in refusing the prayer of the lady to get herself examined in court and still drawing inferences for not examining herself."

4. The brief facts of the case giving rise to this appeal are that the plaintiff-respondents had filed suit for specific performance and damages with the allegation that defendant no.1 was the sirdar of the disputed land. She wanted to dispose of, for which an agreement for sale had taken place in between the plaintiff and defendant No.1 for Rs.8000/-. Out of which a sum of Rs.6000/- was paid to the defendant no.1 by the plaintiff. Defendant No.1 executed an Ikrarnama because at that time this land was Sirdari land of defendant no.1. Defendant no.1 agreed to execute a sale deed in favour of plaintiff in respect of the land in question after becoming the Bhumidhar. She also agreed to give the possession to the plaintiff and gave it after taking Rs. 6000/-. Defendants no.2 to 5 are the Pattidars of plaintiff. They kept enmity

with him. They misguided the defendant no.1. When the plaintiff went to defendant no.1 to pay the remaining amount and get the sale deed executed, she refused to take it and she told that she executed a sale deed in favour of defendants no. 2 to 5 in respect of the land in question. Defendants no.2 to 5 had misguided the defendant no.1 and got the sale deed executed in their favour from her. Defendant no. 2 to 5 were knowing this fact that defendant no.1 had executed Ikrarnama in his favour even then they persuaded defendant no.1 to get the sale deed executed in their favour.

5. Defendant no.1 had filed written statement and alleged that she had executed a sale deed in favour of defendants no. 2 to 5 in respect of the land in question after taking consideration of Rs.9000/-. She alleged that she never talked with plaintiff to sale the land in question. She never executed any Ikrarnama in favour of the plaintiff. She never talked with plaintiff to give the possession to him. The plaintiff was not in possession over the land in question. She never made her signatures or thumb impression over any plain and blank paper. The plaintiff never raised any objection for execution of sale deed in favour of defendants no.2 to 5.

6. Defendants no. 2 to 5 had filed their written statement alleging that defendant no.1 was the Sirdar of the land in question. She deposited twenty times land revenue and thereafter she became the Bhumidhar of the land in question. She executed a sale deed dated 24.06.1976 in favour of defendants no. 2 to 5. She delivered the possession to the defendants no. 2 to 5. They have been coming in possession over it. They have become the owner of it. The defendant no.1 never executed any agreement in favour of plaintiff. The alleged agreement is forged and fictitious. Plaintiff was never in possession over this land. The alleged Ikrarnama is antedated.

7. After exchange of pleadings six issues were framed by the Trial court and thereafter the evidence was adduced by the parties. After considering the evidence adduced by the parties learned trial court decreed the suit of the plaintiff-respondent with a direction that the defendant no.1 shall execute the sale deed after receiving Rs.2000/- from the plaintiff-respondent failing which the plaintiff-respondent would get it executed on the expenses of the defendant. Being aggrieved the defendant-appellants preferred appeal against the judgment and decree passed by the trial court. The appeal has been dismissed confirming the judgment and decree passed by the trial court, therefore the defendant-appellants are before this court in this second appeal.

8. Learned counsel for the appellants submitted that no agreement was made by the defendant no.1, namely, Smt.Ram Sanehi, with the plaintiff-respondents. She had denied her thumb impression or signatures on the alleged agreement to sale. The suit for specific performance was filed on misconceived and baseless grounds on the basis of the forged agreement. The learned Trial court as well as the appellate court, without considering the pleadings of the parties, material and evidence on record decreed the suit and dismissed the appeal. He further submitted that the application for additional evidence filed before the First Appellate court had wrongly and illegally been rejected by means of the order dated 12.08.1983 by the First Appellate Court. In case the application would have been

allowed and the thumb impression verified, the matter could have been settled. He further submitted that the defendant no.1 Smt. Ram Sanehi, the executor of agreement to sale died during pendency of the First Appeal, therefore the direction issued by the trial court has become non executable after her death and it cannot be executed. The agreement to sale could not be proved in accordance with Section 45 of the Evidence Act 1872. The evidence of the P.W.2 has wrongly and illegally been considered by the courts below.

9. On the basis of above, learned counsel for the appellants submitted that the judgments and decree passed by the courts below are not sustainable in the eyes of law, which are liable to be set aside and the appeal is liable to be allowed on the substantial questions of law formulated by this court. Learned counsel for the appellants relied on **Jagdish Prasad Patel (dead) through Legal representatives and another Versus Shivnath and others; (2019) 6 SCC 82, U.N.Krishnamurthy (since Deceased) through LRs Versus A.M.Krishnamurthy; 2022 (40) LCD 2445, Smt. Ram Rati and others Versus Gram Samaj, Jehwa and others; AIR 1974 Allahabad 106 Full Bench and Smt. Ram Dei Versus Joint Director of Consolidation and others; 2020 (38) LCD 1455.**

10. Per contra, learned counsel for the plaintiff-respondents submitted that the defendant no.1 had entered into an agreement with the plaintiff-respondents for agreement to sale of the land in dispute and after receiving Rs. 6000/-, she had handed over the possession and the sale deed was to be executed after getting Bhumidhari rights because the land was sirdari land at that time. The plaintiff-respondent approached the defendant no.1 with Rs.2000/- for execution of sale deed, then she told that she has executed the sale deed of land in dispute in favour of defendants no. 2 to 5 i.e. the present appellants, therefore the plaintiff-respondent had to file the suit. The plaintiff-respondent proved the agreement by cogent evidence and he was always ready and willing to comply his part but the defendant no.1 has not complied. The defendant no.1 had not appeared in evidence to prove that the agreement to sale was not executed by her and her thumb impressions are not on the agreement, whereas one attesting witness of the agreement to sale and writer of agreement were produced to prove the agreement to sale and nothing could be extracted by the defendant-appellants from them, which may create any doubt about the veracity of their evidence. She could also have applied for expert opinion to prove that her signatures are not on agreement but it was not done. In view of Section 101 of the Evidence Act, 1872 burden of proof that the agreement to sale was not executed by Smt. Ram Sanehi was on her as she was alleging that she has not signed or put thumb impression on it because it was proved that the agreement to sale was executed by her. He further submitted that the thumb impression on agreement to sale is clear but no verification of thumb impression was made on the written statement and as per findings recorded by the courts below the thumb impression on the 'Vakalatnama' was also blurred, so that it may not be verified. He further submitted that the application under Order 41 Rule 27 of Civil Procedure Code has rightly and in accordance with law been rejected by the First Appellate Court. There is no illegality or infirmity in it. He further submitted that the objection filed under Section 9 A of the

Consolidation of Holdings Act, 1953 by the Consolidation Officer was stayed in appeal, which is still operative. The sale deed was executed without seeking permission from the consolidation authorities, therefore the suit itself was barred under Section 5(c) of the U.P. Consolidation of Holdings Act, 1953 and it was liable to be dismissed on this ground alone. Lastly learned counsel for the respondents submitted that the concurrent findings of facts recorded by the courts below cannot be interfered by this court in Second Appeal as there is no illegality, infirmity or perversity in the same as the findings have been recorded on the basis of the pleadings, material and evidence on record.

11. On the basis of above, learned counsel for the respondents submitted that the judgments and decree passed by the courts below have been passed in accordance with law and no substantial question of law arises in this appeal. The appeal has been filed on misconceived and baseless grounds and it is liable to be dismissed with cost. Learned counsel for the respondents relied on **Daulat Ram and others Versus Sodha and others; AIR 2005 Supreme Court 233, Robins Versus National Trust Company, Limited, and others; A.C. and Privy Council 515 and Narendra Bahadur Singh and others Versus Ram Manorath Singh and others; 2023 (41) LCD 2023.**

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

13. The Suit for specific performance and damages was filed by the predecessor-in-interest of the plaintiff-respondents alleging therein that Smt. Ram Sanehi; the defendant no.1 was intending to sale her property, therefore, she had entered into an agreement to sale for Rs. 8000/- and after receiving Rs. 6000/-, the possession was handed over to him. The agreement to sale was executed on 28.05.1976. At the time of execution of agreement, Late Smt. Ram Sanehi was Sirdar of the land in dispute and the land in dispute was under consolidation operation and the agreement was executed to execute the sale deed by permission from the Consolidation Officer after payment of the remaining amount of Rs.2000/-. In pursuance thereof after receiving Rs.6000/- the possession was handed over to the plaintiff-respondents. In the 1st week of August 1976 the plaintiff-respondent went to Late Smt. Ram Sanehi with Rs.2000/- for payment and execution of sale deed. Then the defendant no.1 told that she has already sold the land in dispute to the defendants no.2 to 5 i.e. the appellants. It was further alleged that the plaintiff-respondent was and is always ready and willing to pay the remaining Rs.2000/- and get the sale deed executed. The written statement was filed by the defendant no.1; Late Smt. Ram Sanehi denying the averments made in the plaint and stating that she has not made any signatures or put her thumb impression either on the agreement or on any plain paper. The plea was also taken that even if the signature or thumb impression is tried to be proved, even then no agreement has taken place between the plaintiff-respondent and the defendant no.1, therefore the same is totally forged and the plaintiff-respondent would not get any benefit out of it. The written statement was filed on 27.08.1979. A separate written statement was filed by the defendants no.2 to 5 i.e. the appellants denying the averments made in the plaint and stating that after deposit of 20 times land revenue the defendant no.1 has acquired the

Bhumidhari rights and she has executed a sale deed in their favour on 24.06.1976 for a consideration of Rs.9000/- and has also handed over the possession. They have also denied that any agreement to sale was made by the defendant no.1 in favour of plaintiff-respondent.

14. Thereafter the evidence was adduced by the parties, in which the plaintiff-respondent had appeared as P.W.1 and the witness and writer of the agreement to sale as P.W.2 and P.W.3. They proved the agreement to sale and as to how it was executed. They deposed that the agreement was read over and explained to defendant no.1; Late Smt. Ram Sanehi and thereafter she put her thumb impression on the agreement. Thereafter witnesses Hans Raj and Shiv Prasad had put their thumb impression/signature. Hans Raj, who had appeared as P.W.2 had proved the agreement to sale. Raj Bahadur the writer of the agreement to sale had appeared as P.W.3 and proved that it is the same agreement to sale, which was written by him. The writer P.W.3 has also stated that he had put his signature on the agreement. Thus the agreement was proved by the plaintiff-respondent by adducing cogent evidence.

15. The defendant-appellants though took a plea that no agreement to sale was executed by the defendant no.1 in favour of predecessor-in-interest of the plaintiff-respondents but the defendant no.1, who could have proved that the agreement to sale was not executed by her had not appeared in the witness box, whereas as per Section 101 of the Evidence Act, the burden was on the defendant no.1 to prove that the agreement was not executed by her because it was asserted by the defendant-appellants. The learned Trial court, after considering the pleadings of the parties and considering the evidence adduced before it, while deciding the issue no.5 as to whether the defendant no.1 has not put her thumb impression on the agreement to sale as asserted by her in paragraph 17 of her written statement, has recorded that the agreement to sale was put in sealed cover on the date of filing of the suit on 22.05.1979. The written statement was filed on 28.08.1979, though a copy was on record but the defendant no.1 has not made endorsement not admitted on the agreement or its copy, as such the same stands admitted. Learned trial court has also found that the defendant No.1 has stated that she has neither signed nor put thumb impression on the agreement to sale or any plain paper without going through the original agreement to sale, therefore she was determined to deny the execution of agreement to sale in any case. Even otherwise if she was illiterate and does not sign then the question of stating that she has not signed or put thumb impression would not have been mentioned, when the photocopy was also on record. The learned trial court also found that the thumb impression of the defendant no.1 on the agreement to sale is clear, whereas on the written statement and the Vakalatnama it is blurred and it has also not been identified by any counsel. Learned Trial court also recorded a finding that the defendant no.1 was the best witness to prove that the agreement to sale was not executed by her but she had not appeared in the witness box to record her evidence on oath. Thus the thumb impression on the agreement to sale is of the defendant no.1. The Privy Council, in the case of **Robins Versus National Trust Company Limited and others (Supra)**, has held that onus is always on the person who attacks the will.

16. The learned Trial Court, while considering the issue no.1 as to whether the

defendant no.1 has executed the agreement to sale after receiving Rs.6000/- as advance and has also handed over the possession to plaintiff-respondent, after considering the evidence and material on record has recoded the findings that P.W.1, P.W.2 and P.W.3 have proved the agreement to sale in accordance with law. The D.W.2 Govind though had stated about the possession of Raj Bahadur but he does not know as to whether he has given any evidence in the case of Ram Abhilakh Versus Hridai Ram or not. D.W.3 Ram Abhilakh has stated that he has not seen the possession of Aditya Prakash this time, but for any time, he can say nothing. He also could not tell the area of the land in dispute. He also could not tell the plots adjacent to the land in dispute. The plaintiff-respondent produced certain documents to prove their possession. On the contrary, the defendant-appellants had not filed any document to show their possession. Thus the issue no.1 was also decided in favour of the plaintiff-respondent. Accordingly the issue no.2 was decided. This court does not find any illegality or infirmity in the aforesaid findings recorded in regard to the aforesaid issues on the basis of evidence and material on record.

17. The plea of illiterate and infirm village lady was not taken by the defendant no.1 either in her written statement or in the First Appeal filed by her along with the defendant-appellants, therefore, it cannot be said that the burden to prove that the transaction with the illiterate and infirm village lady was made fairly, consciously and with independent advise of the lady or not was on the plaintiff-respondent, rather in view of Section 101 of Indian Evidence Act, the burden to prove that the agreement was not made by her was on her because this plea was taken by her and the plaintiff-respondent has proved that the agreement was made by her by adducing cogent and convincing evidence. Since the plea of infirm and village lady was not taken by the defendant no.1 in her written statement or in the appeal filed by her, therefore this plea is not available to the defendant-appellants. Even otherwise it was not the case also. Therefore this court is of the view that the courts below have rightly and in accordance with law decreed the suit and dismissed the appeal. Thus the first substantial question of law does not arise in this appeal.

18. The defendant no.1 Smt. Ram Sanehi had not appeared in the witness box and after the judgment and decree was passed by the trial court, she filed first appeal and at the appellate stage she moved an application for her examination or for remanding the case for fresh decision after taking her evidence on the ground that she was not examined before the court, which has been criticized by the learned Munsif. It was further alleged that the appellants had been ill advised by their counsel and their failure to appear in the witness box was for the said reason. The learned first appellate court dismissed the application by means of the order dated 12.08.1983 holding that the ill advice of the counsel would not be a valid ground for taking the additional evidence and if she preferred to withheld herself from swearing the oath it cannot be said that it has not been produced with due diligence. It has also been recorded that the counsel for the defendant-appellants admitted that it cannot be a ground for remand.

19. Order 41 Rule 27 of Civil Procedure Code (here-in-after referred as CPC) provides for production of additional evidence in appellate court in three

contingencies. First of which is that the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted. The second is that the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed. The third is that the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. The first two contingencies are not attracted at all in this case. So far as the third contingency is concerned, the appellate court can pass such order if it requires that it is necessary to enable it to pronounce the judgment or for any other substantial cause but this power can not be exercised to fill up the lacuna, if any. In this case since the agreement to sale was proved by adducing the cogent evidence before the trial court, therefore this court is of the view that there was no occasion for the first appellate court to pass any such order. In view of above this court does not find any illegality or error in rejection of the application by the learned first appellate court. However it does not preclude the court from drawing adverse inference to strengthen the view taken by it on the basis of pleadings, evidence and material on record. Thus the second substantial question of law is decided accordingly.

20. The appellants have filed an application bearing IA No.9 of 2022 under Order 41 Rule 27 CPC before this court for bringing on record certain documents as permitted by this court by means of judgment and order dated 23.09.2021 passed in Review Petition No. 264 of 2003; Chandra Bhan Major and 4 others (Second Appeal No. 224 of 1986) Versus Aditya Prakash, which was filed for review of the judgment and order dated 14.08.2003 passed by this court in this Second Appeal, by means of which the appeal was dismissed without formulating the substantial questions of law after admission of appeal. The application has been filed for taking on record the certified copy of Registered Sale deed dated 24.05.1976, a copy of the judgment and order dated 04.05.2006 passed by the Consolidation Officer, Bikapur, Faizabad, photocopies of Khatauni and Khasra of the plots in dispute and report of finger print expert sought by the defendant-appellants from Mr. D. K. Patel at Ahmadabad. So far as the certified copy of the sale deed dated 24.05.1976 is concerned it could have been filed earlier. The order passed by the Consolidation Officer dated 04.05.2006 does not decide the title and it has been passed on account of pendency of this appeal and as argued it has been stayed in appeal and stay is still operating. Khasra and Khatauni of the land in question could have been filed by the defendants-appellants earlier also. Even otherwise the order dated 04.05.2006 passed by the Consolidation Officer has no material bearing on the present case as the same has been passed in consolidation proceedings only on the ground that the judgment and decree passed by the trial court has not been executed because the plaintiff-respondents have failed to show the payment of the remaining amount of Rs.2000/- within the time granted by the trial court and execution of sale deed thereafter because the appeal is pending. So far as the report of the finger print expert obtained by the defendant-appellants is concerned, the same has been given on the basis of the zerox copies and it is only

provisional and subject to verification of original documents. Even otherwise it cannot be said that the thumb impression on the sale deed made in favour of the defendant-appellants are the admitted thumb impression of Smt. Ram Sanehi; the defendant no.1 because the plaintiff-respondent has only averred in the plaint that the sale deed was executed by her as informed by her, when the plaintiff-respondent approached her with the remaining amount of Rs.2000/- for execution of sale deed. This court is of the view that the application moved under Order 41 Rule 27 CPC before this court is misconceived and baseless and liable to be rejected only.

21. The Hon'ble Supreme Court, in the case of **Jagdish Prasad Patel (dead) through Legal Representatives and another Versus Shivnath and others (Supra)** has summarized the principles for taking additional evidence on record under Order 41 Rule 27 CPC and held that the provisions does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment and the matter is entirely within the discretion of the court and it is to be used sparingly. The relevant paragraphs 29 and 30 are extracted here-in-below:-

"29. Under Order 41 Rule 27 CPC, production of additional evidence, whether oral or documentary, is permitted only under three circumstances which are:

(I) where the trial court had refused to admit the evidence though it ought to have been admitted;

(II) the evidence was not available to the party despite exercise of due diligence; and

(III) the appellate court required the additional evidence so as to enable it to pronounce judgment or for any other substantial cause of like nature.

An application for production of additional evidence cannot be allowed if the appellant was not diligent in producing the relevant documents in the lower court. However, in the interest of justice and when satisfactory reasons are given, the court can receive additional documents.

30. In *Union of India v. Ibrahim Uddin [Union of India v. Ibrahim Uddin*, (2012) 8 SCC 148 : (2012) 4 SCC (Civ) 362] , this Court held as under : (SCC pp. 167-68 & 170, paras 36-37, 40 & 47)

"36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take

additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide K. Venkataramiah v. A. Seetharama Reddy [K. Venkataramiah v. A. Seetharama Reddy, AIR 1963 SC 1526] , Municipal Corpn., Greater Bombay v. Lala Pancham [Municipal Corpn., Greater Bombay v. Lala Pancham, AIR 1965 SC 1008] , Soonda Ram v. Rameshwarlal [Soonda Ram v. Rameshwarlal, (1975) 3 SCC 698] and Syed Abdul Khader v. Rami Reddy [Syed Abdul Khader v. Rami Reddy, (1979) 2 SCC 601] .)

37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali & Co. [Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali & Co., (1978) 2 SCC 493] .)

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40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

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47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important

bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed."

22. The trial court, while considering the issue no.3 as to whether the sale deed is against the Consolidation Act and illegal has held that since it was executed during consolidation proceedings, therefore in view of Section 5(1)(C) (II) of the U. P. Consolidation of Holdings Act, 1953 read with Section 45(A) (2) it is illegal and non effective. The issue no.4, as to whether the agreement to sale is illegal and forged has been decided in negative and the issue no.5 that the suit is liable to be decreed. The appellate court also considering the pleadings of the parties, evidence and the grounds raised in the appeal held that the agreement was executed by the defendant no.1 in favour of the Plaintiff-respondents in respect of land in question and also upheld the findings recorded by the trial court in accordance with law. This court does not find any illegality or infirmity in the findings recorded by the courts below.

23. The Full Bench of this court, in the case of **Smt.Ram Rati and others Versus Gram Samaj, Jehwa and others (Supra)** has held that the provisions of Section 5(1)(c) (ii) could apply to transfer of part of holdings only, but no such plea has been taken in the present case, therefore it is not applicable.

24. The Hon'ble Supreme Court, in the case of **U.N. Krishnamurthy (Since deceased) through LRs Versus A.M.Krishnamurthy (Supra)**, has held that it is settled law that for relief of specific performance, the plaintiff has to prove that all along and till the final decision of the suit, he was ready and willing to perform his part of the contract. In the present case the plaintiff-respondents have proved their readiness and willingness of performance on their part and get the sale deed executed, till now.

25. A Co-ordinate Bench of this court, in the case of **Smt. Ram Dei Venus Joint Director of Consolidation and others (Supra)**, has considered the comparison of thumb impression made by the court but it is not applicable in the facts and circumstances of the present case because it is not the case herein.

26. The Hon'ble Supreme Court, in the case of **Daulat Ram and others Versus Sodha and others (Supra)**, has held that the document has to be proved by primary evidence except where court finds that the document is to be proved by leading the secondary evidence.

27. It is settled law that the concurrent findings of facts recorded by the two courts below cannot be interfered unless the findings are without jurisdiction, perverse or against the evidence and record. A Co-ordinate Bench of this Court, after considering several judgments of the Hon'ble Supreme Court in the case of **Suryakunwari versus Nanhu and Others 2019 (37) LCD 2346**, has held that the concurrent findings of fact recorded by the two courts are not liable to be set aside unless and until the findings are perverse. The relevant paragraphs 11 to 16 are extracted here-in-below:-

*"11. In this case, there are concurrent findings on facts by*

*both the courts below. The Hon'ble Apex Court in catena of judgments has laid down the law that the concurrent findings of fact recorded by two courts below should not be interfered by the High Court in Second Appeal, unless and until the findings are perverse.*

*12. In a recent case of Shivah Balram Haibatti Vs. Avinash Maruthi Pawar (2018)11 SCC 652 the Apex Court has held as under:-*

*"...... These findings being concurrent findings of fact were binding on the High Court and, therefore, the second appeal should have been dismissed in limine as involving no substantial question of law."*

*13. In another recent case of Narendra and others Vs. Ajabrao S/o Narayan Katare (dead) through legal representatives, (2018) 11 SCC 564 the Hon'ble Apex Court held as under:-*

*"...interference in second appeal with finding of fact is permissible where such finding is found to be wholly perverse to the extent that no judicial person could ever record such finding or where* that finding is found to be against any settled principle of law or pleadings or evidence. Such errors constitute a question of law permitting interference in Second Appeal."

*14. In one more recent case Dalip Singh Vs. Bhupinder Kaur, (2018) 3 SCC 677 the Hon'ble Apex Court has held that if there is no perversity in concurrent findings of fact, interference by the High Court in Second Appeal is not permissible.*

*15. In Gautam Sarup v. Leela Jetly and Ors. [(2008) 7 SCC 85], the Apex Court held that a party is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.*

*16. In State Bank of India and others Vs. S.N. Goyal; (2008) 8 SCC 92 the Hon'ble Supreme Court has held as under :-*

*"Second appeals would lie in cases which involve substantial questions of law. The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of section 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which*

*arises incidentally or collaterally, having no bearing in the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law."*

28. One of the contention of learned counsel for the appellants in this appeal is that since the defendant no.1; Smt. Ram Sanehi who has not received the remaining amount of Rs.2000/- and executed the sale deed has died and no legal representative has been brought on record as she had no legal representative, therefore, the judgment and decree passed by the courts below is not executable. This court is of the view that the contention of learned for the appellants is misconceived and not tenable because the judgment and decree passed by the competent court of law cannot be frustrated merely by death of a person. Even otherwise the trial court has passed an order that if the defendant no.1 does not execute the sale deed, the plaintiff-respondent can get it done from the court on the expenses of defendants, therefore the appellants can deposit the remaining amount with the court concerned, who may pay to the claimant, if any, as and when comes forward on behalf of the defendant no.1 and the court can execute the sale deed.

29. In view of above and considering the overall facts and circumstances of the case this court is of the view that the appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed.

30. With the aforesaid, this Second Appeal is **dismissed**. No order as to costs.

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**(2024) 7 ILRA 1300**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 05.07.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE OM PRAKASH SHUKLA, J.**

First Appeal No. 239 of 2023

**Shruti Agnihotri ...Appellant**
**Versus**
**Anand Kumar Srivastava ...Respondent**

**Counsel for the Appellant:**
Ashish David Rao, Anurag Dixit, Shakti Kumar Verma, Sunieta Ojha

**Counsel for the Respondent:**
Pradeep Kumar, Kapil Dev Chaubey, Seema Kashyap

**A. Family Courts Act, 1984-Section 19-Hindu Marriage Act, 1955 - Sections 7, 8, 9, 12 & 28-Indian Penal Code, 1860-Sections 419, 420 & 496- Fraudulent marriage-the respondent was claiming marriage with the appellant but no evidence produced-no pleading about any celebration or festivities-he filed suit for restitution for conjugal rights-the alleged marriage, based on the Arya Samaj certificate and Certificate of registration at Registrar is a nullity, as prerequisites of a valid marriage as per section 7 of the Act, 1955 in the form of customary rites (Saptpadi) were never performed and the documents got signed fraudulently on the pretext of getting them enrolled as members of spiritual marination-Neither the priest who may have performed the marriage has produced in the Court nor other persons who may have witnessed**

**the ceremony-Thus, in the absence of marriage the certificate issued by any entity is of no legal consequence.(Para 1 to 43)**

**The appeal is allowed.** (E-6)

**List of Cases cited:**

1. Dolly Rani Vs Manish Kumar Chanchal , TA (C) No. 2043 of 2023

2. Ashish Morya Vs Anamika Dhiman FAPL No. 830 of 2022

(Delivered by Hon'ble Rajan Roy, J. & Hon'ble Om Prakash Shukla, J.)

1. Heard Ms. Sunieta Ojha, learned counsel for the appellant and Ms. Seema Kashyap, learned counsel for the respondent.

2. This is an appeal under Section 19(1) of the Family Courts Act, 1984 read with Section 28 of Hindu Marriage Act, 1955 challenging the judgment and order dated 29.08.2023 passed in Original Suit No. 1990 of 2009; Shruti Agnihotri Vs. Anand Srivastava.

3. The appellant herein had filed a Suit bearing No. 1990 of 2009 under Section 12 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act, 1955') against the respondent i.e. the alleged husband, on 14.10.2009. The respondent on the other hand filed a Suit bearing No. 2168 of 2009 under Section 9 of the Act, 1955 on 11.11.2009 seeking restitution of conjugal rights. Both the suits were clubbed together for the purposes of collecting and recording of evidence and for being decided by a common judgment. The evidence is therefore common. The suit of the appellant under Section 12 of the Act, 1955 has been dismissed, whereas, the suit of the respondent under Section 9 of the Act, 1955 has been decreed.

4. The facts of the case in brief are that the appellant and her family were residents of Kanpur. The appellant's 'mausi' used to reside at Lucknow. Through her 'mausi' the family members of the appellant, except her father, came in touch with the respondent herein, who, as alleged, was a religious Guru and used to hold religious discourses at his residence, at Lucknow. The appellant while she was a minor used to go with her mother, mausi and maternal uncle, to the residence of respondent for such religious discourses including on the occasion of Gurupurnima or other special occasions. The family members of the appellant, except her father, were deeply under the influence of the respondent and used to refer him as their Spiritual Guru. It is stated that during ceremonies at the place of the respondent certain 'prasad' including 'special prasad' used to be given and on taking the same the disciples used to feel elevated and used to loose normal consciousness.

5. It is said that on 05.07.2009 which was Gurupurnima the respondent called the mother of the appellant for signing certain papers on the pretext of enrolling them as members of his spiritual institution, accordingly, the appellant and her mother visited his place at Lucknow and signed certain papers. It is alleged that on 03.08.2009 when the appellant and her mother had gone to Lucknow to attend birthday of appellant's cousin, they were again called by the respondent at his place and made to sign certain papers on the pretext of being witnesses to a sale deed and they signed certain documents. It is pertinent to mention that on the relevant date i.e. 05.07.2009 the appellant had

barely crossed marriageable age of 18 years, say by 12 days, her date of birth being 21.06.1991, whereas, the respondent was at that time about 39 years of age.

6. On 05.08.2009 the respondent called the father of the appellant to inform him that he had married the appellant at Arya Samaj Mandir, Ganeshganj, Lucknow on 05.07.2009 and had got it registered with the Registrar of Marriages on 03.08.2009. This sent the entire family into a tizzy. They were all taken aback and felt cheated by the fraudulent act of the respondent, who, it appears, used the signed papers aforesaid to get a marriage registered, although, according to the appellant, she had never married the respondent and had never given her consent for the same. All efforts by family members of the appellant to contact the respondent failed, but, ultimately, they some how persuaded him to meet the family members and the appellant's father and mausa reached his residence on 04.09.2009. They called the Police and get the respondent arrested. An F.I.R. was lodged by the father of the appellant at Police Station - Gazipur, District- Lucknow under Sections 419, 420, 496 IPC.

7. It is against the aforesaid background, as the appellant had never married the respondent nor had she ever consented for the same of her own free will, a suit was filed by her under Section 12 of the Act, 1955. Thereafter, a Suit under Section 9 of the Act, 1955 was filed by the respondent.

8. Before the Family Court the appellant examined herself as PW-1. Her maternal uncle Harsh Shukla was examined as PW-2 and her mother was examined as PW-3. On the other hand the respondent examined himself as DW-1. One Shri Anil Kumar Khare was examined in chief by way of an affidavit dated 01.07.2023 as DW-2, however, he did not enter the witness box for cross examination, therefore, his testimony has not been taken into consideration by the trial Court, rightly so. One Shri Ram Pratap Giri was examined as DW-3 on behalf of the respondent.

9. Apart from it, documentary evidence was also led by both the parties which would be considered hereinafter.

10. The trial Court framed the following issues in Suit No. 1990 of 2009 on 21.05.2017:-

> *"1- क्या वादी द्वारा प्रतिवादिनी से छल कपट करके विवाह किया गया है जैसा कि वादपत्र में उल्लिखित है ?*
>
> *2- क्या वादिनी प्रतिवादी के विरुद्ध विवाह दिनांक 05.7.2009 को शून्य करा पाने की अधिकारिणी है ?*
>
> *3- क्या वादिनी किसी अन्य अनुतोष को प्राप्त करने का अधिकारी है \"*

11. On the same date i.e. 21.05.2017 the following issues were framed in Suit No. 2168 of 2009:-

> " 1- क्या वादी वाद पत्र में किये गये अभिकथनों के आधार पर प्रतिवादिनी के विरुद्ध वैवाहिक सम्बन्धों के पुर्नस्थापना की डिक्री प्राप्त करने की अधिकारी है जैसा कि वादपत्र में कहा गया है?
>
> 2- क्या वादी अन्य किसी अनुतोष को प्राप्त करने का अधिकारी है ?"

12. On a consideration of the facts pleaded and evidence led in the light of the issues framed, the trial Court has recorded a finding that Gurupurnima did not fall on 05.07.2009 instead it fell on 07.07.2009. Further, from the marriage certificate

issued by Arya Samaj Mandir and the Registrar of Marriages as also the photos affixed thereon which has been accepted by the appellant as hers and no evidence has been led to rebut the said documentary evidence, therefore, they were reliable. Based on the aforesaid, the Court below has recorded that the presence of the appellant at the Arya Samaj Mandir and Registrar's Office has been proved. The Court below has recorded that certificate issued by the Arya Samaj Mandir, Ganeshgaj, Lucknow and the Registrar bore the signature of the appellant's mother Prama Agnihotri. PW- 2 Harsh Kumar Shukla, her maternal uncle, on being confronted with the aforesaid documents stated that these were all fabricated documents and that the appellant had herself stated that she was deceived in signing certain papers after taking some 'prasad' etc. The Court below found that even PW-2 has accepted the signatures of the appellant on the aforesaid documents. The Court below has found contradictions and inconsistencies in the testimony of PW-3 and PW-1 i.e. the appellant. While PW-3 has stated that he has no knowledge of any such marriage between the appellant and the respondent and that it was a fraudulent act, the appellant herself has stated in last paragraph of her examination-in-chief that marriage between the appellant and respondent had taken place on 05.07.2009 fraudulently and that the same be declared null and void. Thus, the appellant on the one hand denies the marriage and on the other hand has sought a declaration that the marriage be declared as null and void, whereas, even in the first information report lodged by the father of the appellant there is a mention about she being taken to the Arya Samaj Mandir and the Registrar's Office and the father has also stated therein about marriage being solemnized in the temple. The Court below found that the case set-up by the appellant/plaintiff that at the time of marriage and registration of the same she was hypnotized and was not in her senses, but, this was not believable, as, the Arya Samaj Mandir and Registrar's Office are not secluded place. These are public place where several persons are present. The trial Court has opined that the appellant has also not given any reason as to why no medical examination was got done and action taken when she fell slightly different on taking 'prasad' given by respondent. Though, the appellant had denied her writing on some of the documents viz C-50/1, C-50/2, C-50/3 and 50/4, she had not adduced any evidence of a hand writing expert to prove that some of the said documents had been written by the respondent. The Court below did not find any document on record establishing that the respondent had been convicted of the offence alleged in the F.I.R. lodged against him by father of the appellant. The Court below found that on 03.07.2009 appellant was a major and had completed her intermediate and her mother possessed the educational qualification of M.A., B.A. and was a Teacher, therefore, it was not believable that they would be present at the Arya Samaj Mandir and at the Registrar's Office for registration of marriage unknowingly or under some influence and would also sign the documents relating to such marriage. The appellant and her family members did not take any action if they were of the opinion that the respondent was using 'tantra mantra' on them. The Family Court has found that, although, there is a difference of 20 years in the age of the appellant and respondent, but, the presence of the appellant at the Arya Samaj Mandir and the Registrar's Office is proved and the appellant had failed to prove that the marriage was

solemnized by fraud or deceit by the respondent. The Court below has also taken into consideration the testimony of respondent- herein that the appellant had given her consent to marriage and was agreeable to the same till she was beaten up by her maternal uncle and it is under pressure of her family members that all these proceedings have been initiated. Accordingly, the trial Court has dismissed the suit of the appellant.

13. With regard the Suit No. 2168 of 2009 under Section 9 of the Act, 1955 filed by the respondent there is no discussion by the trial Court in the light of the ingredients/ parameters mentioned in the said provision, satisfaction of which is a prerequisite for decreeing such a suit for restitution of conjugal rights. The trial Court has simply mentioned the willingness of the respondent to take his wife i.e. the appellant, with him, and accordingly, the Suit has been decreed.

14. The contention of the appellant' counsel is that in fact no marriage took place between the appellant and the respondent. The alleged marriage and registration of marriage is a fraudulent act by the respondent referable to Section 12(1)(c) of the Act, 1955. On the other hand the respondent's counsel submitted that there is sufficient proof on record to prove that marriage had taken place between the appellant and the respondent and she being a major and she as also her mother being educated ladies it is unbelievable that they would go to the Arya Samaj Mandir to get the marriage solemnized and then to the Registrar of marriages to get it registered without their consent and free will. The turn around in their stand is on account of pressure of the family, nothing else. There is no reasonable excuse for the appellant to withdraw from the society of the respondent, therefore, no interference is called for by this Court with the judgment of the trial Court.

15. It is not in dispute that both the appellant and the respondent are Hindus. It is case of the respondent as is evident from the pleadings that his marriage with the appellant was solemnized as per Hindu rites and customs. Thus, there is no dispute that both the parties are Hindus and the marriage being claimed by the respondent is not under the Special Marriage Act, 1954 but as per Hindu rites and customs, therefore, necessarily it has to be in terms of the Hindu Marriage Act, 1955. The respondent claims that marriage had taken place at the Arya Samaj Mandir, Ganeshganj, Lucknow, thereafter, it was got registered in the Office of Registrar of the marriages, which is referable to Section 8 of the Act, 1955 and the Rules made thereunder by the State Government. The Hindu Marriage Act, 1955 applies not only to Hindus but also to followers of Brahmo, Prarthana or Arya Samaj and other religious communities.

16. The points which fall for determination in this appeal are as under:-

(1) Whether any marriage was solemnized between the appellant and the respondent as per Hindu rites and customs and in terms of Section 7 of the Act, 1955 or not ?

(2) Whether such marriage was solemnized with the consent and free will of the appellant or fraudulently. If not, the consequences and relief to which the appellant may be entitled under Section 12 of the Act, 1955 ?

(3) If the answer to the aforesaid questions, is also in the affirmative, then, the other point for determination would be as to whether the appellant has/had any reasonable cause to withdraw from the Society of the respondent. If not, then, the relief to which the respondent would be entitled in his Suit under Section 9 of the Act, 1955 ?

Point No. 1 is implicit in Point no. 2.

17. Having heard learned counsel for the parties and having perused the records including the records of the trial Court, we find that the appellant herein had attained marriageable age of 18 years on 21.06.2009. She had, thus, barely crossed 12 days from the marriageable age when the alleged marriage is said to have taken place. The family members including the appellant revered the respondent as their spiritual guru, however, the father, as has come in the testimony of the appellant herself, did not approve of such activities nor did he ever visit the respondent at Lucknow nor was he present at the time of the alleged marriage at Arya Samaj Mandir, Ganeshganj, Lucknow nor in the office of Registrar of Marriages at Lucknow. Even the respondent has not deposed about his presence at any time at his place or during alleged marriage at the Arya Samaj Mandir or at the time of its registration at Lucknow. No doubt, 05.07.2009 was not a Gurupurnima, instead, it was on 07.07.2009 and it appears that the cousin's birthday was also not on 03.08.2009, facts which have weighed with the trial Court in disbelieving the case of the appellant. In our opinion the trial Court has missed the woods for the trees. The appellant has nowhere admitted marriage with the respondent as claimed by the latter. The allegation of fraud in respect of the marriage being claimed by the respondent is on account of certain papers having been got signed by the respondent and, as apprehended, the same being used for preparation of relevant certificates etc. to show that some marriage had taken place between the appellant and the respondent, but, such pleadings on behalf of the appellant can not constitute admission of any relationship of husband and wife with the respondent nor of any marriage having taken place between them. She has nowhere admitted that any such marriage had taken place in accordance with Hindu rites and customs nor has she admitted performance of any such ceremonies which were necessary for a valid Hindu marriage. In fact, it has been stated in paragraph 10 and 11 of her plaint that on 05.08.2009 the respondent telephoned her father to inform him that he had married the appellant on 05.07.2009 and had got it registered on 03.08.2009. On receiving such information the appellant-plaintiff and her family members underwent great mental stress and pain because the appellant and her family members reposed trust in the respondent as their Spiritual Guru but had been deceived and without consent of the appellant a fabricated marriage was being claimed on the basis of cheating and deceit. The background of these pleadings is the assertion in Paragraph 7 about getting some papers signed by the appellant and her mother on the false pretext of sale of property or getting them enrolled as members of spiritual marination. It is in this context that these allegations have been made. These can not be construed as an admission of any marriage as per law with the respondent.

18. In para 14 of her plaint the appellant-plaintiff has clearly stated that

she had never given such consent for marriage. She has stated that it is the result of cheating, fraud and deceit. The marriage has been referred as a fabricated marriage. This can never be construed as admission of any such marriage of the appellant with the respondent. She has categorically stated in Para 15 that not only the marriage was a fabricated one she had never lived as husband and wife prior to or after such alleged marriage. No relationship of husband and wife had been formed prior to or subsequent to such fabricated marriage.

19. In this regard we may also examine the testimony of the appellant/plaintiff i.e. PW-1. Therein, also we do not find any admission of such marriage or the ceremonies which are necessary for solemnization of such marriage as per Hindu rites and customs so as to constitute a valid marriage as per law. In her cross examination she has categorically stated - 'मेरी आनन्द से कभी कोई शादी हुयी ही नहीं'. If there was any doubt in this regard the same stood clarified by this statement in her cross examination by the respondent-defendant. She has denied the certificate of marriage issued by the Arya Samaj Mandir and the Registrar of marriages. When she was shown the photographs affixed on the certificate of marriage issued by the Registrar's Office she has stated that, though, the photo appears to be hers but she has never got such marriage registered. She has reiterated that the respondent/defendant got some papers signed by her and her mother on the pretext of purchasing some property and enrolling them as members of his spiritual organization and, believing him, as, they had a relationship of trust and faith, he being their being Spiritual Guru, they signed the papers. She has reiterated that she has never solemnized any marriage with the respondent/defendant in her senses, which can not be treated as an admission of any such marriage. She has denied any pressure of her family members in filing the Suit etc. She has denied having ever lived with the respondent/defendant. She has denied that any marriage was solemnized between the the appellant and the respondent/defendant with her consent.

20. In view of the above, as it is the respondent who claims marriage with the appellant-plaintiff the burden to prove such marriage as per Hindu rites and customs was upon him.

21. Now, in this context, when we peruse the the pleadings of the respondent/defendant we find that in Para 4 of the written statement filed in Suit No. 1990 of 2009 he has admitted that people used to call him for spiritual discourses at their home and several other persons would also take part in the said discourses. Although, he has denied the relationship of Guru and Disciple with the appellant but the aforesaid fact has been accepted by him that he used to hold spiritual discourses. In his written statement he has nowhere stated that marriage between him and the appellant was solemnized in accordance with the Hindu rites and customs. He has simply stated that marriage had taken place on 05.07.2009 which was got registered on 03.08.2009 and that the appellant and her mother had signed requisite papers in this regard. In the plaint filed by him under Section 9 of the Act, 1955, in para 2 he has stated that he and the appellant herein are Hindus and that they have married each other at Arya Samaj Mandir, Ganeshganj, Lucknow on 05.07.2009 in the presence of their family members i.e. the appellant's and respondent's family members as per rites and customs of Hindu religion. As, he

has claimed marriage with the appellant, therefore, the burden of proving the same was upon him, especially as, the appellant has nowhere admitted such marriage as per Hindu rites and customs. In fact, in her written statement she has categorically denied the averments made by the respondent in Para 2 of his plaint under Section 9 of the Act, 1955. She has stated that in fact the respondent claims himself as an incarnation of God and used to call himself 'Anand Prabhu' and used to give spiritual discourses and 'Satsang'. She has reiterated her stand in the written statement in the Suit under Section 9 of the Act, 1955 as in her plaint under Section 12 of the Act, 1955.

22. Now, against this when we see evidence led by the respondent/ defendant we find firstly that there is a copy of the F.I.R. lodged by the appellant's father. The appellant has clearly testified in her testimony that her father never visited the residence or place of the respondent/defendant to attend spiritual discourses or to meet him, in fact, he used to discourage such activities and did not believe in them. There is no evidence led by the respondent/defendant that the father of the appellant was present at the time of marriage at the Arya Samaj Mandir or at the time of its registration. The F.I.R. has been lodged under Sections 419, 420, 496 IPC not by the appellant but by the father who obviously would have 'presumed' certain things as he had not seen the alleged marriage. Any recital in the F.I.R. lodged by the appellant's father would not bind the appellant nor can it be used as proof that she has admitted her marriage to the respondent/defendant. In view of the above, the trial Court has erred in relying upon the recitals in the F.I.R.

23. As regards, the marriage certificate issued by the Arya Samaj Mandir, Ganeshganj, Lucknow i.e. the certificate paper C-47 does not bear the signature of the appellant or her family members. The said document has been denied by the appellant/plaintiff. A photocopy of another document (C-55/8) purporting to be a certificate of marriage issued by Arya Samaj Mandir attested by its alleged 'care taker' Pandit Satish Tiwari on 22.05.2023 has been filed. This document has also been denied by the appellant and her mother. In any case such certificate by itself does not prove a valid marriage as per Hindu rites and customs. Issuance of such certificates by the Arya Samaj Mandir have been considered by Courts in several cases and it has been held that such certificates have no meaning unless and until prerequisites for a valid Hindu marriage are completed/satisfied and proved. The respondent/defendant has not produced any witness from the Arya Samaj Mandir, Ganeshganj, Lucknow to prove that any such ceremonies, which are necessary for a valid Hindu marriage, were performed on 05.07.2009 at the Arya Samaj Mandir, Ganeshganj, Lucknow. We may in this very context refer to the provisions of Section 7 of the Act, 1955 which read as under:-

> "*7. Ceremonies for a Hindu marriage.- (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.*
>
> *(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and*

*binding when the seventh step is taken*."

24. Neither in the pleadings contained in the plaint filed by the respondent under Section 9 of the Act, 1955 nor in the pleadings contained in his written statement filed in the suit of the appellant under Section 12 has he pleaded about any such customary rites and ceremonies which are required to be performed at a Hindu marriage as having been performed on 05.07.2009 at the Arya Samaj Mandir, Ganeshganj, Lucknow so as to constitute a valid Hindu marriage between the appellant and the respondent. It has also not been pleaded that it was not the custom to perform such necessary rites and ceremonies including 'Saptapadi' etc.

25. As already stated the priest who may have performed those ceremonies has not been produced in Court. No other person who may have participated in such marriage ceremony and may have the witnessed the customary rites and ceremonies being performed regarding the marriage of the appellant with the respondent has been produced before the Court in support of his case.

26. We may in this very context refer to a recent decision of Hon'ble the Supreme Court dated 19.04.2024 rendered in ***Transfer Petition (C) No. 2043 of 2023; Dolly Rani Vs. Manish Kumar Chanchal.*** Although, in the said case the parties arrived at an agreement to dissolve their marriage but in this very context they stated that in fact no marriage was solemnized and they had merely got their marriage registered and certificate of marriage had been issued by an organization known as Vadik Jankalayan Samiti under the U.P. Registration Rules, 2017 and a certificate of marriage was also issued by the Registrar of Marriages. Hon'ble the Supreme Court held that when there was no Hindu marriage which took place between them, the issuance of the said certificate was of no consequence. In fact, it considered at length the provisions of Sections 7 and 8 of the Act, 1955 the prerequisite of a valid Hindu marriage. As the ratio of the said judgment is relevant to the facts of the case, therefore, we fruitfully quote relevant extracts thereof which are as under:-

> *"But before granting the reliefs sought for by the parties we wish to make certain observations.*
>
> *Section 7 of the Act reads as under:*
>
> *"7. Ceremonies for a Hindu marriage.—(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. (2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken."*
>
> *Section 7 of the Act speaks about ceremonies of a Hindu marriage. Sub-section (1) uses the word "solemnised". The word "solemnised" means to perform the marriage with ceremonies in proper form. Unless and until the marriage is performed with appropriate ceremonies and in due form, it cannot be said to be "solemnised". Further, sub-section (2) of Section 7 states that where such rites and ceremonies include*

*the saptapadi, i.e., the taking of seven steps by the bridegroom and the bride jointly before the sacred fire, the marriage becomes complete and binding when the seventh step is taken. Therefore, requisite ceremonies for the solemnisation of the Hindu marriage must be in accordance with the applicable customs or usage and where saptapadi has been adopted, the marriage becomes complete and binding when the seventh step is taken. Where a Hindu marriage is not performed in accordance with the applicable rites or ceremonies such as saptapadi when included, the marriage will not be construed as a Hindu marriage. In other words, for a valid marriage under the Act, the requisite ceremonies have to be performed and there must be proof of performance of the said ceremony when an issue/controversy arise. Unless the parties have undergone such ceremony, there would be no Hindu marriage according to Section 7 of the Act and a mere issuance of a certificate by an entity in the absence of the requisite ceremonies having been performed, would neither confirm any marital status to the parties nor establish a marriage under Hindu law.*

*A perusal of the marriage certificate produced in the instant case along with the application filed under Article 142 of the Constitution of India states that the 'marriage' between the parties has been solemnised according to Hindu Vedic rites and customs. The certificate issued by Vadik Jankalyan Samiti (Regd.) in the absence of any indication as to the rites and customs that were performed and as to whether the requirements under Section 7 of the Act was complied with would not be a certificate evidencing a Hindu marriage in accordance with Section 7 of the Act. In the absence of any ceremony being performed such a certificate could not have been issued. It is on the basis of the said certificate that the Marriage Registration Officer has issued under the Uttar Pradesh Marriage Registration Rule, 2017 a certificate stating that the parties had presented before the office on 07.07.2021 and had declared that their marriage was solemnised on the said date at Vadik Jankalyan Samiti (Regd.), Ghaziabad and on the basis of the said certificate issued by the said entity, the Marriage Registration Officer registered the marriage which is under Section 8 of the Act.*

*Section 8 of the Act reads as under:*

*"8. Registration of Hindu marriages.—(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.*

*(2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or*

*expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.*

*(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.*

*(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.*

*(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry."*

*Under Section 8 of the Act, it is open for two Hindus married under the provisions of the Act to have their marriage registered provided they fulfil the conditions laid down therein regarding performance of requisite ceremonies. It is only when the marriage is solemnised in accordance with Section 7, there can be a marriage registered under Section 8. The State Governments have the power to make rules relating to the registration of marriages between two Hindus solemnised by way of requisite ceremonies. The advantage of registration is that it facilitates proof of factum of marriage in a disputed case. But if there has been no marriage in accordance with Section 7, the registration would not confer legitimacy to the marriage. We find that the registration of Hindu marriages under the said provision is only to facilitate the proof of a Hindu marriage but for that, there has to be a Hindu marriage in accordance with Section 7 of the Act inasmuch as there must be a marriage ceremony which has taken place between the parties in accordance with the said provision. Although the parties may have complied with the requisite conditions for a valid Hindu marriage as per Section 5 of the Act in the absence of there being a "Hindu marriage" in accordance with Section 7 of the Act, i.e., solemnization of such a marriage, there would be no Hindu marriage in the eye of law. In the absence of there being a valid Hindu marriage, the Marriage Registration Officer cannot register such a marriage under the provisions of Section 8 of the Act. Therefore, if a certificate is issued stating that the couple had undergone marriage and if the marriage ceremony had not been performed in accordance with Section 7 of the Act, then the registration of such marriage under Section 8 would not confer any legitimacy to such a marriage. The registration of a marriage under Section 8 of the Act is only to confirm that the parties have*

*undergone a valid marriage ceremony in accordance with Section 7 of the Act. In other words, a certificate of marriage is a proof of validity of Hindu marriage only when such a marriage has taken place and not in a case where there is no marriage ceremony performed at all.*

*We further observe that a Hindu marriage is a sacrament and has a sacred character. In the context of saptapadi in a Hindu marriage, according to Rig Veda, after completing the seventh step (saptapadi) the bridegroom says to his bride, "With seven steps we have become friends (sakha). May I attain to friendship with thee; may I not be separated from thy friendship". A wife is considered to be half of oneself (ardhangini) but to be accepted with an identity of her own and to be a co-equal partner in the marriage. There is nothing like a "better-half" in a marriage but the spouses are equal halves in a marriage. In Hindu Law, as already noted, marriage is a sacrament or a samskara. It is the foundation for a new family.*

*With the passage of centuries and the enactment of the Act, monogamy is the only legally approved form of relationship between a husband and a wife. The Act has categorically discarded polyandry and polygamy and all other such types of relationships. The intent of the Parliament is also that there should be only one form of marriage having varied rites and customs and rituals. Thus, when the Act came into force on 18.05.1955, it has amended and codified the law relating to marriage among Hindus. The Act encompasses not only Hindus as such but Lingayats, Brahmos, Aryasamajists, Buddhists, Jains and Sikhs also who can enter into a valid Hindu marriage coming within the expansive connotation of the word Hindu..........*

*........... In the absence of there being any such marriage in accordance with Section 7 of the Act, a certificate issued in that regard by any entity is of no legal consequence. Further, any registration of a marriage which has not at all taken place under Section 8 of the Act and as per the rules made by the State Government would not be evidence of a Hindu marriage and also does not confer the status of a husband and a wife to a couple."*

27. It has been categorically held in the said judgment that in absence of there being any such marriage in accordance with Section 7 of the Act, a certificate issued in that regard by any entity is of no legal consequence. Further, any registration of a marriage, which has not at all taken place, under Section 8 of the Act and as per the rules made by the State Government would not be evidence of a Hindu marriage and also does not confer the status of a husband and a wife to a couple. It accordingly declared the certificate issued by the Vadik Jankalyan Smiti dated 07.07.2021 and the certificate issued under the U.P. Registration Rules, 2017 as null and void and also declared that the petitioner and the respondent were not married in accordance with the provisions of the Act, 1955 and therefore, they have never acquired the status of husband and

wife. The law on the subject has been succinctly and lucidly explained in the aforesaid extracts from the judgment of the Supreme Court. It has been categorically held with reference to Section 7 of the Act, 1955 that unless and until the marriage is performed with appropriate ceremonies and in due form, it cannot be said to be "solemnised". Requisite ceremonies for solemnisation of a Hindu marriage must be in accordance with the applicable customs or usage and where Saptapadi has been adopted, the marriage becomes complete and binding when the seventh step is taken. Where a Hindu marriage is not performed in accordance with the applicable rites or ceremonies such as Saptapadi when included, the marriage will not be construed as a Hindu marriage. In other words, for a valid marriage under the Act, the requisite ceremonies have to be performed and there must be proof of performance of the said ceremony when an issue/controversy arise. Unless the parties have undergone such ceremony, there would be no Hindu marriage according to Section 7 of the Act and a mere issuance of a certificate by an entity in the absence of the requisite ceremonies having been performed, would neither confirm any marital status to the parties nor establish a marriage under Hindu law.

28. It also noticed that the Certificate issued by the Vadik Jankalyan Samiti did not indicate as to the rites and customs that were performed and as to whether the requirements under Section 7 of the Act, 1955 was complied with, therefore, it would not be a certificate evidencing a Hindu marriage in accordance with Section 7 of the Act, 1955. It also noticed that on the basis of the said certificate the marriage was got registered by the Registrar Officer and a certificate was issued by the latter on 07.07.2021 under the Registration Rules, 2017 mentioning that their marriage had been solemnized at Vadik Jankalayan Samiti (Regd.) Ghaziabad and based on the certificate issued by the said entity the marriage the Registration Officer registered the marriage which is under Section 8 of the Act, 1955. Hon'ble the Supreme Court then considered Section 8 of the Act, 1955 and observed that it is only when the marriage is solemnised in accordance with Section 7, there can be a marriage registered under Section 8.

29. It has observed that the advantage of registration is that it facilitates proof of factum of marriage in a disputed case, but if there has been no marriage in accordance with Section 7, the registration would not confer legitimacy to the marriage. The registration of Hindu marriages under Section 8 is only to facilitate the proof of a Hindu marriage but for that, there has to be a Hindu marriage in accordance with Section 7 of the Act inasmuch as there must be a marriage ceremony which has taken place between the parties in accordance with the said provision.

30. It has also observed that in the absence of there being a valid Hindu marriage, the Marriage Registration Officer cannot register such a marriage under the provisions of Section 8 of the Act. Therefore, if a certificate is issued stating that the couple had undergone marriage and if the marriage ceremony had not been performed in accordance with Section 7 of the Act, then the registration of such marriage under Section 8 would not confer any legitimacy to such a marriage. The certificate of marriage is a proof of validity of Hindu marriage only when such a

marriage has taken place and not in a case where there is no marriage ceremony performed at all. Hindu marriage is a sacrament and has a sacred character.

31. On performance of Saptapadi in a Hindu marriage, according to 'Rig Veda', after completing the seventh step (Saptapadi) the bridegroom says to his bride, "with seven steps we have become friends (sakha). *May I attain to friendship with thee; may I not be separated from they friendship*." Therefore, this ceremony is necessary unless of course it is proved that it is not the custom in a particular area.

32. We may in this context also refer to a Division Bench judgment of this Court rendered in ***First Appeal No. 830 of 2022; Ashish Morya Vs. Anamika Dhiman*** wherein it was held that marriage certificate of Arya Samaj by itself is not proof of valid marriage.

33. Thus, the Certificate issued by the Arya Samaj Mandir, Ganeshganj, Lucknow does not by itself prove marriage between the appellant/plaintiff and the respondent/defendant. None of the certificates mention about the ceremonies which were performed. Merely mentioning that marriage was performed as per vaidik rites itself does not prove marriage between the appellant/plaintiff and respondent/defendant, especially as, document C-47 does not bear signature of the appellant or her mother. Document C-55/8 is a photocopy albeit attested by some Administrator of Arya Samaj Mandir, but, it also does not prove marriage for the reasons already given hereinabove.

34. The marriage certificate allegedly issued by the Registrar of Hindu Marriages on 03.08.2009 also by itself does not prove the said marriage, as, it does not mention any customary rites and ceremonies having been performed which are prerequisites for a valid Hindu marriage. It merely mentions that marriage was solemnized on 05.07.2009 at Arya Samaj Mandir, Ganeshganj, Lucknow, in the same way, as was mentioned in the case before the Supreme Court in ***Dolly Rani*** (supra) and which was disapproved. Such marriage certificates do not have any evidentiary value in the absence of any proof of marriage having been performed as per Section 7 of the Act, 1955 and in fact in view of the aforesaid decision in the case of ***Dolly Rani (supra)*** such a certificate should not have been issued under the Registration of Marriage Rules, 1973 which have been framed by the State Government under the Act, 1955. This document (C-47/7), though, it contains photograph of the appellant it does not bear her signature nor has it been admitted by her. In any case as already stated this is no proof by itself of any valid marriage having taken place in view of the legal position enunciated hereinabove.

35. In this very context we may refer to the oral evidence led on behalf of the respondent/defendant. In his testimony as DW-1, he has nowhere delineated the customary rites and ceremonies which may have been performed during the alleged marriage of the appellant with him. Merely saying that it was performed in accordance with Hindu rites and customs is not sufficient, as, it is his word against that of the appellant who has denied such marriage. In his testimony respondent/defendant changed his stand as accepted in his pleadings that he used to give discourses albeit on being invited by persons at their home and that they used to organize bhajans instead he has stated that

he is a creative person, a musician etc. DW-2 as already stated, though, he has examined himself in chief by way of an affidavit he did not enter the witness box to be cross examined, therefore, his testimony has no significance in law. DW-3 in his cross examination could not tell the date of alleged marriage of the appellant and respondent. He had no knowledge as to where the alleged marriage had taken place. He has no knowledge as to whether the said marriage has been registered in the office of the Registrar. In view of this, his testimony is of no help to the respondent/defendant and does not prove marriage between the parties.

36. No other evidence was adduced by the respondent/defendant which could prove a valid Hindu Marriage between the appellant and the respondent. It is not his case that marriage was solemnized under the Special Marriage Act, 1954 . Photocopies of certain affidavits were filed by the respondent/defendant which have been denied by the appellant, therefore, the burden was upon to him to prove the veracity of the said documents which has not been done. Nobody has been examined from the Arya Samaj Mandir, Ganeshganj, Lucknow where the said affidavits are said to have been filed. They are photocopies. These could not have formed the basis for any finding of a valid marriage between them. In fact, in this very context the allegation was by the appellant about respondent having got certain papers signed by her on a false pretext which may have been misused and based thereon marriage was being claimed fraudulently.

37. We may also in this regard refer to Section 8 of the Act, 1955. No such extract of any register which is required to be maintained by the Registrar of Marriages was adduced during evidence nor anybody was examined from the office of Registrar to prove such registration or filing of affidavits valuntarily. Even if, he had, unless it was proved that the registration was preceded by a valid Hindu marriage including performance of customary rites and ceremonies, it would be inconsequential, as already held by Hon'ble the Supreme Court in the case of ***Dolly Rani*** (supra).

38. The respondent has not produced any evidence to prove his assertion/ claim that the appellant lived with him as husband and wife for about one month after marriage. No documentary or oral evidence has been adduced in support of this assertion. Further, there is no pleading about any celebration or festivities having been held after marriage which may have been attended by relatives, friends or neighbours of either parties, nor any such evidence has been led by the respondent.

39. As already stated, the respondent was claiming marriage with the appellant. He filed a Suit for restitution of conjugal rights, albeit, after the suit of the appellant under Section 12 of the Act, 1955. The appellant, as already discussed, has nowhere admitted to the marriage, therefore, the burden of proving marriage was upon the respondent who claimed marriage with the appellant and he failed to discharge this burden but the trial Court has failed to consider/ appreciate this aspect of the matter. The Court below has erred in proceeding on the premise that marriage had taken place between the parties and the only question to be decided was as to whether it was with the consent of the appellant or not. It has readily believed documentary proof adduced by the respondent/defendant. Even after taking

into consideration the provisions of Section 14 of the Family Courts Act, 1984 we do not approve of the manner in which the trial Court has considered the facts and issues, evidence, its admissibility and relevance, nor do we approve the findings recorded by it on its basis, in the facts of the present case. The ingredients of a valid Hindu marriage in terms of Section 7 of the Act, 1955 had to be proved by the respondent herein but the trial Court omitted to consider these material aspects and has thereby misdirected itself. It did not consider the issue as to whether the marriage itself had taken place in the first place as per law, as discussed hereinabove. Its judgment is erroneous.

40. In view of the above discussion, we are of the considered opinion that marriage between the appellant and the respondent as per Hindu rites and customs in terms of Section 7 of the Act, 1955 itself is not proved and the trial Court has gravely erred in not considering this aspect of the matter which was implicit in the issues framed by it. In the absence of a valid Hindu marriage there was no way that the suit of the respondent/defendant under Section 9 of the Act, 1955 could have been decreed, especially, in the manner in which it has been done, without discussing any of the prerequisites which are required to be satisfied under the said provision. For the same reason, the trial Court has erred in dismissing the suit of the appellant/plaintiff under Section 12 of the Act, 1955.

41. We, accordingly, hold that no marriage has taken place between the appellant and respondent as per law and the marriage as alleged by the respondent/defendant based on the certificate issued by the Arya Samaj Mandir, Ganeshganj, Lucknow and the Certificate of registration issued by the Registrar of marriages, Lucknow etc., is a nullity, as, prerequisites of a valid marriage in the form of customary rites and ceremonies required for a Hindu marriage were never performed and the said certificates have no significance in the eyes of law and do not by themselves prove such marriage. The alleged marriage, based on the aforesaid documents has rightly been claimed by the appellant to be a fraudulent exercise. Point no. 1 is determined accordingly in the negative. Points no. 2 and 3 are also determined in terms of the above in favour of the appellant and against the respondent.

42. In view of the above discussions, we set aside the judgment and decree passed on 29.08.2023 in Original Suit No. 1990 of 2009; Shruti Agnihotri Vs. Anand Srivastava. The Original Suit No. 1990 of 2009 is allowed. The Suit bearing No. 2168 of 2009 under Section 9 of the Act, 1955 is dismissed.

43. The first appeal is **allowed** in the aforesaid terms.

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**(2024) 7 ILRA 1315**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 29.07.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

Second Appeal No. 267 of 2017

**I.R. Construction Pvt. Ltd. & Anr.** **...Appellants**

**Versus**

**Yashpal Khullar & Ors.** **...Respondents**

**Counsel for the Appellants:**
Tarun Agrawal

**Counsel for the Respondents:**
Siddharth Srivastava, Swapnil Kumar

**Civil Law- (The Transfer of Property Act, 1882-Sections 3 & 5) (The Indian Succession Act, 1925-Section 2(h)) -** Once admitted that ownership in the disputed property never vested in SLM during his lifetime, mere execution of the Will mentioning that ownership would devolve upon the plaintiff after death of the testator would not make the plaintiff as owner of the disputed plot after death of SLM. Even if the rights conferred by SLM are treated to be lawfully bequeathed upon the plaintiff under the Will of 1995, the plaintiff would, at the most, succeed rights of SLM as an allottee and not more than that- Even if the Court ignores the Will of 1996, as rightly observed by the lower appellate court, for the reason that its photostat copy was inadmissible in evidence and, even otherwise, its proof did not satisfy the statutory requirements needed for that, the same, in itself, could not be a circumstance to grant various decrees by the lower appellate court, including a decree against the co-operative society, non- party, and which relief appears to be clearly barred under Section 111 (d) of the U.P. Co-operative Societies Act, 1965. **(Para 19, 25 & 27)**

**Second appeal allowed.** (E-15)

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. The instant second appeal has been filed by two defendants of the Original Suit No.482 of 2002 assailing the judgment and decree dated 17.01.2017 whereby learned Additional District Judge, First, Gautam Budh Nagar, has allowed Civil Appeal No.19 of 2013 filed by the plaintiff-respondent no.1, set aside the judgment of the trial court dated 23.03.2013 and decreed the suit granting various reliefs to the plaintiff-respondent no.1.

PLAINT CASE

2. As per plaint case, a residential plot No.122, Block-E, Measuring 180 sq. mtrs situated at Sector 41, Noida had been allotted by defendant no.4, i.e. New Okhla Industrial Development Authority (for short 'NOIDA') in favour of one Shadi Lal Mehra (for short 'SLM') who executed a registered agreement for sale dated 24.11.1995 in favour of the plaintiff. According to the plaintiff, SLM had delivered possession of plot to him. The plaintiff also pleaded about a registered Will dated 24.11.1995 and certain other documents, like power of attorney etc, executed by SLM in his favour. SLM died on 11.02.1996, consequent upon which, the plaintiff became owner of the plot to the divestment of defendants no.2 and 3, who are respectively widow and son of SLM. The plaintiff could not inform NOIDA about the rights acquired by him at the strength of the Will and other documents but, on 12.12.2002, when he found the defendant no.1 (I.R. Constructions Pvt Ltd) (appellant no.1 herein) raising constructions over the plot, on being asked from the appellant no.1, he was informed about execution of certain documents by the defendants no.2 and 3 in favour of defendant no.5-Devendra Kumar (appellant no.2 herein) and also a registered lease deed dated 28.05.2001 for 90 years by NOIDA. The plaintiff stated all the documents executed inter se defendants as null and void by relying upon the agreement for sale and Will dated 24.11.1995 in his favour by SLM and, consequently, prayed for a decree for specific performance of the agreement directing the defendants no.2, 3 and 5 to execute sale deed in his favour, grant of which if not possible, a decree restraining the defendant no.1 from raising constructions and demolition of constructions raised so far; declaring all

documents executed amongst the defendants as null and void; declaring the plaintiff as owner of the disputed plot at the strength of the Will dated 24.11.1995 with a further decree that possession of the plot be directed to be delivered to the plaintiff.

CONTEST BY DEFENDANTS

3. The defendants no.1 and 5 (appellants herein) pleaded in written statement that a Will dated 10.01.1996 was executed by SLM in favour of defendant no.5; the said defendant applied before NOIDA for entering his name in the records and for getting a lease deed executed; NOIDA executed a registered lease deed on 28.05.2001 in favour of defendant no.5 and also delivered its possession to him, whereafter the defendant no.5 executed documents in favour of defendant no.1 and also handed over its possession to the said defendant. It was further pleaded that the defendant no.1 raised constructions over the plot and had also obtained a completion certificate from NOIDA prior to institution of the suit. They disputed the sustainability of the Will dated 24.11.1995 by referring to proceedings of a probate case filed by the plaintiff which was dismissed for want of prosecution on 30.08.2003 by the District Judge, Ghaziabad. Certain other documents executed amongst the defendants were also pleaded with a further stand that the suit was filed at a very belated stage after the title stood vested in the defendants. Wife of late SLM and his son were defendants no.2 and 3 against whom suit had proceeded ex-parte, as would be apparent from the appellate court's judgment and the main contest was made by the present appellants, who were respectively, defendants no.1 and 5 in the suit.

TRIAL COURT'S JUDGMENT

4. The trial court framed nine issues and the main issues were to the effect as to whether the plaintiff was entitled to get the relief of the declaration of his rights at the strength of Will dated 24.11.1995 and further a decree of cancellation of all documents including lease deed executed in favour of the defendant no.5. The trial court, after discussing oral and documentary evidence, dismissed the suit by judgment and order dated 23.03.2013 by raising serious doubts on the execution of Will dated 24.11.1995 by SLM on the ground that neither disclosure of natural successors of SLM was given in the Will nor was any circumstance disclosed as to why bequeath in favour of a stranger (plaintiff) by divesting the natural heirs was justified. The plaintiff's plea of possession was also discarded by the trial court and it gave weightage to the Will dated 10.01.1996 relied upon by the defendant no.5 in his favour claiming it to have been executed by SLM. The trial court observed that in view of the subsequent Will of 1996, the previous Will of 1995 automatically stood nullified and, consequently, the plaintiff's claim for any relief was turned down.

FIRST APPELLATE COURT'S JUDGMENT

5. The plaintiff filed Civil Appeal No.19 of 2013, which has been allowed by the learned Additional District Judge, Gautam Budh Nagar by the impugned judgment and decree dated 17.01.2017. In order to adjudge the entire controversy involved, it would be quite apt to quote the operative portion of the decree drawn by the lower appellate court, which reads as under:-

"अपीलार्थी की अपील सव्यय स्वीकार की जाती है। मूलवाद संख्या 482/2002 में पारित निर्णय दिनांकित 23.03.2013 व डिक्री निरस्त की जाती है। वादी का वाद सव्यय डिक्री किया जाता है।

भूखण्ड संख्या 122, ब्लाक-ई, सैक्टर-41, नोएडा, जिला गौतमबुद्धनगर के सम्बन्ध में मूल आबंटी स्व० श्री शादीलाल मेहरा द्वारा निष्पादित वसीयत दिनांकित 24.11.1995 के आधार पर वादी को उनके स्थान पर आबंटी घोषित किया जाता है और साथ ही साथ शादीलाल मेहरा के स्थान पर संबंधित सोसायटी का सदस्य भी दिनांक 11.02.1996 से घोषित किया जाता है। वादी समस्त औपचारिकताएं प्रार्थना पत्र, शुल्क आदि इस सम्बन्ध में पूर्ण करेगा। यह भी घोषित किया जाता है इस प्लाट के संबंध में वादी को शादीलाल मेहरा के स्थान पर समस्त अधिकार प्राप्त हैं। यह भी घोषित किया जाता है कि उपरोक्त प्लाट के संबंध में अपीलार्थी/वादी यशपाल खुल्लर को त्रैपक्षीय लीजडीड भी निष्पादित कराने का अधिकार है।

दिनांक 28.05.2001 को प्रतिवादी संख्या-5 देवेन्द्र कुमार के पक्ष में कथित वसीयत दिनांकित 10.01.1996 के आधार पर निष्पादित किया गया त्रैपक्षीय लीजडीड शून्य व निष्प्रभावी घोषित किया जाता है और इसके आधार पर देवेन्द्र कुमार के पक्ष में जारी किये गये सभी आदेश चाहे वह प्राधिकरण के हो या संबंधित सोसायटी के हों, शून्य व निष्प्रभावी घोषित किये जाते हैं। लीजडीड दिनांकित 28.05.2001 के शून्य व निष्प्रभावी किये जाने की सूचना उपनिंबधक नोएडा-प्रथम, जिला गौतमबुद्धनगर को प्रेषित की जाये।

दिनांक 28.05.2001 की लीजडीड के आधार पर जो भी अभिलेख निष्पादित किये गये हैं या कार्यवाहियां प्रतिवादी संख्या-5 देवेन्द्र कुमार द्वारा की गयी हैं, वह सब शून्य व निष्प्रभावी घोषित की जाती हैं।

प्रतिवादी संख्या-4 नोएडा तथा संबंधित सोसायटी को निर्देशित किया जाता है कि वह वादी/अपीलार्थी के पक्ष में दो माह के अंदर त्रैपक्षीय लीजडीड निष्पादित कर दें तथा कब्जा भी प्रदान करें। इस संबंध में जो भी आवश्यक औपचारिकताएं होंगी, वह वादी सम्पादित करेगा।

प्रतिवादीगण को आदेशित किया जाता है कि वह दो माह के अंदर उपरोक्त प्लाट संख्या 122, ब्लाक-ई, रकबा 180 वर्गमीटर स्थित सैक्टर-41, नोएडा, गौतमबुद्धनगर से अपना समस्त निर्माण हटाकर अपीलार्थी/वादी को खुला कब्जा प्रदान कर दें।"

## ADMISSION ORDER PASSED IN INSTANT SECOND APPEAL

6. The instant second appeal was admitted by a Coordinate Bench by order dated 05.02.2020 on the following substantial questions of law:-

"(i) Whether the Will dated 10.01.1996 has a specific stipulation superseding earlier Will dated 24.11.1995 ?

(ii) Whether the defendant could prove his Will before the court of law so to sustain his claims as have been bestowed on him subsequently on the basis of such Will ?

(iii) Whether Will dated 10.01.1996 could have superseded earlier Will dated 24.11.1995 despite the fact that plaintiff did not challenge the cancellation of the Will dated 10.01.1996 before the Court of competent jurisdiction ?

(iv) Whether the letter of allotment creates any transferable right in favour of the allottee which can be transferred through a Will or not ?

7. I have heard Sri Tarun Agrawal, learned counsel for the defendant-

appellants and Sri Swapnil Kumar, assisted by Sri Prem Chandra and Sri Virendra Singh Tomar, learned counsel for the plaintiff-respondent and have carefully perused the original records of both the courts below.

8. In order to answer the questions so framed, this Court needs to examine the rival claims set up by both sides at the strength of various documents, such as registered Will dated 24.11.1995, power of attorney of the same date, an unregistered Will dated 10.01.1996, certain No Objection Letters issued in favour of defendant no.5 by the heirs of late SLM, registered lease deed dated 28.05.2001, letter of allotment issued by NOIDA in favour of SLM on 22.06.1991 and membership of SLM with a Co-operative Housing Society, namely, Paradise Co-operative Housing Building Society Ltd, reference whereof has come on record in various documents and proceedings.

SUBMISSION OF APPELLANTS

9. Sri Tarun Agrawal, learned counsel for the defendant-appellants argued that no title ever vested in SLM as there was merely an allotment letter dated 22.06.1991 executed by NOIDA in his favour which did not confer ownership on SLM; power of attorney executed by SLM in favour of plaintiff on 24.11.1995 lost its efficacy and significance after death of SLM which occurred on 11.02.1996; even otherwise, no action was taken by the plaintiff at the strength of the Will or power of attorney, either during lifetime or after demise of SLM and, therefore, the documents remained of no significance; on 14.03.2000, NOIDA cancelled the allotment made in favour of SLM and, thereafter, executed registered lease deed in favour of appellant no.2 on 28.05.2001 after the said appellant had been inducted as a member in the Co-operative Society; cancellation order dated 14.03.2000 was never assailed by the plaintiff; the suit as framed was not maintainable as the plaintiff was out of possession on the date of institution of suit but no relief of dispossession of the defendants was claimed; for the same reason suit for injunction was also not maintainable; the plea of plaintiff that SLM had delivered him actual and physical possession over the plot was not tenable as per the defence taken by the NOIDA in its written statement that possession could not be delivered to him for want of execution of lease deed and since SLM never came in possession over the plot, there was no question of handing over possession by SLM to the plaintiff.

10. As regards Will dated 10.01.1996 executed by SLM in favour of defendant no.5, Sri Agrawal admitted that it was an unregistered document and only its photostat copy was brought on record from the defendants' side. He, however, submits that even if the Will of 1996 is ignored for all purposes, the alleged weakness of the defence case on that basis would not strengthen the plaintiff's case and he would have to stand on his own legs to get a decree in his favour.

SUBMISSION OF RESPONDENT

11. Sri Swapnil Kumar, learned counsel the plaintiff-respondent no.1, on the other hand, has vehemently opposed the submissions and argued that the entire case of the defendant was based upon an alleged Will dated 10.01.1996 which was manufactured for the purposes of the case after the death of SLM and, even otherwise,

its photostat copy was brought on record which would not fall in the category of either primary or secondary evidence and, consequently, the defence case falls on this ground alone. He further submits that even if ownership did not vest in SLM, admittedly, there being an allotment order of 22.06.1991 in his favour, whatever rights SLM possessed at the strength of such allotment order, the same stood devolved by testamentary succession upon the plaintiff at the strength of registered Will dated 24.11.1995. He further submits that all the defendants colluded amongst themselves to deprive the plaintiff of his right to get the lease deed executed and even the officer of NOIDA, who had appeared as a witness, concealed material information by stating that the record was not available in office. He submits that natural heirs of SLM did not contest the proceedings and the entire circumstances and chain of dates and events apparently suggest only one thing that rights acquired by plaintiff were sought to be nullified by the defendants by manufacturing fabricated documents which included obtaining 'No Objection' from the Co-operative Society as regards transfer of membership in favour of the defendant no.5 and all the defendants succeeded in their evil design. It was further argued that the trial court discarded the registered Will and accepted the photostat copy of an unregistered Will as having more evidentiary value over a registered document and, consequently, the lower appellate court has rightly set aside the trial court's judgment and granted a lawful decree.

ANALYSIS OF RIVAL CONTENTIONS

12. In order to arrive at a conclusion as to whether the suit has been rightly decreed by the lower appellate court, it would be necessary to carefully examine the documents relied upon by both the parties. From the original record, it is apparent that the land earlier belonged to Paradise Co-operative Housing Building Society Ltd, and was acquired by NOIDA, as is apparent from the statement of DW-2 Mr. R.P. Dilwali, President of the said Society in which he stated that NOIDA made allotments to the members of the said Society. There is no dispute that SLM was a member of the said Co-operative Housing Society and original Share Certificate dated 02.11.1974 is on record of the trial court as Paper No.151/1. It is also not in dispute that at the strength of membership of the Society, allotment of disputed plot was made by NOIDA in favour of SLM on 22.06.1991. The allotment letter, being Paper No.152, contained a clear stipulation amongst others that after completion of various formalities, lease deed would be executed and possession would be delivered thereafter. Admittedly, during lifetime of SLM, the lease deed was not executed by NOIDA and, therefore, the question of delivery of actual and physical possession by NOIDA to SLM could never arise.

13. The plaintiff's claim was based upon a registered Will and registered agreement for sale, both dated 24.11.1995 and executed by SLM in his favour. The original Will being Paper No.9-Ka on record, is a one page document executed in a printed proforma. It was termed by SLM as his last irrevocable Will/ Testament. He claimed to be owner of the disputed plot and stated that he wanted to immediately relinquish all the rights and ownership in the said property in favour of the plaintiff and that after his death, the plaintiff would become the sole and absolute owner

thereof. Admittedly, on the date of execution of Will, no document of title was executed by NOIDA in favour of SLM. There was a mere allotment letter dated 22.06.1991 existing in favour of SLM which, in no way, can be treated as a document of ownership and, hence, the statement made in the Will, though in a printed proforma, as regards ownership of SLM would, in itself, be not sufficient to reach to a conclusion that in case the Will stands proved, ownership would vest in the beneficiary, i.e. the plaintiff. Apart from this, there was no mention of natural successors of SLM in the Will except a printed paragraph stating that *"any objection to be raised by my wife/ husband/ children (major or minor, married or unmarried), brothers, sisters or any legal heirs/ representatives regarding this "Will" shall be deemed as null and void and ineffective and that his heirs and legal representatives shall have no rights or any interest in the property which he had purchased independently out of his self-earned income."* No reason was assigned as to why there being natural successors i.e. wife and sons what was the justification for depriving them of the rights in property and executing a Will in favour of a stranger, i.e. the plaintiff.

14. Even if this Court finds that the trial court, while holding the registered Will dated 24.11.1995 as surrounded by suspicious circumstances, gave weightage to the unregistered Will dated 10.01.1996 relied upon by the defendant side and giving priority and supremacy to the unregistered Will of 1996 over the registered Will of 1995 was not a correct and lawful approach of the trial court for the additional reason that only photostat copy of the said unregistered Will was produced which could not be treated as either primary or secondary evidence, nevertheless the Will of 1995 relied upon by the plaintiff being surrounded by suspicious circumstances, the view taken by the trial court to that extent appears to be strictly in consonance with law and the Will of 1995 was, hence, rightly discarded. Even if for the sake of accepting the Will of 1995 and reading it in favour of the plaintiff, it is quite necessary to explain the legal position as regards a Will and the rights bequeathed upon the beneficiary under it.

15. A Will is not an instrument of transfer of property and that is why it does not find place in the Transfer of Property Act, 1882, Section 3 whereof defines an "instrument" as follows:-

> "Instrument" means a non-testamentary instrument.

16. 'Transfer of Property' has been defined under Section 5 as an act by which a living person conveys property, in present or future, to one or more other living persons, or to himself. The said provision reads as under:-

> **"5. "Transfer of property" defined**.— In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, and one or more other living persons; and "to transfer property" is to perform such act..............."

17. Admittedly, the property in dispute is an immovable property and its definition contained in Section 3 of the Act, 1882 only provides that "immovable

property" does not include standing timber, growing crops or grass. Clear definition of an "immovable property" is not found in the Transfer of Property Act, however, it has been defined under Section 4(23) of the U.P. General Clauses Act, 1904 in the following words:-

> "4(23) "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth, but shall not include standing timber, growing crops or grass."

18. The Will being a testamentary instrument excluded by the provisions of Transfer of Property Act and which comes into effect after the death of the testator is certainly not an instrument of transfer of property by one living person to other as per Section 5 of the Transfer of Property Act. Rather, as per Section 2 (h) of the Indian Succession Act, 1925, the Will has been defined as under:-

> "2(h) "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."

19. In view of the above discussion, once it is admitted that ownership in the disputed immovable property never vested in SLM during his lifetime, mere execution of the Will mentioning that ownership would devolve upon the plaintiff after death of the testator would not make the plaintiff as owner of the disputed plot after death of SLM. Even if the rights conferred by SLM are treated to be lawfully bequeathed upon the plaintiff under the Will of 1995, the plaintiff would, at the most, succeed rights of SLM as an allottee and not more than that. Admittedly, NOIDA cancelled allotment of SLM on 14.03.2000 and there is sufficient documentary evidence on record that NOIDA issued notices, one after another, to SLM to take steps for getting the lease deed executed making it clear that in the event of non-compliance, the allotment would be cancelled but when no response was received, NOIDA cancelled the allotment by letter dated 14.03.2000. The said order having not been assailed in any independent proceedings or even in the suit in question, the necessary consequence would be that the allotment stood washed away for all theoretical and practical purposes. There being no fresh allotment in favour of the plaintiff even otherwise, no rights whatsoever stood devolved on him even if the Will of 1995 is treated to have been validly executed. Going to the extreme extent that the order of cancellation of allotment was passed by NOIDA on 14.03.2000, i.e. after four years from the death of SLM and, hence, would be of no significance as far as rights alleged by plaintiff are concerned, the Court records that the subsequent lease deed was executed in favour of the defendant no.5 (appellant no.2 herein) on 28.05.2001, which act was fully supported by natural heirs of SLM in terms of letters submitted by SLM's wife, namely, Vijay Mehra (defendant no.2), his mother Satyawati Mehra and son Vishal Mehra and also for grant/transfer/conferment of membership by the Paradise Co-operative Housing Building Society Ltd in favour of defendant no.5-Devendra Kumar vide MR No.7406 dated 10.05.2001 with a clear No Objection by the Society as regards transfer of allotment by NOIDA in favour of Devendra Kumar. The voluminous evidence on record

infers only one thing that all the defendants including the non-party Cooperative Housing Society recognized the rights of membership acquired by appellant no.2 and transfer of allotment and execution of lease deed in his favour by NOIDA in the year 2001. By that time, the allotment made in favour of SLM was not in existence as the same had been cancelled on 14.03.2000 and even if rights of plaintiff at the strength of Will are stretched in his favour, he could only get issued a fresh allotment by NOIDA in his favour but no such fresh allotment letter was ever issued by NOIDA in his favour. The allotment made in favour of SLM would not automatically devolve upon the plaintiff without intervention by NOIDA and as far as execution of lease deed is concerned, the same could be done only in favour of a member of the Co-operative Housing Society. There is nothing on record that the plaintiff ever acquired membership in the society, as is apparent from the operative portion of the decree drawn by the lower appellate court declaring the plaintiff as member of the society with effect from 11.02.1996 on which date SLM had expired.

20. Now coming to that part of the decree whereby the plaintiff has been declared as a member of the Society in place of SLM with effect from 11.02.1996, it is to be noted that, admittedly, the Paradise Co-operative Housing Building Society Ltd was not a party to the proceedings nor was the issue of membership involved in the suit proceedings. Before arriving at a conclusion as regards membership, the lower appellate court should have considered that the cooperative society being a Housing Cooperative Society, the provisions of U.P. Cooperative Societies Act, 1965 would come into application. Here, it would be necessary to deal with the said aspect as finds place in the Statute.

21. As per Section 2(n) of the Act, 1965, "member" means a person who joined in the application for registration of a society or person admitted to membership after such registration in accordance with the provisions of the Act, Rules and the Bye-laws. As to who can become a member of a Cooperative Society, Section 17 of the Act deals with the same. Section 18 defines classes of members. Section 25 contains a provision to the effect that liability of a past member or of the estate of a deceased member would continue. For a ready reference, Section 25(1) of the Act is reproduced as under:-

> "25(1) Subject to the provisions of sub-section (2) the liability of a past member or of the estate of a deceased member of a co-operative society for the debts of the society as they existed-
>
> (a) in the case of a past member, on the date on which he ceased to be a member ; and
>
> (b) in the case of a deceased member, on the date of his death shall continue for a period of two years from such date."

22. Section 26 is a provision dealing with refusal to admit a person as a member. Sub-sections (1) and (2) of the said section read as under:-

> "26 (1) A person may be admitted as a member of co-operative society subject to the provisions of this Act, the rules and the bye-laws.
>
> (2) Where a person may be admitted as a member of

> cooperative society, the decision refusing admission shall be communicated by the society to that person within seven days of the date of the decision."

23. Aforesaid provisions, when read with controversy involved in the present case, would make it clear that liability of estate of deceased member (SLM) would continue to exist for a period of two years from the date of his death. It, therefore, automatically ceased after 11.02.1998 when two years period from his death expired. During these two years period of time, no body came forward to assert rights, if any, left behind by SLM. Hence, any right held by SLM in terms of allotment made in his favour ceased to survive for all purposes. Once fresh membership came into existence in favour of defendant-appellant no.2 on 10.05.2001, as reflected from the letter of the office bearer of the Society addressed to AGM, NOIDA, the controversy ended then and there and, therefore, on the date of institution of suit in the year 2002, the plaintiff could not assert any right allegedly flowing from membership of SLM or even allotment made in his favour. The documents executed by SLM in favour of the plaintiff would also become of insignificant value in the facts of the case read with statutory provisions referred to hereinabove.

24. Another significant aspect would be applicability of barring provision of the Act of 1965, section 111 whereof specifically bars jurisdiction of a civil court. The said provision reads as under:-

> "111. Save as expressly provided in this Act, no civil or revenue court shall have any jurisdiction in respect of :-
>
> (a) the registration of a co-operative society or its bye-laws or of an amendment of a bye-laws ;
>
> (b) the supersession or suspension of a committee of management ;
>
> (c) any dispute required under section 70 to be referred to the Registrar ; and
>
> (d) <u>any other order or award made under this Act.</u>"

25. Though in the present case, neither registration of the co-operative society nor its Bye-laws nor supersession or suspension of a Committee of Management nor any dispute required under Section 70 to be referred to the Registrar is involved, certainly there is an order of 10.05.2001 conferring membership in the society in favour of the defendant-appellant no.2-Devendra Kumar based upon which the lease deed was executed by NOIDA in his favour on 28.05.2001. The lower appellate court, while observing that since all the defendants had maliciously acted to the detriment of the interest of the plaintiff and the documents executed amongst themselves were invalid for such acts of them, has misdirected itself to comment upon the membership of the appellant no.2 in the co-operative society or act of its office bearers and also declaring the plaintiff as member without looking into the fact that the co-operative society was not a party to the proceedings nor was its order dated 10.05.2001 conferring membership upon the defendant-appellant no.2 under challenge. Surprisingly, the lower appellate court held the membership of the appellant No.2 as invalid by simply observing that the membership as well as registered lease deed was obtained on the

basis of an invalid Will dated 10.01.1996. Even if the Court ignores the Will of 1996, as rightly observed by the lower appellate court, for the reason that its photostat copy was inadmissible in evidence and, even otherwise, its proof did not satisfy the statutory requirements needed for that, the same, in itself, could not be a circumstance to grant various decrees by the lower appellate court, including a decree against the co-operative society, non- party, and which relief appears to be clearly barred under Section 111 (d) of the U.P. Co-operative Societies Act, 1965.

## CONCLUSION

26. For all the aforesaid reasons, this Court is of the considered view that though the lower appellate court was right in holding that Will dated 10.01.1996 would not supersede the registered Will dated 24.11.1995, merely on that basis the suit could not be decreed as per the discussion made herein above. In this view of the matter, first three substantial questions of law are answered in favour of the plaintiff-respondent and against the defendant-appellants, however, the last question no.4, framed as regards transferable right created under the letter of allotment or a Will, is answered in favour of the defendant-appellants and against the plaintiff-respondent holding that mere allotment made by NOIDA in favour of SLM or execution of registered Will dated 24.11.1995 or agreement or power of attorney by him in favour of the plaintiff-respondent was not sufficient to grant the decree drawn by the lower appellate court.

27. In view of the above, the instant second appeal succeeds and is allowed.

28. The judgment and decree dated 17.01.2017 passed by learned Additional District Judge, First, Gautam Budh Nagar in Civil Appeal No.19 of 2013 is hereby set aside. Consequently, Original Suit No.482 of 2002 (Yashpal Khullar Vs. I.R. Constructions Pvt Ltd and others) stands dismissed for additional reasons given in this judgment.

29. Office is directed to remit the record of lower appellate court as well as trial court to the District Judge, Gautam Budh Nagar forthwith so as to facilitate return of original documents to the concerned parties by the District Court office in accordance with the provisions of General Rules (Civil).

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**(2024) 7 ILRA 1325**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.07.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

Second Appeal No. 454 of 2024

**Smt. Reeta Devi & Ors. ...Appellants**
**Versus**
**Raj Kamal & Anr. ...Respondents**

**Counsel for the Appellants:**
Sri Prashant Kumar Mishra, Sri Sharad Malviya

**Counsel for the Respondents:**
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**Civil Law - Code of Civil Procedure,1908 - Order 22 Rule 10-A-**Plaintiff-respondent is a Co-operative Housing Society-instituted a suit for declaration of a sale deed inter se defendant-Appellants as null and void-valuation and court fee not proper-consequently plaint rejected-Secretary died-date of death endorsed by the pleader of the Plaintiff-Trial Court not justified in rejecting the plaint-should have

followed Order 22 Rule 10-A-Plaint rejected against a dead person-Appellate Court set aside the order-impugned-Second Appeal-no error in appellate order.

**Second Appeal dismissed.** (E-9)

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Sri Sharad Malviya, learned counsel for the appellants and perused the record.

2. The plaintiff-respondent is a Co-operative Housing Society and instituted a suit for declaration of a sale deed dated 07.09.2012 inter se defendant-appellants as null and void.

3. An issue with regard to the valuation of the suit and payment of court fee was framed by the trial court. It was decided against the plaintiff-respondent and it was directed to make good deficiency of court fees.

4. Sri Sharad Malviya, learned counsel submits that the plaintiff did not comply with the order of the trial court and, consequently, the plaint was rejected under Order 7 Rule 11(c) C.P.C. by order dated 21.08.2017. The said order amounts to a decree as per Section 2(2) C.P.C. and assailable under Section 96 of Civil Procedure Code. Civil Appeal was filed by the society through a different Secretary and it has been allowed by the impugned judgment dated 26.02.2024 only on the ground that the Secretary of the society had died on 17.08.2017 and, therefore, the trial court was not justified in rejecting the plaint without facilitating the procedure for substitution/due representation of the parties. He submits that the order for making good deficiency was passed long ago and it remained un-complied with for years together and, therefore, merely because the Secretary of the society died in August, 2017, the same could not be a ground for allowing the appeal.

5. Having heard learned counsel for the appellants, this Court finds that the date of death of the Secretary was noted in the margin of the order-sheet dated 21.08.2017. The said endorsement was made by the counsel for the plaintiff-respondent i.e. the society. On the same date the plaint was rejected by the trial court. The endorsement reads as under:-

"श्रीमान् जी,
वादी की मृत्यु हो चुकी है।
ह०
21.8.2017"

6. As per the Order 22 Rule 10-A of C.P.C., whenever a pleader appearing for a party to the suit comes to know of the death of that party, he is under obligation to inform the court about it, and the court shall thereupon give notice of such death to the other party and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist. For ready reference, Order 22 Rule 10-A reads as under:-

> "**10A. Duty or pleader to communicate to Court death of a party**— Wherever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall there upon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist."

7. In view of the fact that the counsel for the plaintiff society informed the court by making an endorsement in the margin of the order-sheet about death of the secretary, the trial court, on the same date, was not justified in rejecting the plaint and it should have followed the procedure prescribed under Rule 10-A of Order 22. As a matter of fact, the plaint has been rejected against a dead person.

8. Although the plaintiff was not a human being but certainly it was a Co-operative Housing Society and a juristic person on which the provisions of U.P. Co-operative Societies Act, 1965 are applicable. For the purposes of the instant case, Sections 29 and 31(2) of the Act of 1965 are required to be referred. The same read as under:-

> **"29. Committee of Management.**
>
> (1) The management of every co-operative society shall vest in a Committee of Management constituted in accordance with this Act, the rules and the bye-laws, which shall exercise such powers and perform such duties as may be conferred or imposed by this Act, the rules and the bye-laws."
>
> **"31(2). The Secretary shall be the Chief Executive Officer of the society** and subject to such control and supervision of the Chairman and the committee of management as may be provided in the rules or the bye-laws of the society shall –
>
> (a) be responsible for the sound management of the business of the society and its efficient administration;
>
> (b) **carry on the authorized and normal business of the society;**
>
> (c) subject to the provisions of the bye-laws of the society, operate its accounts and, except where the society has a cashier or treasurer, handle and keep in his custody its cash balances;
>
> (d) **sign and authenticate all documents for and on behalf of the society;**
>
> (e) be responsible for the proper maintenance of various books and records of the society and for the correct preparation and timely submission of periodical statements and returns in accordance with this Act, the rules, the bye-laws and the instructions of the Registrar or the State Government.
>
> (f) convene meetings of the general body, the committee of management and any sub-committee constituted by the committee of management and maintain proper records of such meetings; and
>
> (g) **perform such other duties and exercise such other powers as may be imposed or conferred on him under the rules or the bye-laws of the society."**

9. Further, as per Section 2(o) of the Act, 1965, Secretary, being an officer of a Co-operative Society, is empowered to carry on the business of the society or to supervise its affairs. Section 9 also needs mention and is quoted hereunder:-

> "9. Co-operative societies to be bodies corporate- The registration of a society, shall

render it a body corporate by the name under which it is registered, having perpetual succession and a common seal, and with power to hold property, enter into contracts, institute and defend suits and other legal proceedings and to do all things necessary for the purpose for which it was constituted."

10. The aforesaid provisions demonstrate that the society may sue or be sued through its Secretary and, therefore, once death of the secretary was an admitted fact and specifically brought on record on 21.08.2017 itself, irrespective of the fact that the order of making good deficiency of court fee might have remained uncomplied with for long, the plaint could not be rejected on 21.08.2017 when the society was represented by a dead person.

11. The Court also notices the fact that the civil appeal was filed by the society represented through a newly appointed Secretary and the lower appellate court has taken a view that rejection of plaint was at a premature stage and, therefore, the appellate court has set aside the order rejecting the plaint and directed the trial court to decide the suit in accordance with law.

12. The Court may also take note of the power of the civil court to enlarge time for any steps, as provided under Section 148 of C.P.C., which reads as under:-

"148. Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period,1[not exceeding thirty days in total,] even though the period originally fixed or granted may have expired."

13. In the facts of the case, the Court feels that the civil court could have also enlarged time for making good deficiency by granting opportunity to the society represented by the present Secretary had it proceeded to grant opportunity for substitution/due representation of plaintiff society and once the appellate court has already set aside the decree of rejection of plaint, the said course is still open for the trial court, as the power under Section 148 in its restricted sense, as contemplated under the statute itself, is vested in civil court.

14. Since civil appeal is in continuance of suit proceedings and was filed by the society represented by a new secretary, the Court finds that rejection of plaint on 21.08.2017, on which date the counsel for the society had duly informed the factum of death of ex-secretary, was improper and unwarranted exercise of power by the civil court. Consequently, the Court does not find any error in the view taken by the appellate court.

15. No substantial question of law arises for consideration.

16. The second appeal is **dismissed**.

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**(2024) 7 ILRA 1328**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 25.07.2024**

**BEFORE**

**THE HON'BLE SAURABH LAVANIA, J.**

Transfer Application (Crl.) No. 69 of 2024

**Rajesh Kumar @ Rajesh Kumar Singh @ Amit Singh & Anr. ...Petitioners**
**Versus**
**State of U.P. & Anr. ...Opp. Parties**

**Counsel for the Petitioners:**
Sumit Kumar Srivastava

**Counsel for the Opp. Parties:**
G.A.

**Criminal Law-**The Bhartiya Nagrik Suraksha Sanhita, 2023-Section-447) (The Code of Criminal Procedure, 1973-Section 407)-Mere suspicion by the party that he will not get justice would not justify transfer. There must be a reasonable apprehension to that effect. There must be a reasonable apprehension to that effect. A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case. Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another. It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise**. (Para5, 19 & 24)**

**Application rejected.** (E-15)

**List of Cases cited:**

1.Rajkot Cancer Society Vs Municipal Corporation, Rajkot, AIR 1988 Guj 63

2. Pasupala Fakruddin & anr. Vs Jamia Masque & anr., AIR 2003 AP 448

3. Nandini Chatterjee Vs Arup Hari Chatterjee, AIR 2001 Cul 26

4.Transfer Application (Civil) No. 519 of 2014 (Amit Agarwal vs. Atul Gupta)

5.Smt. Sangeetha S. Chugh Vs Ram Narayan V. & ors., AIR 1995 Kar 112

6. Official Assignee, Madras Vs Inspector-General of Registration, Bangalore & anr., AIR 1981 Mad 54

7. Gujarat Electricity Board & anr. Vs Atmaram Sungomal Poshani; AIR 1989 SC 1433 (1436).

8. G. Lakshmi Ammal Vs Elumalai Chettiar & ors., AIR 1981 Mad 24

9. Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248

10.Smt. Munni Devi & ors. Vs St. of U.P. & ors., 2013(2) AWC 1546

11. Gurcharan Das Chadha Vs St. of Raj. (1966) 2 SCR 686.

12. Jawant Singh Vs Virender Singh 1995 Supp (1) SCC 384

13. Chetak Construction Ltd. Vs Om Prakash & ors., (1998) 4 SCC 577

14. R.K. Anand Vs Registrar, Delhi High Court (2009) 8 SCC 106

15. Kulwinder Kaur Vs Kandi Friends Education Trust reported in (2008) 3 SCC 659

16. Abdul Nazar Madani Vs St. of T.N. MANU/SC/0349/2000 : (2000) 6 SCC 204

17. Captain Amarinder Singh Vs Parkash Singh Badal & ors. MANU/SC/0797/2009 : (2009) 6 SCC 260

18. Lalu Prasad alias Lalu Prasad Yadav Vs St. of Jhar. MANU/SC/0796/2013 : (2013) 8 SCC 593

19. Rajesh Talwar Vs CBI [(2012) 4 SCC 217]

20. Nahar Singh Yadav & anr. Vs U.O.I. & ors. MANU/SC/0964/2010 : (2011) 1 SCC 307]

21. Usmangani Adambhai Vahora Vs St. of Guj. & ors., MANU/SC/0014/2016 (AIR 2016 SC 336),

22. Rohit Yadav & anr. Vs St. of U.P. & anr. 2016 SCC OnLine All 3052

23. Afjal Ali Sha @ Abjal Shaukat Sha Vs St. W.B.& ors. 2023 SCC OnLine SC 282

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard.

2. Present application has been filed under Section 407 Cr.P.C./Section 447 of Bhartiya Nagrik Suraksha Sanhita, 2023 (in short "BNSS") for transfer of the Case No. 16166 of 2013 (State vs. Rajesh Pratap Singh and Another), arising out of FIR/Case Crime No. 0324 of 2023 under Section 323, 504, 506 & 307 IPC, P.S.- Kotwali Nagar, District-Pratapgarh, pending before C.J.M., Pratapgarh to any other district of Uttar Pradesh.

3. The facts, relevant as indicated in the affidavit filed in support of application seeking transfer of the case in issue is to the effect that the opposite party No.2/Guarav Singh, Advocate are a practicing Advocate in the District-Pratapgarh and as such he with the help of other Advocates beaten the applicant Nos. 1 and 2 on 01.06.2023 and thereafter with the help of Police personnel lodged the false FIR against the applicants alongwith two unknown persons on 01.06.2023 registered as Case Crime No. 0324 of 2023 under Section 323, 504, 506, 394 & 307 IPC, P.S.-Kotwali City, District-Pratapgarh and on account of pressure of opposite party No.2, the Advocate engaged by the applicants is not doing smoothly pairavi on behalf of the applicants before the Chief Judicial Magistrate, Pratapgarh.

4. This application has been filed with a prayer to transfer the criminal case from District-Pratapgarh to any other district in the State of U.P. and in view of the prayer sought, this Court finds it appropriate to take note of the observations made in this regard by the Constitutional Courts.

5. Mere suspicion by the party that he will not get justice would not justify transfer. There must be a reasonable apprehension to that effect. There must be a reasonable apprehension to that effect. A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case. Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another. It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise. Reference can be made to the judgment(s) passed in the case of ***Rajkot Cancer Society vs. Municipal Corporation, Rajkot, AIR 1988 Guj 63; Pasupala Fakruddin and Anr. vs. Jamia Masque and Anr., AIR 2003 AP 448; and Nandini Chatterjee vs. Arup Hari Chatterjee, AIR 2001 Cul 26***; as also the judgment dated 12.11.2014 passed in ***Transfer Application (Civil) No. 519 of 2014 (Amit Agarwal vs. Atul Gupta).***

6. A Judge is not expected to remain silent during course of hearing and not to express any opinion. A sphinx like attitude is not expected from a Presiding Officer. There has to be an effective discussion and effective attempt to conciliate or to clarify the misunderstanding or to get the issues clear, so that the issues can be settled or a just and proper decision can be arrived at. If in that process the Presiding Officer would make a statement it should not be misunderstood as an expression of decision. Judges' opinions during hearing of case do not automatically justify transfer. ***[Smt. Sangeetha S. Chugh vs. Ram Narayan V. and others, AIR 1995 Kar 112 and Official Assignee, Madras vs. Inspector-General of Registration, Bangalore and Anr., AIR 1981 Mad 54; Gujarat Electricity Board & Anr. vs. Atmaram Sungomal Poshani; AIR 1989 SC 1433 (1436).]***

7. Certain observations made by a Judge in an earlier case can never be made a ground for transfer of the case as held in ***G. Lakshmi Ammal vs. Elumalai Chettiar and Ors, AIR 1981 Mad 24***. The allegations of bias of Presiding Officer, if made the basis for transfer of case, before exercising power under Section 408 Cr.P.C., the Court must be satisfied that the apprehension of bias or prejudice is bona fide and reasonable. The expression of apprehension, must be proved /substantiated by circumstances and material placed by such applicant before the Court. It cannot be taken as granted that mere allegation would be sufficient to justify transfer.

8. In ***Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248***, the Hon'ble Apex Court said that superior Courts are bound to protect the Judges of subordinate Courts from being subjected to scurrilous and indecent attacks, which scandalise or have the tendency to scandalise, or lower or have the tendency to lower the authority of any court as also all such actions which interfere or tend to interfere with the due course of any judicial proceedings or obstruct or tend to obstruct the administration of justice in any other manner. No affront to the majesty of law can be permitted. The fountain of justice cannot be allowed to be polluted by disgruntled litigants. The protection is necessary for the courts to enable them to discharge their judicial functions without fear.

9. This Court also made similar observations in Smt. Munni Devi and others vs. State of U.P. and others, 2013(2) AWC 1546 and in para 10, said:-

> *"Be that as it may, so far as the present case is concerned, suffice is to mention that the Constitution makers have imposed constitutional obligation upon the High Court to exercise control over subordinate judiciary. This control is both ways. No aberration shall be allowed to enter the Subordinate Judiciary so that its purity is maintained. Simultaneously Subordinate Judiciary can not be allowed to be attacked or threatened to work under outside pressure of anyone, whether individual or a group, so as to form a threat to objective and independent functioning of Subordinate Judiciary."*

10. In assessing whether a case for transfer of the proceedings has been made out, it would, at the outset, be appropriate to advert to the locus classicus on the subject of the case. In Gurcharan Das Chadha Vs. State of Rajasthan : (1966) 2 SCR 686.

> *"The law with regard to transfer of cases is well-settled. A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case*

*does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge the reasonableness of the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension."*

11. These sentiments have been placed, in no uncertain terms, in the judgment of the Hon'ble Apex Court in ***Jawant Singh Vs. Virender Singh 1995 Supp (1) SCC 384*** thus:

*"It is most unbefitting for an advocate to make imputations against the Judge only because he does not get the expected result, which according to him is the fair and reasonable result available to him. Judges cannot be intimidated to seek favourable orders...."*

12. In a subsequent decision in **Chetak Construction Ltd. Vs. Om Prakash & Ors., (1998) 4 SCC 577** the Hon'ble Apex Court while adverting to these observations held thus:-

*"Indeed, no lawyer or litigant can be permitted to browbeat the court or malign the presiding officer with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities were permitted and in the result administration of justice would become a casualty and rule of law would receive a setback. The Judges are obliged to decide cases impartially and without any fear or favour. Lawyers and litigants cannot be allowed to "terrorize" or "intimidate" Judges with a view to "secure" orders which they want. This is basic and fundamental and no civilised system of administration of justice can permit it. The court certainly, cannot approve of any attempt on the part of any litigant to go "forum-shopping". A litigant cannot be permitted "choice" of the "forum" and every attempt at "forum-shopping" must be crushed with a heavy hand."*

13. In R.K. Anand Vs. Registrar, Delhi High Court (2009) 8 SCC 106, the Hon'ble Apex Court made certain observations which, though in the context of a recusal, are of significance:-

*"In the order the Judge concerned further observed: "The path of recusal is very often a convenient and a soft option. This is especially so since a Judge really has no vested interest in doing a particular matter. However, the oath of office taken under Constitution of India enjoins the Judge to duly and faithfully and to the best of his knowledge and judgment, perform the duties of office without fear or favour, affection or ill will while upholding the Constitution and the laws. In a case, where unfounded and motivated allegations of bias are sought to be made with a view of forum hunting / Bench preference or brow-beating the court, then, succumbing to such a pressure*

*would tantamount to not fulfilling the oath of office."*

14. The Hon'ble Apex Court in the case of ***Kulwinder Kaur v. Kandi Friends Education Trust reported in (2008) 3 SCC 659***, observed as under:-

> *"23. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by courts. They are balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the court feels that the plaintiff or the defendant is not likely to have a "fair trial" in the court from which he seeks to transfer a case, it is not only the power, but the dutyof the court to make such order."*

15. Hon'ble Apex Court in ***Abdul Nazar Madani v. State of T.N. MANU/SC/0349/2000 : (2000) 6 SCC 204*** has held that:-

> *"...The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the Petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."*

16. In the case of ***Captain Amarinder Singh v. Parkash Singh Badal and Ors. MANU/SC/0797/2009 : (2009) 6***

***SCC 260***, while dealing with an application for transfer petition preferred Under Section 406 Code of Criminal Procedure, a three-Judge Bench of Hon'ble Supreme Court has opined that for transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It has also been observed therein that mere an allegation that there is an apprehension that justice will not be done in a given case alone does not suffice. It is also required on the part of the Court to see whether the apprehension alleged is reasonable or not, for the apprehension must not only be present but must appear to the Court to be a reasonable apprehension. In the said context, Hon'ble Supreme Court has held thus:-

> *"19. Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State Under Section 407 and anywhere in the country Under Section 406 Code of Criminal Procedure.*
>
> *20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the court to be a reasonable one."*

17. In ***Lalu Prasad alias Lalu Prasad Yadav v. State of Jharkhand MANU/SC/0796/2013 : (2013) 8 SCC 593***, Hon'ble Apex Court, repelling the submission that because some of the distantly related members of the trial Judge were in the midst of the Chief Minister, opined that from the said fact it cannot be presumed that the Presiding Judge would conclude against the appellant. From the said decision, following passage is reproduced hereinunder:-

> *"Independence of judiciary is the basic feature of the Constitution. It demands that a Judge who presides over the trial, the Public Prosecutor who presents the case on behalf of the State and the lawyer vis-a-vis amicus curiae who represents the accused must work together in harmony in the public interest of justice uninfluenced by the personality of the accused or those managing the affairs of the State. They must ensure that their working does not lead to creation of conflict between justice and jurisprudence. A person whether he is a judicial officer or a Public Prosecutor or a lawyer defending the accused should always uphold the dignity of their high office with a full sense of responsibility and see that its value in no circumstance gets devalued. The public interest demands that the trial should be conducted in a fair manner and the administration*

*of justice would be fair and independent."*

18. In the case of ***Rajesh Talwar vs. CBI [(2012) 4 SCC 217]*** the Hon'ble Apex Court held as under: -

> *"46. Jurisdiction of a court to conduct criminal prosecution is based on the provisions of the Code of Criminal Procedure. Often either the complainant or the accused have to travel across an entire State to attend to criminal proceedings before a jurisdictional court. In some cases to reach the venue of the trial court, a complainant or an accused may have to travel across several States. Likewise, witnesses too may also have to travel long distances in order to depose before the jurisdictional court. If the plea of inconvenience for transferring the cases from one court to another, on the basis of time taken to travel to the court conducting the criminal trial is accepted, the provisions contained in the Criminal procedure Code earmarking the courts having jurisdiction to try cases would be rendered meaningless. Convenience or inconvenience inconsequential so far are as the mandate of law is concerned. The instant plea, therefore, deserves outright rejection."*

19. The aforesaid laws would clearly emphasize on sustenance of majesty of law by all concerned. Seeking of the transfer of criminal trial at the drop of a hat is not recognized by the courts or by any tenent of law. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the conduct of the trial by a Presiding Officer. This power would have to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide complete justice and credibility to the trial as held in ***Nahar Singh Yadav and Anr. v. Union of India and Ors. MANU/SC/0964/2010 : (2011) 1 SCC 307]***, the apprehension with regard to the miscarriage of justice should be real and substantial.

20. It is also worthwhile to extract the view of the Hon'ble Supreme Court in ***Usmangani Adambhai Vahora Vs. State of Gujarat and Ors, reported in MANU/SC/0014/2016 (AIR 2016 SC 336)***, wherein it is emphasized that simply because an accused or a party has filed an application for transfer, a Judge is not required to express his disinclination. He is required under law to do his duty and not to succumb to the pressure put by a party by making callous allegations and he is not expected to show unnecessary sensitivity to such allegations.

21. In the case of ***Rohit Yadav and Another vs. State of U.P. and Another*** reported in ***2016 SCC OnLine All 3052*** the transfer of the case was sought broadly on two grounds; First ground was to the effect that father of first informant is a Member of District Court Bar Association Jhansi, as such, he is exercising great pressure on the Members of Bar Association, Jhansi as well as Presiding Officer of Sessions Court, Jhansi. Second ground was to the effect that the first informant is a political leader as well as student leader of Bundelkhand Degree College and at present, he is President of the students union. This Court, upon due consideration, rejected the said application. The relevant observations of

this Court in the judgment passed in the case of ***Rohit Yadav (supra)*** on reproduction read as under:-

*"24.Vague and vexatious accusation without an element of truth on the working of Trial Court not supported either by fact or circumstances will not ipso facto be sufficient ground for transfer of a case. Transfer of a case can be made only when the same is reasonably required under facts and circumstances of a case. If allegations made for transfer are straightway discovered or found to be affecting adversely interest of justice instead of supporting it then the same will tantamount to erosion of judicial process itself and any claim so made for transfer can be, in that eventuality, termed unreasonable and uncalled for transfer of a case cannot be asked by making ostentatious, baseless and whimsical personal apprehensions. Normally such attempts should be strongly deprecated and discouraged. While considering the entirety of the matter in hand, it is obvious that this transfer application has not been moved with any fair motive but appears to be well thought attempt to somehow occasion delay in conclusion of the trial. If the applicants are apprehensive of their personal security then they may bring relevant facts to the notice of the trial Court itself. More so the record reflects that the wife of applicant No. 1 Rohit Yadav has moved bail application on behalf of minor son Chahat Yadav and has sought release of her (minor) son in her custody. This particular fact reveals that wife of applicant No. 1 is able to do Parvi of a case in the Court. More so applicant No. 2 is already on bail and it cannot be said that he is absolutely unable to do Parvi of the cases (two sessions trials) pending before the Sessions Court Jhansi. Personal inconvenience and personal apprehension of applicants as claimed by them are found to be not based on reasonable and substantive grounds as such would not justify transfer of the sessions trials. Further if the transfer application is moved with an ulterior motive to occasion or cause delay in disposal of the trial itself then that application is highly misconceived and cannot be allowed as that would adversely affect interest of justice. In catena of decisions, this tendency to seek transfer on frivolous and vague grounds has been deprecated repeatedly. Consequently, the grounds urged in support of the transfer application for transferring the aforesaid sessions trial are without any force and are liable to be turned down.*

*25. Accordingly, the instant transfer application is rejected."*

22. The Hon'ble Apex Court in the case of ***Afjal Ali Sha @ Abjal Shaukat Sha vs. State of West Bengal & Ors. 2023 SCC OnLine SC 282*** observed as under:-

*"C.2. GROUNDS FOR TRANSFER*

*26. Coming to the second limb of the contentions raised on behalf of the parties, we may firstly*

*notice some of the well-defined contours in relation thereto. It has by now been well established that a well-founded apprehension that justice will not be done is a prerequisite for transfer of the case. Tracing the power of transfer of a case, we are reminded of Lord Hewart's dictum in Rex v. Sussex Justices stating that "It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".*

*27. The right to a fair trial is a fundamental right under Article 21 of the Constitution of India and its importance cannot be emphasised enough. However, to obtain the transfer of a case, the Petitioner is required to show circumstances from which it can be inferred that he entertains a reasonable apprehension. This apprehension cannot be imaginary and cannot be a mere allegation.*

*28. The power of transfer under Section 406, CrPC is to be exercised sparingly and only when justice is apparently in grave peril. This Court has allowed transfers only in exceptional cases considering the fact that transfers may cast unnecessary aspersions on the State Judiciary and the prosecution agency. Thus, over the years, this Court has laid down certain guidelines and situations wherein such power can be justiciably invoked.*

*29. In Amarinder Singh v. Parkash Singh Badal, this Court observed as follows:*

*"19. Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC."*

*30. In Nahar Singh Yadav v. Union of India after analysing the case-law, this Court enumerated the basic principles of the power of transfer under Section 406, CrPC as follows:*

*"29. Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Section 406 CrPC 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 some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice."*

*31. In R. Balakrishna Pillai v. State of Kerala, this Court noted the crucial separation of powers between the judiciary and the executive and held that "Judges are not influenced in any manner either by the propaganda or adverse publicity. Cases are decided on the basis of the evidence available on record and the law applicable."*

*32. The convenience of parties and witnesses as well as the language spoken by them are also relevant factors when deciding a transfer petition, as has been noted by this Court in a catena of judgments.*

*33. In some of the recent decisions including in Neelam Pandey v. Rahul Shukla, this Court has viewed that transfer of a criminal case from one state to another implicitly reflects upon credibility of not only the State Judiciary but also of the prosecution agency."*

23. Having considered the observations made by the Constitutional Courts on the issue of transfer of a case from one Court to another Court as also the fact(s) of the present case that (i) Applicant No. 1 is brother-in-law of opposite party No. 2; (ii) Sister of opposite party No. 2 (wife of applicant No. 1) lodged an FIR against the applicants under Section 498-A, 323 I.P.C. & Section-3/4 D.P. Act in two Districts in respect of same alleged incident in which one has been registered as a Case Crime No. 29/2020 at Police Station-Dariyabad, District-Barabanki and another in Case Crime No. 01/2020 at Police Station-Kotwali Nagar, District-Pratapgarh and both the cases Investigating Officers have submitted the Charge-sheets against the applicants; (iii) Allegations that under the pressure of opposite party No. 2 the charge sheets have been filed in the cases instituted by the sister of the opposite party No. 2 are completely vague; (iv) The applicant No. 1 is already on bail in the case in issue and this fact indicates that opposite party No. 2 did not influence either the Advocate appearing in the case or the Police of the district or the Presiding

Officer and accordingly it reveals that family members of the applicant No. 1 and applicant are able to do pairavi in the case; (v) Applicant No. 1 has to attend the case instituted at District-Pratapgarh by wife, this Court finds no force in the application.

24. Accordingly, present application is **rejected**. No order as to costs.

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**(2024) 7 ILRA 1339**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 30.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ-A No. 6890 of 2024
Alonwith
Writ-A No. 18846 of 2018

**Radheshyam** **...Petitioner**
**Versus**
**State of U.P. & Ors.** **...Respondents**

**Counsel for the Petitioner:**
Uma Nath Pandey

**Counsel for the Respondents:**
C.S.C.

**A. Service matter- Constitution of India, 1950-Article 226-U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules 1978-Rule 4-Petitioner sought payment of contributory provident fund, pension, and salary arrears-The court had previously held( in 2018) that seniority would only count from the year a teacher obtained the necessary qualifications, making one Ravendra Singh senior to the respondents-The Director of Education, however ruled in 2018 that seniority should be based on initial appointment dates, disregarding the 2018 court ruling-The court quashed the Director's order and reaffirmed that seniority should be determined from the date of obtaining training qualifications, not initial appointment-The director was ordered to reconsider the seniority claims within two months.(Para 1 to 33)**

**The petition is allowed.** (E-6)

**List of Cases cited:**

1. U.P. Basic Shiksha Parishad & anr Vs Hari Deo Mani Tripathi & ors. (1996) 9 SCC 623

2. Shitla Prasad Shukla Vs St. of U.P. & ors. (1986) UPLBEC 473

3. Panchami Singh & ors. Vs Jt. Dir. of Edu. Gorakhpur & ors. (2003) 1 363 All

4. Arvind Kumar Tripathi Vs St. of U.P. & ors. (2013) 1 UPLBEC 419

5. Jagdish Narain Shastri Vs Basic Shiksha Parishad Etawah (1986) UPLBEC 1058 (CMWP No. 10920 of 1986)

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

1. Case called out in the revised list.

2. Heard Sri Kushmondeya Shahi, the learned counsel for the petitioner, Sri Manoj Srivastava, learned Standing Counsel representing respondents no. 1, to 3 and Sri Uma Nath Pandey, learned counsel appearing for respondent no. 6. No other counsel is present and no adjournment of the case has been sought.

3. By means of Writ-A No. 18846 of 2018 filed under Article 226 of the Constitution of India, the petitioner - Ravendra Singh, has challenged the validity of an order dated 07.08.2018, passed by the Director of Education (Secondary), U.P. Lucknow, rejecting the petitioner's representation dated

23.03.2018, through which he had claimed to be placed in seniority list above the respondents no. 5 to 7, and had claimed payment of salary on the post of Trained Assistant Teacher with effect from 27.10.2004.

4. Writ-A No. 6890 of 2024 has been filed by the petitioner - Radheshyam, who is opposite party no. 6 in Writ-A No. 18846 of 2018, claiming payment of contributory provident fund, pension and other retiral benefits and also arrears of salary for the period 14.11.2005 to 10.09.2018.

5. Writ-A No. 6890 of 2024 has apparently been filed for the reason that an interim order dated 05.09.2018 was passed in Writ-A No. 18846 of 2018 directing that status quo, as is existed of the date of the said order, shall be maintained.

6. Briefly stated facts of the case are that the respondents no. 5 to 7 – Brijbhan, Radhey Shyam and Prem Prakash Srivastava, were appointed as Assistant Teachers in Captain M.D. Singh Uchchatar Madhyamik Vidyalaya, Basti on 01.07.1981, whereas the petitioner - Ravendra Singh, was appointed as Assistant Teacher in the aforesaid institution on 05.04.1984.

7. Rule 4 of the U. P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules 1978, as it stood prior to its amendment by a Notification dated 04.12.2019, provided that the minimum qualification for the post of Assistant Teacher of a recognized 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.

8. Although, the respondents no. 5 to 7 were appointed as Assistant Teacher on 01.07.1981, they did not possesses the essential qualification of training, as provided by Rule 4 aforesaid and all of them acquired the requisite qualification of training in the year 1986.

9. On the other hand, the petitioner - Ravendra Singh had acquired the requisite qualification of training in the year 1982 and he possessed the essential qualification on 05.04.1984 - the date of his appointment as Assistant Teacher in Captain M.D. Singh Uchchatar Madhyamik Vidyalaya, Basti.

10. At the time when the petitioner joined as an Assistant Teacher in the Institution in question, it was a junior high school, it was upgraded to High School level with effect from 22.11.1985, and the provisions of U. P. High Schools and Intermediate Colleges (Payment of Salaries to Teachers and other Employees) Act, 1971 became applicable to the institution after the benefit of aid was extended to it on 27.10.2004.

11. A Government Order dated 27.10.2004, specifies that apart from the post of Principal, seven posts of Assistant Teacher, one post of clerk and five posts of peon were sanctioned in the college. The names of respondent nos. 5 to 7 were included as Assistant Teachers of the college, whereas the name of the petitioner was not included therein.

12. The petitioner filed Writ-A No. 72525 of 2005, stating that although respondent nos. 5 to 7 had been appointed on 01.07.1981, they did not possess the essential qualification of training on the date of their appointment and also on the date of approval granted to their appointment on 10.01.1986. The petitioner was appointed on 05.04.1984, and the District Basic Education Officer had granted approval to the petitioner's appointment on 07.12.1985.

13. An interim order dated 25.11.2005, was passed in Writ-A No. 72525 of 2005, withholding payment of salary to respondent nos. 5 to 7 until further orders. On 21.04.2009, this Court passed another order directing that the Director, Madhyamik Education to take a final decision in the pending enquiry in respect of grant of salary to the petitioner as well as the respondents and it was provided that the interim order granted earlier shall continue to operate till final disposal of the Writ Petition.

14. In furtherance of the aforesaid order dated 21.04.2009 passed in Writ-A No. 72525 of 2005, the Director proceeded to passed an order dated 01.06.2009 holding that the respondent nos. 5 to 7 were appointed on 01.07.1981, and they were senior to the petitioner, who was appointed on 05.04.1984 and, therefore, they were entitled to get salary.

15. The petitioner challenged the aforesaid order dated 01.06.2009 passed by the Director by filing Writ-A No. 33324 of 2009.

16. Both the Writ Petitions nos. 72525 of 2005 and 33324 of 2005 filed by the petitioner Ravendra Singh were allowed by means of a common judgment and order dated 13.03.2018 passed by this Court, in which this Court held that it is settled law that benefit of seniority would enure to an Assistant Teacher only after he attains training qualification. The private respondents admittedly were not possessing any training qualification on the date of their appointment. They have obtained such qualification in the year 1986. Their entry into service would be treated only from 1986, and not prior to it for the purposes of seniority. For the aforesaid reason, this Court, allowed the writ petition quashed the impugned order and Director of Education (Secondary) to consider the respective claims of the parties afresh, in light of the aforesaid observations made by this Court in the judgment dated 13.03.2018, and also the law laid down by the Hon'ble Supreme Court in **U.P. Basic Shiksha Parishad and Another versus Hari Deo Mani Tripathi and Others**: (1996) 9 SCC 623.

17. After passing of the aforesaid order, the petitioner - Ravendra Singh submitted a representation dated 23.03.2018, and the Director Education ((Secondary) has rejected the same by the impugned order dated 07.08.2018. The Director of Education has stated in the impugned order that respondent nos. 5 to 7 had acquired the qualification of training in the year 1986 i.e. prior to 01.01.2004, when the college was taken on grant-in-aid list. The petitioner was appointed on 05.04.1984, on probation for a period of one year and the District Basic Education Officer had granted approval to the petitioner's appointment by means of an order dated 07.12.1985. The appointment of petitioner made on 05.04.1984, was not as per rules, as the petitioner had been appointed prior to approval by the District Basis Education Officer.

18. It is relevant to note in this regard that the respondent nos. 5 to 7 were also appointed on 01.07.1981, and approval for their appointment was granted on 10.01.1986 but the Director Education (Secondary) did not raise such objection against validity of their appointment although, approval of their appointment was granted five years after their actual appointment.

19. The Director of Education proceeded to state in the impugned order that as per the provisions contained in Regulation 3 of Chapter II of the Regulations framed under the Intermediate Education Act, seniority of a teacher shall be fixed from the date of his original appointment. The original appointment of the petitioner was made on 05.04.1984, whereas the respondent nos. 5 to 7, were appointed on 01.07.1981. He has taken into consideration a report submitted by the District Inspector of Schools, Basti, stating that the institution in question was included in the grant-in-aid list on 27.10.2004, but the list of teachers of the college did not include the name of the petitioner and, therefore, the petitioner was not entitled to payment of salary. The report submitted by the D.I.O.S. also stated that the petitioner had acquired training on 16.07.1982, and he was appointed on 05.04.1984, whereas the respondent nos. 5 to 7 were appointed on 01.07.1981 and they had acquired training in the years 1986. In compliance of the order dated 25.11.2005, passed by this Court in Writ-A No. 72525 of 2005, the directorate had passed an order dated 01.06.2009, holding the petitioner to be junior to the other three teachers, due to which reason salary was not being paid to him. Regarding the decision of the Hon'ble Supreme Court in **Hari Deo Mani Tripathi (supra)**, the Director held that the Basic Education Service Rules 1981 apply to the Basic Schools, whereas Captain M.D. Singh Higher Secondary Schools is not a Basic School and is not regulated by the aforesaid Rules. It was a Junior High School, which was upgraded to a High School and thereafter it was taken on grant-in-aid list. The appointments of teachers made prior to 1985 were governed by U.P. Recognized Basis Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules 1978.

20. The Director of Education held that the institution in question which is aided and recognized up to intermediate level, is governed by the provisions of U.P. Intermediate Education Act, U.P. Secondary Education Service Selection Board, U.P. High School and Intermediate Colleges (Payment of Salary of Teachers and other Employees) Act, 1971. The respondent nos. 5 to 7 were appointed on 01.07.1981, whereas the petitioner was appointed on 05.04.1984, therefore, the petitioner is junior to the other three teachers. The Director categorically stated that the seniority of teachers will be calculated on the basis of their initial appointment and not from the date of their acquiring the eligibility condition of training.

21. While assailing validity of the aforesaid order, the learned counsel for the petitioner has drawn attention of the Court to the judgment of the Hon'ble Supreme Court in **U.P. Basic Shiksha Parishad and Another versus Hari Deo Mani Tripathi and Others**: (1996) 9 SCC 623, wherein the Hon'ble Supreme Court had propounded the following principals: -

*"23. **Historically, as we have noticed earlier, untrained***

***Assistant Teachers used to be employed when trained teachers were not available and the untrained Assistant Teachers became trained Assistant Teachers only on their getting requisite certificate of training and from that date only they were treated as regular Assistant Teachers getting the proper scale of pay meant for them.*** *It is the trained Assistant Teacher who alone was eligible for promotion to the post of Headmaster. There were three scales even for trained Assistant Teachers and it was trained Assistant Teacher in the Higher scale who was eligible for being promoted as Headmaster.* ***When the 1981 Rules came into force the writ petitioners had by then become trained Assistant Teachers and as such under Rule 22 only the date of appointment as trained Assistant Teacher in substantive capacity is to be seen and not the date of appointment as untrained Assistant Teacher.***

*24. Reliance by the High Court on the case of Jagdish Narain Shastri (supra) is not proper as that case related to Assistant Teacher of Sanskrit employed under Rule 13.A of the Manual for whom no qualification of trained teacher was required and thus the judgment in that case was of no avail to the learned Judge in the present case.* ***In the past also the seniority lists were being maintained separately for trained Assistant Teachers and untrained Assistant Teachers.***

*25. Thus the respondents,* ***untrained teachers, are of a different class and cannot rely upon the service as untrained Assistant Teachers in the lower grade with the trained Assistant Teachers drawing higher grade of pay."***

(Emphasis added)

22. Regulation 3, Chapter II of the Regulation framed under the U.P. Intermediate Education Act, 1921 provides as follows: -

*"For the purposes of this case relevant provision of Regulation 3 of Chapter-II, which reads as follows, is also being looked into:*

*"3. The Committee of Management of every institution shall cause a seniority list of teachers to be prepared in accordance with the following provisions-*

*(a)* ***The seniority list shall be prepared separately for each grade of teachers whether permanent or temporary, on any substantive post;***

*(b)* ***Seniority of teachers in a grade shall be determined on the basis of their substantive appointment in that grade****. If two or more teachers were so appointed on the same date, seniority shall be determined on the basis of age;....................."*

(Emphasis added)

23. In **Shitla Prasad Shukla versus State of U.P. and Others**: 1986 UPLBEC 473, wherein a distinction was made between teachers who were regularly and properly appointed and those whose appointment became regular subsequently.

It was held that these two sets of teachers would belong to different streams and a teacher whose appointment became regular at some point of time after this appointment could not be permitted to steal a march over a teacher who was regularly appointed earlier.

24. In **Panchami Singh and Others Vs. Joint Director of Education Gorakhpur and Others**: 2003 (1) ESC 363 (All), this Court held that: -

> *"where the petitioner acquired the requisite training qualification subsequent to his appointment, he became a qualified trained teacher, only from the date he acquired the training qualification."*

25. A Co-ordinate Bench of this Court held in **Arvind Kumar Tripathi versus State of U.P. and Others**: 2013 (1) UPLBEC 419, that: -

> *"On the parameters of the aforesaid regulation quote above, it is apparent that ad-hoc service has hardly relevance and inter se seniority is dependent totally from the date of substantive appointment."*

26. Per contra, Sri Uma Nath Pandey, learned counsel for the respondent no. 6 has submitted that in the case of **Hari Deo Mani Tripathi (Supra)**, the Hon'ble Supreme Court had referred to a judgment of this Court in the case of **Jagdish Narain Shastri vs. Basic Shiksha Parishad, Etawah**: 1986 UPLBEC 1058 (Civil Misc. Writ No. 10920 of 1986, decided on 07.08.1986), in which this High Court held that: -

> *"Eligibility for promotion Under Rule 18 of U.P. Basic Education (Teachers) Service Rules is seniority alone. Therefore, Petitioner or any other teacher who was appointed as teacher in 1962 or onwards was eligible to be called for interview, when opposite parties who were appointed later and were junior to Petitioner were not only called but selected. Exclusion of Petitioner because they received training later than opposite parties is not supported by any rule or government order. Training for the post of head master of Junior High School may be imperative. But that in absence of any rule could not be basis of seniority. Requirement is training and not the period or length of training. Although even if that would have been necessary Petitioner took training in 1972-73 is more than ten years before selection. In any case the scope of any ambiguity has been ruled out as the government by its order issued in 1981 clarified that training shall not result in break of service and all those appointed prior to 1968 shall be entitled to be treated as in continuous service. Exclusion of Petitioner, therefore, was not justified.*
>
> *This Court directed the authorities to treat all those teachers of Junior Basic Schools who were appointed prior to 1968 but received their training later on as senior in order of their appointment and call them for interview for the post of head master.*

27. While dealing with the judgment in the case of **Jagdish Narain Shastri** (Supra), the Hon'ble Supreme Court noted in **Hari Deo Mani Tripathi** (Supra) that the High Court has recorded a concession given on behalf of the petitioner that they were interested in getting their promotion and having their seniority fixed and, therefore, they did not want to disturb the headmasters already selected. Consequently, the High Court had directed that seniority of the petitioners be fixed afresh and thereafter, they be considered for promotion. An order passed on concession of the parties, without recording any finding or reasons of the Court, does not lay down any ratio decidendi, which would be binding on subsequent cases. Moreover, in para 24 of the judgment in **Hari Deo Mani Tripathi (supra)**, the Hon'ble Supreme Court has held that reliance by the High Court in the case of **Jagdish Narain Shastri (supra)** is not proper.

28. The learned counsel for the respondent no. 6 has next submitted that the case of **Hari Deo Mani Tripathi (supra)**, dealt with a question of seniority of a teacher in basic school and not with a teacher of an intermediate college.

29. In this regard, suffice it to say that the judgment in **Hari Deo Mani Tripathi (supra)** lays down a principle of law regarding fixation of seniority, that if an untrained Assistant Teachers was employed when trained teachers were not available, he can be treated as a regular Assistant Teacher only after he acquires the requisite certificate of training. Only the date of appointment as trained Assistant Teacher in substantive capacity is to be seen and not the date of appointment as untrained Assistant Teacher. Untrained teachers are of a different class and the service rendered as untrained teacher cannot be equated with the services of the trained Assistant Teachers. Therefore, separate seniority lists of trained Assistant Teachers and untrained Assistant Teachers should be maintained. This principle is not limited is applicable to the teachers of basic schools and the principle would apply to the teachers of High Schools and Intermediate colleges as well.

30. In the judgment and order dated 13.03.2018, passed by this Court in Writ-A Nos. 72525 of 2005 and 33324 of 2009 this Court had categorically held that the respondent nos. 5 to 7, admittedly were not possessing any training qualification on the date of their appointment and they obtained such qualification in the year 1986. Their entry into service would be treated only from 1986 and not prior to it for the purposes of seniority. After recording the aforesaid finding, this Court had directed the Director of Education (Secondary) to accord consideration to the respective claims of the parties afresh keeping in view the observation made above. The Director of Education has passed the impugned order, without taking into consideration the aforesaid observation made by this Court in the judgment and order dated 13.03.2018, that the entry of the respondent nos. 5 to 7 into service would be treated only from 1986 and not prior to it.

31. As the Director of Education has passed the impugned order dated 07.08.2018 against the findings recorded by this court in the judgment and order dated 13.03.2018 passed in Writ-A Nos. 72525 of 2005 and 33324 of 2009, and also against the principle of law laid down by the Hon'ble Supreme Court in the case of **Hari Deo Mani Tripathi (supra)**, the order

passed by the Director of Education (Secondary) is unsustainable in law.

32. The claim of the petitioner in Writ A No. 6890 of 2024 is consequential to the order to be passed by this Court in Writ A No. 18846 of 2018 and the learned Counsel for the petitioner in Writ A No. 6890 of 2024 has advanced submissions in opposition of Writ A No. 18846 of 2018 only.

33. Accordingly Writ A No. 18846 is **allowed** and the impugned order dated 07.08.2018, passed by the Director of Education (Secondary) is quashed and Writ A No. 6890 of 2024 is **dismissed**.

34. The matter is remanded to the Director of Education (Secondary) to pass a fresh order regarding the claim of seniority of the petitioner and the respondent nos. 5 to 7, within a period of two months from the date of receipt of a certified copy of this order, after giving adequate opportunity of hearing to the affected persons and keeping in view the observations made by this Court in the earlier judgment and order dated 13.03.2018 passed by this Court in passed in Writ-A Nos. 72525 of 2005 and 33324 of 2009 as well as the observations made in this judgment.

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**(2024) 7 ILRA 1346**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 26.07.2024**

**BEFORE**

**THE HON'BLE DR. GAUTAM CHOWDHARY , J.**

Application U/S 482 No. 20438 of 2022

**Nikki Devi ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Akhilesh Chandra Shukla, Amar Bahadur Maurya, Amber Khanna, Anubhav Dwivedi, Anurag Mishra, Deepak Singh Patel, Dev Kant Trigunait, Dinesh Kumar Pandey, Durgesh Chandra Tiwari, Kavindra Dwivedi, Mukesh Kumar, Neeraj Kumar Pandey, Raj Kumar Khanna, Rajendra Prasad Dubey, Rajesh Kumar Gautam, Ramesh Kumar Ojha, Sanjai Singh, Satya Dheer Singh Jadaun, Saurabh Basu, Shailesh Kumar, Upendra Upadhyay, Vinod Rajmurti Yadav, Vishwambhar Nath

**Counsel for the Opposite Parties:**
Anurag Kamal, G.A., Hari Om Rai

**A. Criminal Law-Criminal Procedure Code,1973-Section 482-Indian Penal Code, 1860-Sections 376-D & 506 & -Section 3(2)(v) of the SC/ST Act-applicant seeks expedited trial in Session Trial no. 560 of 2021 involving charges of gang rape, criminal intimidation, and violations of the SC/ST Act-non-practicing advocates, in collaboration with women from SC/ST community, involved in fabricating false cases for personal and financial gain, particularly targeting innocent individual (including practicing advocates)-The court stayed the proceedings of trial and ordered a thorough investigation in this matter-CBI inquiry revealed discrepancies in the victims statements, raising doubts about he validity of the allegations against the accused-The CBI identified a pattern of false allegations in 46 similar cases, including the present one, which led to concerns about the abuse of judicial process for financial gain-the preliminary enquiry reports clears the entire position that innocent persons have been trapped in fake and bogus cases at the behest of Advocates.(Para 1 to 45)**

**B. CBI Inquiry Ordered:-In light of seriousness of the allegations and the complexity of the matter, the Court exercised its inherent powers to direct a CBI investigation. The CBI was tasked**

**with conducting a preliminary inquiry into 46 similar cases in which non-practicing advocates were allegedly involved in fabricating charges. The investigation was necessary to ensure impartiality and restore faith in the judicial process. The CBI's inquiry revealed significant discrepancies, particularly in Call Detail Records and the Statements provided by the victim, which cast doubt on the authenticity of the rape allegations . I was found that during the alleged crime, the victim's location was inconsistent with her account, and no concrete evidence supported the claims made against the accused.(Para 23 to 34)**

**C. Allegations of False cases and Misuse of SC/ST Act- The core allegation in this case revolved around a conspiracy by non-practicing advocates, in collaboration with women from SC/ST community, to file false cases under various sections of the IPC and SC/ST Act. The court observed that while the SC/ST Act is an essential legislative measure for protecting marginalized communities, its misuse for personal gain undermines its purpose.(1 to 35)**

**D. Inherent Powers of the High Court (Section 482 CrPC)-The court emphasized that the inherent powers granted u/s 482 CrPC must be used with caution and discretion. These powers are meant to prevent the abuse of judicial process, ensure that justice is delivered, and intervene when the legal process, is manipulated for wrongful purposes. While these powers are broad, their application should not stifle legitimate prosecutions or shield offenders from accountability. The court referred to the precedent set in State of West Bengal Vs. Committee for Protection of Democratic Rights, wherein the Apex Court highlighted that judicial discretion should be exercised in exceptional cases where there is a risk of a miscarriage of justice. (Para 1 to 35)**

**The petition is disposed of.** (E-6)

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

1. Heard Sri Shailesh Mishra, learned counsel for the applicant, Sri Gyan Prakash learned Additional Solicitgor General of India, assisted by Sri Sri Sanjay Yadav, learned counsel for the C.B.I. learned A.G.A. for the State and Sri Bhupendra Pandey, opposite party no.2-Advocate in person

2. By means of the present application under Section 482 Cr.P.C. the applicant-informant namely, Nikki Devi has sought direction upon the learned Special Court SC/ST Act, Prayagraj, District Prayagraj, to consider and decide the trial of Sessions Trial No. 560 of 2021 (State Vs. Bhupendra Pandey) arising out of Case Crime No. 150 of 2021 under Sections 376-D, 506 I.P.C. and Section 3 (2) (v) of SC/ST Act, Police Station Daraganj, District Prayagraj, as expeditiously as possible.

3. The instant case has remained pending since 2022. When the matter came up for consideration on 21.07.2022, it was intimated to the Court by Sri Bhupendra Pandey, the opposite party no.2 that several gangs of non-practising Advocates, are being operated involving women, to trap the innocent persons in fake cases

implicating them amongst others Sections of IPC, under SC/ST Act and after submission of charge sheet, they distribute the money received from the Government, amongst themselves.

4. Apart from the aforesaid submissions made by Sri Bhupendra Pandey, it was also intimated to the Court that certain persons, though they are Advocates on paper, but are non-practising Advocate have formed a gang and are closely associated with the ladies of SC/ST community. The *modus operandi* of the gang is -the ladies enter into agreement to sell after taking earnest money from the vendee. When the vendee asks them to execute the sale deed, they refuse and on insistence by the vendee, the alleged vendor use to implicate those vendees in false and frivolous case under penal provision of IPC along with SC/ST Act. When the vendee seeks protection in accordance with law before appropriate Court, these vendor take shelter of those of Advocates Gang, who used to initiate criminal proceedings at the behest of those vendor not only against the vendee but also against the Advocates of vendee who contests the case on their behalf. It was also brought to the notice of the Court that practising Advocates have also become victims of false accusation by the non-practising Advocates. Those non practising advocates are involved in some other profession such a real estate, construction etc. under the garb/ shelter of their advocacy.

5. It is well acknowledged that the powers under section 482 Cr.P.C has to be exercised by the Court to prevent abuse of the process of any court or otherwise to secure the ends of justice. Though the powers possessed by the High Court under Section 482 of Cr.P.C. are very wide but the very plenitude of the power requires great caution in its exercise. The inherent power cannot be exercised to stifle a legitimate prosecution. Such powers have to be exercised only to give effect to any order under Cr.P.C, to prevent abuse of the process of any court and to secure the ends of justice. Therefore, considering the seriousness of the allegations made and the gravity of offence, this Court vide order dated 21.07.2022 had stayed the further proceedings of Sessions Trial No. 560 of 2021 (State Vs. Bhupendra Pandey) arising out of Case Crime No. 150 of 2021 under Sections 376-D, 506 I.P.C. and Section 3 (2) (v) of SC/ST Act, Police Station Daraganj, District Prayagraj after inviting

counter and rejoinder affidavits fixing the matter for 18.08.2022.

6. In line no.1 of paragraph no.9 the word ”applicant” was inadvertently transcribed in place of “accused”, thus the correction application filed for the said correction was allowed vide order dated 01.08.2022.

7. When the matter was taken up on 18.08.2022, counter affidavit was filed by the accused-opposite party no.2 bringing on record a list of as many as 50 cases registered against the innocent persons including the Advocates. Including the instant case i.e. Sessions Trial No. 560 of 2021 (State Vs. Bhupendra Pandey) arising out of Case Crime No. 150 of 2021 under Sections 376-D, 506 I.P.C. and Section 3 (2) (v) SC/ST Act, Police Station Daraganj, District Prayagraj, in this way total 51 cases have been registered at District Prayagraj, out of which 36 cases have been registered at Police Station Mau Aima and the remaining cases have been registered at different Police Stations. The list of criminal cases is annexed as Annexure-CA17 to the affidavit. This Court relying upon the Judgement of Hon’ble Apex Court in the matter of ***State of West Begal and others Vs. The Committee for Protection of Democratic Rights, West Bengal and others reported in 2010 (3) SCC 571*** and also taking into account the interest of justice and to protect the interest of Advocates, who are being victimised on false accusation directed the C.B.I. to conduct preliminary enquiry with regard to 46 cases only as well as Sessions Trial No. 560 of 2021 (State Vs. Bhupendra Pandey) arising out of Case Crime No. 150 of 2021 under Sections 376-D, 506 I.P.C. and Section 3 (2) (v) SC/ST Act, Police Station Daraganj, District Prayagraj. The detail of which are given below:-

1. Case Crime No. 181 of 2002 under Sections 323, 504 I.P.C. Police Station Mau-aima, District Allahabad.

2. Case Crime No.406 of 2002 under Sections 323, 504, 506, 452 I.P.C. Police Station Mau-aima, District Allahabad.

3. Case Crime No. 128 of 2005 under Sections 323, 504, 506, 452, 394, 307 I.P.C. Police Station Mau-aima, District Allahabad.

4. Case Crime No. 233 of 2007 under Sections 198Ka, 323, 504, 506, 452, 307, 394, 147, 148 I.P.C. Police Station Mau-aima, District Allahabad.

5. Case Crime No. 112 of 2010 under Sections 307, 323, 504, 506, 324 I.P.C. Police Station Mau-aima, District Allahabad.

6.Case Crime No.416 of 2011 under Sections 147, 392, 452, 323, 504, 506, 427 I.P.C. Police Station Mau-aima, District Allahabad.

7. Case Crime No. 302 of 2007 under Sections 367, 504, 506 I.P.C. Police Station Mau-aima, District Allahabad.

8. Case Crime No. 87 of 2012 under Sections 323, 324, 504, 506, 308 I.P.C. Police Station Mau-aima, District Allahabad.

9. Case Crime No. 30 of 2013 under Sections 507, 115, 120-B I.P.C. Police Station Mau-aima, District Allahabad.

10. Case Crime No. 299 of 2016 under Section 174, 504, 507 I.P.C. Police Station Shiv Kuti District Allahabad.

11. Case Crime No. 154 of 2016 under Sections 147, 323, 447, 452, 504, 505, 427 I.P.C. Police Station Baharia, District Allahabad.

12. Case Crime No. 47 of 2016 under Sections 323, 504, 427 I.P.C. Police Station Kydganj, District Allahabad.

13. Case Crime No.361 of 2016 under Sections 147, 323, 504, 506, 379 I.P.C. and Section 3 (2) V SC./ST Act Police Station Shivkuti, District Allahabad.

14. Case Crime No. 38 of 2017 under Section 506 I.P.C. Police Station Colonelganj, District Allahabad.

15. Case Crime No. 277 of 2017 under Sections 323, 504, 506 I.P.C. Police Station Shivkuti, District Allahabad.

16. Case Crime No. 92 of 2017 under Sections 147, 379, 447, 323, 504, 506, 427 I.P.C. and Section 3 (2) V SC/ST Act, Police Station Baharia, District Allahabad.

17. Case Crime No. 82 of 2008 under Sections 147, 148, 149, 302/34, 120-B I.P.C. Police Station Baharia, District Allahabad.

18. Case Crime No. 557 of 2017 under Sections 147, 323, 504, 506, 427, 394 I.P.C. Police Station Cantt. District Allahabad.

19. Case Crime No. 218 of 2012 Police Station Shivkuti, District Allahabad.

20. Case Crime No. 680 of 2021 under Sections 376 (D), 452, 506, I.P.C. and Section 3/4 of POCSO Act, and Section 3 (2) (V) SC/ST Act, Police Station Mau-aima, District Allahabad.

21. Case Crime No. 370 of 2019 under Sections 147, 323, 504, 352, 506 I.P.C. Police Station Mau-aima, District Allahabad.

22. Case Crime No. 097 of 2022 under Sections 147, 323, 504, 506, 452, 427 I.P.C. Police Station Mau-aima, District Allahabad.

23. Case Crime No. 142 of 2012, S.T. No. 389 of 2014 under Sections 323, 324, 504, 506 I.P.C. Police Station Mau-aima, District Allahabad.

24. Case Crime No. 106 of 2002 under Sections 323, 504, 508, 452 I.P.C. Police Station Mau-aima, District Allahabad.

25. Case Crime No. 125 of 2005 Police Station Mau-aima, District Allahabad.

26. Case Crime No. 179 of 2016 under Sections 302, 201 I.P.C. Police Station Mau-aima, District Allahabad.

27. Case Crime No. 270 of 2019 under Sections 323, 394, 504, 506 I.P.C. Police Station Mau-aima, District Allahabad.

28. Case Crime No. 29 of 2016 under Sections 147, 506, 507 I.P.C. Police Station Shivkuti, District Allahabad.

29. Case Crime No. 381 of 2017 under Section 506 I.P.C. Police Station Colonelganj, District Allahabad.

30. Case Crime No. 391 of 2017 under Sections 147, 323, 504, 506,379 I.P.C. and Section 3 (2) V Ka SC/ST Act, Police Station Shivkuti, District Allahabad.

31. Case Crime No. 30 of 2013 under Sections 504, 115, 120-B I.P.C. Police Station Shivkuti, District Allahabad.

32. Case Crime No. 181 of 2002 under Sections 323, 504 I.P.C. Police Station Mau-aima, District Allahabad.

33. Case Crime No. 406 of 2002 under Sections 323, 504, 506, 452 I.P.C. Police Station Mau-aima, District Allahabad.

34. Case Crime No. 233 of 2007 under Sections 198Ka, 323, 504, 506, 452, 307, 394, 147, 148 I.P.C. Police Station Mau-aima, District Allahabad.

35. Case Crime No. 112 of 2010 under Sections 307, 323, 504, 506, 324 I.P.C. Police Station Mau-aima District Allahabad.

36. Case Crime No. 416 of 2011 under Sections 147, 392, 452, 323, 504, 506, 427, I.P.C. Police Station Mau-aima, District Allahabad.

37. Case Crime No. 302 of 2007 under Sections 379, 504, 506 I.P.C. Police Station Mau-aima, District Allahabad.

38. Case Crime No. 142 of 2012 under Sections 323, 324, 504, 506, 308 I.P.C. Police Station Mau-aima, District Allahabad.

39. Case Crime No. 090 of 2021 under Sections 342, 376-D, 506 I.P.C. Police Station Mau-aima, District Allahabad.

40. Case Crime No. 317 of 2018 under Sections 392, 354Kha I.P.C. Police Station Mau-aima, District Allahabad.

41. Case Crime No. 72 of 2018 under Sections 436, 452, 147Kha, 148 I.P.C. Police Station Mau-aima, District Allahabad.

42. Case Crime No. 218 of 2018 under Sections 323, 308 I.P.C. Police Station Mau-aima, District Allahabad.

43. Case Crime No. 240 of 2017 under Sections 323, 504 I.P.C. and Section 3/2/5 SC/ST Act, Police Station Mau-aima, District Allahabad.

44. Case Crime No. 617 of 2018 under Sections 376, 313, 504, 506 I.P.C. Police Station Mau-aima, District Allahabad.

45. Case Crime No. 144 of 2022 under Sections 376D, 328, 506 I.P.C. Police Station Phaphamau, District Allahabad.

46. Case Crime No. 420 of 2021 under Sections 307, 342, 506 8I.P.C. Police Station Mau-aima, District Allahabad.

8. The informant-applicant Nikki Devi challenged the order dated 21.07.2022 and 18.08.2022 before Hon'ble Apex Court by way of filing Special Leave to Appeal (Crl) No(s) 8313-8314 of 2022 and the Hon'ble Apex Court had been pleased to dismiss the said special leave petition, vide order dated 12.09.2022.

9. After filing of counter affidavit by Sri Bhupendra Pandey, Advocate-the accused-opposite party no.2, who had specifically stated in his counter affidavit that as many 50 cases have been registered against the innocent persons at the behest of the non-practising Advocates and considering the gravity of cases, this Court had ordered for preliminary enquiry into the matter with respect to 46 cases vide order dated 18.08.2022 fixing the matter for 20.10.2022.

10. On 20.10.2022, Sri Vinod Shanker Tripathi, Advocate, had filed a modification/clarification application no.03 of 2022 along with impleadment application supported by an affidavit. He had filed a detailed affidavit, wherein it has been stated that malicious allegations have been imputed upon him by the opposite party no.2 to the extent of implicating him in a false and frivolous complaint through Smt. Nikki Devi and further levelling allegation against him that he is an active member of alleged gang of Advocates, who use to trap people in false/fake cases, in order to extract money. It has also been stated in the affidavit that the opposite party no.2 in the present case, has not come up with clean hands and intent before this Court since the opposite party no.2 himself encroached upon the land of innocent owners and is habitual of lodging false and frivolous F.I.Rs. He has also stated that the opposite party no.2 also got a false F.I.R. lodged through his sister against innocent persons for unlawful consideration in Case Crime No. 549 of 2015 under Sections 354, 504 I.P.C. Police Station Colonelganj, District Allahabad, in which compromise was entered into, after taking monetary compensation. Apart from the aforesaid averments several other averments have been made in the affidavit accompanying the modification application and had prayed that the order dated 18.08.2022 may be modified to the extent that apart from preliminary enquiry directed to be conducted by the C.B.I. with regard to the

cases shown at serial no. 1 to 46, the C.B.I. may also be directed to conduct preliminary enquiry with regard to the cases detailed in Annexure-23 of the affidavit accompanying the application.

11. Taking into consideration the averments made by Sri Vinod Shanker Tripathi in the impleadment application as well as in the modification application, this Court vide order dated 20.10.2022 had allowed the impleadment application for impleading Sri Vinod Shanker Tripathi as opposite party no.3. Apart from allowing the aforesaid impleadment application, this Court had also allowed the modification application filed by Sri Vinod Shanker Tripathi and this Court had directed the C.B.I. to conduct the preliminary enquiry with respect to 23 cases out of 26 cases sought to be preliminary enquired by the C.B.I. The details of 23 cases are as under:-

(1) Case Crime No. 0562 of 2012 under Sections 457, 380, 419, 420, 467, 468, 471 I.P.C. Police Station Colonelganj, District Prayagraj.

(2) Case Crime No. 105 of 2021 under Sections 376 (D), 506 I.P.C. Section 3(2) SC/ST Act, Police Daraganj, District Prayagraj.

(3) Case Crime No. 82 of 2010 under Sections 308, 406 I.P.C. Police Station Civil Lines, District Prayagraj.

(4) Case Crime No. 144 of 2022 under Sections 376 (D), 328 I.P.C. Police Station Phaphamau, District Prayagraj.

(5) Case Crime No. 798 of 2021 under Sections 504, 506 I.P.C. Police Station Civil Lines, District Prayagraj.

(6) Case Crime No. 312 of 2022 under Sections 323, 506, 406 I.P.C. Police Station Civil Lines, District Prayagraj.

(7) Case Crime No. 549 of 2015 under Sections 354, 504 I.P.C. Police Station Colonelganj, District Prayagraj.

(8) Case Crime No. 243 of 2018 under Sections 419, 420, 147, 323, 504, 506 I.P.C. and Section 3 (2) (V) and 3 (2) (VI) SC/ST Act, Police Station Civil Lines, District Prayagraj.

(9) Case Crime No. 558 of 2021 under Sections 147, 447, 323, 504 I.P.C. and Section 3 (2) (V) SC/ST Act, Police Station Civil Lines, District Prayagraj.

(10) Case Crime No. 379 of 2022 under Sections 147, 452, 427, 392, 504, 506 I.P.C. Police Station Civil Lines, District Prayagraj.

(11) Case Crime No. 289 of 2022 under Sections 386, 506 I.P.C. Police Station Civil Lines, District Prayagraj.

(12) Case Crime No. 114 of 2022 under Sections 147, 148, 149, 323, 504, 506, 307 I.P.C. Police Station Phaphamau, District Prayagraj.

(13) Case Crime No. 424 of 2022 under Section 420 I.P.C. Police Station Civil Lines, District Prayagraj.

(14) Case Crime No. 447 of 2022 under Sections 147, 148, 149, 323, 504, 506, 395, 34 I.P.C. Police Station Colonelganj, District Prayagraj.

(15) Case Crime No. 361 of 2021 under Sections 279, 304A I.P.C. Police Station Cantt. District Prayagraj.

(16) Case Crime No. 239 of 2012 under Sections 376D, 354, 504, 506 I.P.C. Police Station Mau Aima, District Prayagraj.

(17) Case Crime No. 181 of 2018 under Sections 323, 354B I.P.C. Police Station Mau Aima, District Prayagraj.

(18) Case Crime No. 105 of 2022 under Sections 376-D, 328, 506 I.P.C. 5/6 of POCSO Act, Police Station Mau-Aima, District Prayagraj.

(19) Complaint Case No. 908 of 2022 under Section 138 Negotiable Instruments Act, Police Station Civil Lines, District Prayagraj.

(20) Complaint Case No. 885 of 2022 under Section 138 Negotiable Instruments Act, Police Station Civil Lines, District Prayagraj.

(21) Complaint Case No. 125 of 2022 under Section 354, 452 I.P.C. and Section 3 (2) (V) SC/ST Act, Police Station Cantt., District Prayagraj.

(22) Complaint Case No. 06 of 2020 under Sections 323, 504, 506, 376-D I.P.C., Police Station Mau Aima, District Prayagraj.

(23) Complaint Case No. 17145 of 2022 under Sections 420, 467, 468 I.P.C. Police Station Mau Aima, District Prayagraj.

12. Number of intervener applications, modification application along with impleadment applications etc. were filed before this Court, wherein it has been alleged that the Advocates are being falsely implicated in false and frivolous cases, being the intervener application dated 20.10.2022, impleadment application no.15 of 2022, intervener application no. 24 of 2023, intervention application no.9 of 2022, application no. 13 of 2022 and Criminal Misc. Application No. 03 of 2024 filed in the connected Criminal Appeal No. 8520 of 2022.

13. On the intervener application dated 20.10.2022, this Court vide order dated 20.10.2022 has directed the C.B.I. to conduct the preliminary enquiry in Case Crime No. 599 of 2016 under Sections 147, 148, 149, 376, 354, 395, 397, 452, 427, 504, 506 I.P.C. Police Station Sarai Inayat, District Prayagraj.

14. On the Impleadment application no. 15 of 2022, the preliminary enquiry was directed to be conducted by C.B.I. vide order dated 13.02.2024 with respect to

Case Crime No. 0224 of 2021 under Sections 147, 323, 504, 506, 452, 354B I.P.C. Police Station Sarai Inayat, District Prayagraj as well as Case Crime No. 255 of 2022 under Sections 307, 504, 506, I.P.C. Police Station Sarai Inayat, District Prayagraj.

15. Similarly on intervener application no. 24 of 2023, this Court had also directed to conduct preliminary enquiry by the C.B.I. in Case Crime No. 90 of 2022 under Sections 494, 504, 506 I.P.C. Police Station Industrial Area, District Prayagraj, vide order dated 13.02.2023.

16. This Court while allowing the intervention application no. 09 of 2022, had directed the C.B.I. to conduct preliminary enquiry by the CBI with respect to Case Crime No. 91 of 2020 under Sections 354Kh, 147, 148, 323, 308, 427, 452, 504, 506 I.P.C. Police Station Hanumanganj, District Kushinagar, Criminal Complaint Case No. 429 of 2019 (old no. 180 of 2019) Police Station Kotwali Hata, District Kushi Nagar, Criminal Complaint Case No. 13615 of 2020 (Old Case No. 801 of 2020 ) under Sections 323, 504, 506, 427 I.P.C. Police Station Hanumanganj, District Kushinagar.

17. On the application no.13 of 2022, direction was issued by this Court vide order dated 13.02.2023 that a preliminary enquiry be conducted by the CBI with respect to Case Crime No. 195 of 2020 under Sections 376D, 406, 342, 506 I.P.C. Police Station Kareilly, District Prayagraj, Case Crime No. 141 of 2020 under Sections 468, 467, 420, 419, 406 I.P.C. Police Station Kydganj, District Prayagraj.

18. Another application being Criminal Misc. Application No. 03 of 2024 filed in connected Criminal Appeal No. 03 of 2024 was also allowed by this Court vide order dated 30.01.2024 in which, this Court had directed the C.B.I. to conduct preliminary enquiry in Case Crime No. 335 of 2021 under Sections 323, 504, 506, 354Kha I.P.C. and Section 3 (2) Va of SC/.ST (Prevention of Atrocities) Act, Police Station Kotwali, District Prayagraj/Allahabad.

19. It goes without saying that the applications which were allowed by this Court for conducting preliminary enquiry by the C.B.I. in respect to the cases as detailed in paragraph nos. 13 to 18, the accused persons are of pracitising Advocates.

20. Apart from allowing the aforesaid applications, numbers of applications were rejected by this Court vide order dated 31.10.2023.

21. Thus this Court, on different dates directed the C.B.I. to conduct preliminary enquiry in as many as 78 cases, details of which have already been given in the preceding paragraph nos.7, 11, 12, 13, 14, 15, 16, 17 and 18.

22. Pursuant to the order dated 18.08.2022, the Preliminary Enquiry report submitted by the C.B.I. being No. PE 0532022S0001 shows that the cases which were directed to be enquired preliminary by the C.B.I. were 46, however the cases shown at serial nos. 1, 2, 4, 5, 6, 7, 23, and 28 have been repeated at serial no. 32, 33, 34, 35, 36, 37, 38, 29 respectively and the F.I.R. said to have been registered at serial no. 30 of that report being Case Crime No. 391 of 2017 under Sections 147, 323, 504, 506, 379 I.P.C. and Section 3 (2) V Ka SC/ST Act, Police Station Shivkuti, District Allahabad is not existing. Thus out of 46 cases, only 38 cases were preliminary enquired by the C.B.I. which as are under:-

23. The preliminary enquiry No. PE 0532022S0001 with respect to 38 cases is in the following terms:

**(I)Case Crime No. 150 of 2021 under Sections 376-D, 506 I.P.C. and Section 3 (2)(v) of SC/ST Act, Police Station Daraganj, District Prayagraj,** which is instant case in the present 482 Cr.P.C. in which, the applicant-informant Nikki Devi lodged against the opposite party no.2 Bhupendra Kumar Pandey, has sought prayer to expedite the proceedings.

**Findings of the State Police:-** The first Investigating Officer namely, Sri Jai Prakash Shahi collected CDR of the accused during the investigation, the C.C.T.V. footage to ascertain the movement of the vehcile and recorded the statement of independent witnesses at scene of crime and found the alleged rape allegation suspicious. Since the prosecutrix belongs to Scheduled Caste, the concerned Sections of S/ST Act were added in the case. Therefore, case was transferred to concerned Circle Officer (City-V), Prayagraj for investigation. During subsequent investigation, accused Bhupendra Kumar Pandey, Advocate was arrested.

The Investigation was lastly carried out by Ms. Astha Jaiswal, who obtained legal opinion from Sri Gulab Chandra Saroj Prosecuting Officer, Prayagraj, for filing charge sheet on the basis of

material available on record. He opined positively and suggested that IO may collect more evidence before filing the report under Section 173 Cr.P.C. No further investigation was carried out in this matter and charge sheet was filed against Bhupendra Kumar Pandey under Section 376D and 506 I.P.C. only on the basis of statement of the victim recorded under Section 164 Cr.P.C. The case is at the stage of trial.

**Enquiry by the CBI:-** The first informant-victim had provided her mobile number 6391568409 in the F.I.R. which was issued by the service provider on 15.06.2021 at about 11:44 A.M. CDRs of the mobile number shows that there was no activity on this mobile number from 12:59 hours on 15.06.2021 to 17.06.2021. She got issued one more new mobile SIM on 15.06.2021 (the date of incident of alleged rape) in her name i.e. 7607946506 (Ritel) apart from 6391568406 (Vadafone). ON this day at 18:57:58, the location of mobile no. 7607946506 was found to be at Village Chak Payagi, Pargana Sikandara, Tehsil Phoolpur, District Prayagraj, which is about 32 kilometers away from the place of abduction i.e. C.M.P. Degree College, Prayagraj. Hence her allegation that she met with accused Bhupendra Kumar Pandey near C.M.P. Degree College at 07:00 P.M. does not appear to be correct. Sri Sonu husband of younger sister of the prosecutrix and his wife were using mobile no. 7754832321 & 9369071845 respectively and on that day i.e. on 15.06.2021, they had talked with the victim on her mobile no.7607946506. This further confirms that on 15.06.2021 the victim was using the mobile no 7607946506.

The CDR also reflects that during the alleged time of rape i.e. from 07:00 P.M. to 08:30 P.M. on 15.06.2021, this mobile number had received three calls at 20:06:54, 20:07:48 and 20:22:30 and at the time of receiving these calls, her location was at Village Dharauta, Tehil Mau Aima, District Allahabad and Lalganj, District Patapgarh which locations are more than 43 kilometers away from Jhoonsi area, the alleged place of rape.

The scrutiny of CDRs of mobile numbers 7318336999, 9792866999 of alleged accused Bhupendra Kumar

Pandey revealed that on 15.06.2021 from 16:37:31 to 18:42:47, his location was at Stanley Road, Civil Line, Prayagraj whereas at around 18:58:40, he was at Elgin Road, Prayagraj. At this time he had conversation on mobile no. 9889100101 which lasted for about 12 minutes. From 19:11:03 till 20:56:08 his location was at Kydganj, Bai Ka Bagh, Prayagraj. CDRs do not reflect his movement to the place of scene of crime.

Immediately after activation of mobile number 7607946506 by the victim-prosecutrix, the first call was made from this mobile was at around 12:28 PM on mobile number 8787272838 which was in the name of Sh. Vinay Shankar Tripathi, being used by Sh. Vinod Shankar Tripathi. On 15.06.2021, there were 03 more calls made from this mobile number to the mobile number 8787272838 of Sh. Vinod Shankar Tripathi. Sh. Sandeep Kumar Srivastava, Advocate, who appeared for Prosecutrix in Crl. Appeal No. 5350/21 has stated that Vakalatnama for this purpose was brought to him by Sh. Vinod Shankar Tripathi He denied having seen Prosecutrix in person.

The versions regarding the place of incident are varying in victim's statements recorded u/s 161 Cr.PC, 164 Cr.PC and during inspection of the crime scene. Residents around the place of incident have denied the occurrence of any incident of rape at that place.

From the CCTV footage of the cameras located along the route narrated by Prosecutrix/victim in her statement, movement of accused's vehicle was not seen during the relevant time. During her medical examination, prosecutrix had named Shri Govind Pandey in place of Bhupendra Kumar Pandey as an accused who had raped her.

The above facts do not inspire faith in the allegations of rape levelled by prosecutrix against Bhupendra Kumar Pandey & another. Further, the conduct of Sri. Vinod Shankar Tripathi, Advocate being in constant touch with the prosecutrix/ complainant during the relevant period also points finger towards his involvement in this case.

The registration of the aforesaid false case was followed by a counter rape case wherein Shri Vinod Shankar Tripathi and his father were arrayed as an accused on 15.05.2022 in FIR No. 105/2022 of Police Station: Daraganj lodged by Smt. Samla Giri alleging gang rape of her daughter on 08.05.2022 at about 07:30 PM. Investigation by the State Police established that no such incident had taken place. In fact, the victim, daughter of Smt. Samla Giri in her statement u/s 164 Cr.PC had stated that no such incident had taken place and the FIR was got registered on the directions of her mother. The CDR locations of mobile numbers of accused Vinod Shankar Tripathi, Brijesh, Rajesh Shukla, Sudhakar Mishra and Vijay Tripathi were collected by the State Police during investigation which reflected that at the time of incident, the accused persons were not present at the scene of crime. Shri Vinod Shankar Tripathi has alleged that Smt. Samla Giri is an associate of Shri Bhupender Kumar Pandey, Advocate and this FIR was lodged by her at his behest only.

Around this time Smt. Kusum Lata had stated to be an associate as well as client of Shri Bhupendra Kumar Pandey, Advocate filed another complaint no. 125/2022 dated 22.04.2022 under SC /ST Act before C.J.M. Allahabad against Vinod Shankar Tripathi, his father and brothers alleging that on 20.06.2021 at around 11:30 PM they forcibly entered her house at 14/A, Rajapur, PS Cantt. Prayagraj. Shri Vinod Shankar Tripathi has stated that as per the existing norms, the Govt. of UP gave a compensation of Rs. 6 lacs to her. In this case against Shri Vinod Shankar Tripathi and his family, Shri Jagat Narayan Tiwari is one of the witnesses in favour of Smt. Kusum Lata. Shri Vinod Shankar Tripathi has further stated that Smt. Kusum Lata had earlier taken similar compensation in FIR No. 243 of 2018, PS Civil Lines, Prayagraj in which Sri Jagat Narayan Tiwari who is star witness in this case, was made an accused as per the complaint of Smt. Kusum Lata Around this time, another FIR No. 114/2022 U/s 147, 148, 149, 323, 504, 506, 307 IPC PS Phaphamau was

registered on 21.04.2022 against Vinod Shankar Tripathi and his father on the complaint of Bhupendra Kumar Pandey alleging that on 16.06.2021 while coming from Shantipuram towards Ghori Road, his motorcycle was knocked down by Sri Vinod Shankar Tripathi by his car and that Sri Vinod Shankar Tripathi and his father allegedly fired bullets on him.

While the aforesaid cases were registered against Shri Vinod Shankar Tripathi, gang rape case was registered on 24.05.2022 against Shri Bhupendra Kumar Pandey, Advocate & his associates with the following details:-

**(II)Case Crime No. 144 of 2022 under Sections 376-D, 328, 504, 506 I.P.C. Police Station Phaphamau, District Prayagraj (placed at serial no.45 in the preceding paragraph no.7)**

**Findings of State Police:** The victim-X in her statement under Section 161 Cr.P.C. reiterated the facts narrated in the complaint. Accused-Wasim was arrested in this the matter. However, in her statement recorded under Section 164 Cr.P.C. she did not mention the name of Wasim. She replaced the name/role of Wasim with Bhupendra Kumar Pandey, Advocate. Accordingly, a report under Section 169 Cr.P.C. was filed and Wasim was released from jail. The case is still under investigation.

**Enquiry of CBI:-** Analysis of CDRs established that mobile number 6393579462 of Ms. Mansi Srivastava complainant/victim was in regular contact with mobile no. 9335909607 of Shams Vikas and mobile no. 8787272838 used by Vinod Shanker Tripathi from 17.05.2022 to 26.05.2022. The location of this mobile number on 22.05.2022 was at Jhakarrkati Bus Station, Kanpur at 11:53:54 hours and at Prayagraj Civil Line Bus Terminal at around 17:22:31 hrs. Thereafter, the mobiles location was used to be near Teliharganj from 17:50 to 19:16 Hours. She stayed near Lok Sewa Ayog Chauraha, Allahabad from 22.05.2022 to 24.05.2022 (9:26 Hrs).

Analysis of CDRs of mobile numbers 9792866999, 7318336999 of Advocate Bhupendra Kumar Pandey, revealed that on 22.05.2022, his location was

near Civil Lines area, Allahabad only. He had not visited Phaphamau on 22/23.05.2022 i.e. the date of incident.

Scrutiny of CDRs of mobile number 8787272838 of Vinod Shanker Tripathi revealed that on 22.05.2022, he was in contact with the victim Shams Vikas Advocate (9335909607) and Sudhakar Mishra Advocate (6394965879).

Scrutiny of CDRs therefore indicate that at the alleged time of rape incident , the complainant-victim was present in Civil Lines area, Prayagraj and not a Phaphamau area which is about 9 kilometers away.

Advocate Shams Vikas who is close associate of Vinod Shanker Tripathi, Advocate has confirmed that Vinod Shanker Tripathi is anguished by two false cases against him by Bhupendra Kumar Pandey and Samlagiri used the victim of Kanpur to implicate Bhupendra Kumar Pandey, his brother Arun associate Wasim and Shubham Giri son of Samalgiri in her rape case. During this period i.e. 17.05.2022 to 26.05.2022, Vinod Shanker Tripathi was also using mobile number 9335909607 of Shams Vikas to communicate the victim-X on her mobile 6393579462.

Vinod Shanker Tripathi, Advocate came in contact with complainant/victim as he had filed Public Interest Litigation before this Court in the matter of death of Sri Jitendra @ Kallu, the brother of the complainant/victim, Gaurav Tiwari, Junior of Shri Vinod Shanker Tripathi, confirmed the presence of Ms. Poonam Srivastava (sister of complainant/victim) with Vinod Shanker Tripathi at the residence of Sri Dineshwar Mani Tripathi (relative of Sri Vinod Shanker Tripathi) inside the Lok Sewa Ayog, premises during the relevant conspiracy period.

Facts aforesaid indicate that complainant/victim in conspiracy with Vinod Shanker Tripathi lodged a false F.I.R. No. 144 of 2022 pertaining to her rape against Bhupendra Kumar Pandey, Wasim, Arun Pandey and Shubham Giri to settle the scores particularly after the registration of false cases against Vinod Shanker Tripathi at the behest of BhupendraKumar Pandey and Samlagiri and to extort money from them.

Immediately after registration of above referred false gang rape case, the next day i.e. on 25.05.2022 Smt.Saira Bano wife of accused Wasim resident of Dheenpur, Mauaima Prayagraj filed an application with S.S.P. Prayagraj alleging her rape by Sri Vinod Shanker Tripathi, his father and ot hers on 24.05.2022 near Shantipuram Phaphamau, Prayagraj. Enquiry has revelased that husband of the complainant is work as Clerk (Munshi) with Advocate Bhupendra Kumar Pandey.

Another F.I.R. No. 424 of 2022 dated 04.08.2022 under Section 420 IPC. Police Station Civil Lines, District Prayagraj was registered on the complaint of Shri Bhupendra Kumar Pandey against Vinod Shanker Tripathi and his father alleging manipulation of theHigh Court Order. He got another FIR No. 447 of 202 dated 31.08.2022 under Sections 147, 149, 148, 323, 504, 506, 395 I.P.C. Police Station Colonelganj, District Prayagraj against Sri Vinod Shanker Tripathi, and four othes alleging beating/abuse (maarpeet) in District Court premises.

**Findings of CBI:-** The above mentioned facts established that the rivalry between Sri Bhupendra Kumar Pandey and Sri Vinod shanker Tripathi, Advocates had led to registration of number of criminal cases against both of them and their associates. Enquiry has revealed that out of 8 cases at least 03 cases i.e. F.I.R. Nos. 150 of 2021, Police Station Daraganj District Prayagraj, F.I.R. No. 144 of 2022 Police Station Phaphamau, District Prayagraj against Sri Bhupendra Kumar Pandey, Advocate and F.I.R. No. 105 of 2022 Police Station Daraganj, District Prayagraj lodged against Vinod Shanker Tripathi, Advocate do not appear to be based on true facts.

**(III) Case Crime No. 617/2018 U/s 376, 506, 313, 380 IPC of Police Station- Mauaima Prayagraj. (placed at serial no.44 in the preceding paragraph no.7)** The Enquiry has revealed that Sri. Ashish Kumar Mishra whose petition no. 17706 of 2019 was clubbed with the petition of Smt. Nikki Devi, is practicing as an Advocate in the Allahabad High Court. He has alleged

that he has been falsely implicated in this matter.

The aforesaid F.I.R was registered against Akash Kumar and his brother Dharmendra by the victm on the allegation that Akash Kumar had raped and both had looted her. Sri Sudhakar Mishra, Advocate was the lawyer of the victim in that matter Shri Prabhat Kumar Mishra, Advocate is a close associate of Shri Sudhakar Mishra, Advocate.

Sri Ashish Mishra was appearing before the High Court on behalf of Dharayandra Mishra and others. He stated that on 04.10.2018, he was threatened by Advocate Sunil Kumar and Advocate, Ajay Kumar Mishra on behalf of Prabhat Kumar Mishra that he should not appear before the High Court in the said matter otherwise he would face the consequences. Sri Krishna Kumar Shukla, Senior of Shri Ashish Mishra was also threatened to refrain from appearing in related matters filed by Sh Ramesh Kumar Ojha, Advocate (maternal uncle of Ajay Kumar Mishra) to which he acceded. However, Ashish Mishra continued to appear before the High Court on behalf of Dharayandra Mishra and others and the fact of threatening was submitted before the High Court. The same was mentioned in the order dated 12.10.2018 of the Hon'ble High Court in Transfer Application (Crl.) No. 423 of 2018.

Subsequently, on the basis of statement u/s 164 Cr.P.C., 1973 of rape victim in Case Crime No. 617/2018, PS Mauaima, Prayagraj, name of Ashish Kumar Mishra was added as an accused in the said case. Prosecutrix in her statement u/s 161 Cr.PC had stated that she was raped by Akash Kumar and was looted by Akash and Dharmendra. However, in her subsequent statement u/s 164 Cr.PC, she named Ashish Mishra and Mustqeem as additional offenders. On completion of investigation, a chargesheet was submitted on 23.02.2019 against Akash Kumar, Dharmendra Kumar and Ashish Kumar. Mustqeem was not charge-sheeted as he was living in Mumbai during the relevant period.

Scrutiny of statements of victim recorded under Sections 161 Cr.P.C. as well as statement during medical

examination and and the statements 164 Cr.P.C. shows glaring contradictions. Names of Ashish Mishra and Mustqeem surfaced for the first time in the statement of the victim recorded u/s 164 Cr.P.C wherein she stated that both raped her after Akash. Ashish Mishra has stated that he had not visited the place of crime on the day of incident and the same has been corroborated by the tower location of his mobile numbers which shows that at the time of incident, his location was at Prayagraj and not at the scene of crime i e. village Baka Jalalpur, which is 40 km, away from the scene of crime.

The victim had divorced her first husband Vinod and married Akash, the main accused in this case. The victim on 05.07.2022.

**Finding of CBI:-** Thus, it appears that Ashish Mishra Advocate was falsely implicated in the rape case of victim . The conduct of Sudhakar Mishra, Advocate, Ramesh Kumar Ojha, Advocate, Sunil Kumar, Advocate and Ajay Kumar Mishra, Advocate in this case appears to be suspicious.

Enquiry has revealed that Shri Sudhakar Mishra is an Advocate, who practising in Allahabad. It has been revealed that Advocates namely Ajay Kumar Mishra, Prabhat Kumar Mishra, Dheeraj Kumar Pandey Anurag Mishra, Satish Kumar Shukla, Ashutosh Shukla, Ramesh Kumar Ojha (maternal uncle of Ajay Kumar Mishra), Varun Shukla, Vishvambhar Nath and Aditya Kumar Mishra are associates of Sri Sudhakar Mishra, Advocate. He is native of village Chhata PS Mauaima Prayagraj and Diwakar Prasad Mishra, elder brother of Sudhakar Mishra is active in local Panchayat.

Enquiry has revealed that the group led by Diwakar Prasad Mishra, brother of Sudhakar Mishra is opposed to another group led by Sh. Devanand Yadav in the local Panchyat politics of Village-Chhata. Due to this political rivalry between these two groups, a number of cases were got registered by these rival groups at PS Mauaima. Details of these cases are as under:

**(IV) Case Crime No. 179/2016 dated 29.06.2016 U/s 147, 148, 149, 364, 302, 201 IPC of Police Station: Mauaima, Prayagraj (placed**

**at serial no.26 in the preceding paragraph no.7)**

**Findings of State Police:** Charge-sheet was filed against all 05 FIR named accused persons u/s 147, 148, 149, 364, 302 and 201 IPC. On conclusion of trial, all five accused were convicted vide order dated 08.05.2021 and sentenced for life imprisonment by the trial court and presently they are lodged in the Naini Jail, Allahabad

**Enquiry of CBI:** The complainant and 04 accused persons are neighbours while accused Devanand Yadav is the husband of Pradhan (Pradhan Pati) of their village. Pradhan of the village allotted Govt. Land on Lease to Santlal, Rajbahdur and Ramsevak equally. Davanand Yadav in the capacity of Pradhan Pati helped Santlal to get the possession of patta of said Land from Rajbahadur in the presence of Revenue Officer on 11.05.2016. Diwakar Mishra was having election rivalry with Santlal and Devanand Yadav as wife of Devanand Yadav defeated Diwakar Mishra's wife.

Before the murder case, The daughter-in-law of Raj Bahadur i.e. the Sunita lodged rape FIR No 176/2016 dated 26.06.2016 U/s 376 IPC relating to commission of rape upon her minor daughter alleging that Anil Kumar (13 years old) S/o Sant Lal committed rape upon the victim aged about 07 years on 05.06.2016. Sunita got her treated by local doctor and lodged FIR after 21 days of the alleged rape Anil Kumar was arrested on 27.06.2016. On 28.06.2016, allegation of rape could not be confirmed in the medical examination of the victim She was called by the Medical Officer, the next day le. on 29.06.2016. However, before the victim could appear before the medical examiner/ doctor, she was murdered in the intervening night of 28/29.06.2016. The IO of the State Police did not examine Doctor Bal Govind who was consulted to treat Babita on 05.06.2016 and afterwards.

The witnesses cited by the State Police namely Ramsevak, Satyaprakash and Makhan Lal confirmed the suspicious presence and movement of Ramesh, Sunita, Jeetlal @ Chutnu and Ram Sunder at the house of Raj Bahadur on the night of 28.06.2016, and at the field of Santlal where Babita's body was found.

Anil s/o Basantlal (brother of Sant Lal) had alleged that Sudhakar Mishra and Diwakar Mishra (both brothers) took money from him promising him that they will get his father Basant Lal released as their target was Devanand Yadav and not his family members.

During investigation by State Police, clothes of the victim which were worn by the victim at the time of alleged rape and murder, were not sent for Forensic examination. During the trial, the lady doctor who had examined victim stated that injuries relating to the rape upon 7 year old child, were not found on the body. Further, the medical examination of accused Anil who was a minor i.e. aged 13 years at the time of incident to ascertain whether he was competent for sexual activity or not, is not on record.

According to Post mortem report, food in the stomach of the victim was not fully digested. She was murdered within 03 hours after having her last meal. As per the Doctor who had conducted the post mortem, the general time of food digestion is around 04 hours and in the case of minor girl, it would be less than 04 hours. If she was kidnapped at around 1.30 AM and murdered later on, it means she had had her food not before 10.30 PM. But in her statements Sunita and Rajbahadur had stated that all family members had slept around 08-09 PM at that night which indicate that they must have taken their dinner by that time. It means Babita was murdered before 12.30 AM, not after 01:30 AM which was the time of her abduction. Investigation on this aspect was not conducted.

Similarly, no investigation regarding movement/ presence of all 05 accused persons at the time of incident was conducted, as residence of Devanand Yadav is situated in other village ie Chhata which is more than 02 KM away from the scene of crime. Motive in respect of Devanand Yadav to kill the victim/deceased is absent.

According to FIR, family of the victim/deceased first informed State Police through dial 100 about kidnapping of the victim/deceased. The records of dial 100 and statement of the concerned official are not on record.

Smt. Sunita, mother of the deceased died around 02 months ago due to cancer as stated by her father in Law.

**Finding of the C.B.I:-** It is a fact that a minor girl was murdered. The trial court has already scrutinized the evidence produced before it and convicted the accused persons.

**(V) Case Crime No. 680 of 2021 dated 03.12.2021 U/s 376-D, 452 & 506 of IPC, Section 3 & 4 of POCSO Act and Section 3(2)(v) of SC/ST Act. of Police Station: Mauaima, Prayagraj (placed at serial no.20 in the preceding paragraph no.7)**

**Enquiry of State Police:** Both the victims "A" and "B" sister of victim "A" in their statements recorded u/s 161 and 164 Cr.PC. 1973 had denied occurrence of any such incident. They revealed that there was a property dispute due to which this case was got registered. When the victims were brought for their Medico Legal Examination, they refused the same in writing to the Medical Officer. Accordingly, the State Police filed a closure report dated 02.03.2022 before the Court of Ld. Special Judge, SC/ST, Prayagraj.

**Findings of CBI:-** Enquiry has revealed that earlier another FIR No. 0679 of 2021 dated 03.12.2021 U/s 376-D, 323, 504, 506 and Section 3(2)(v) of SC/ST Act was lodged by victim Diwakar Mishra & his two other associates, all residents of Chhata, Mau Aima, Prayagraj alleging that the victim was raped by them on 17.11.2021 and 01.12.2021 However, during CBI enquiry, victim stated that she was molested by the accused and not raped by them.

Enquiry has revealed that Shubhash @ Kallu, brother of complainant had been working as labourer at the residence of Diwakar Mishra and Sudhakar Mishra for the last 7-8 years. In response to the above mentioned FIR No. 679/2021 lodged by victim against Diwakar Mishra and his associates, the present FIR no. 680/2021 was got lodged through Anita against Surendra Kumar (husband of victim) & 5 others for creating pressure on victim as well as on Dharmendra Yadav @ Babloo. It has also been revealed that with the efforts of Smt Sushma Bharti, a local politician and Shri Ram Tirth Yadav, Gram Pradhan, Mau Aima, a compromise was arrived at between the complainant and accused persons of

both these cases. As a result, both the complainants agreed to withdraw the cases on the basis of investigation and statements recorded u/s 161 and u/s 164 Cr.PC, 1973 of the complainants wherein they had denied the incidents of rape and stated that FIRs were lodged due to property disputes, Closure Reports dated 02.03.2022 were filed in both the cases with the recommendations for action u/s 182 (1) Cr.PC against the complainants of both the cases.

**Findings of the C.B.I:-** Thus, both the FIRs No. 679/21 and 680/21 of PS Mau Aima are not based on genuine facts and were registered due to enmity between Diwakar Prasad Mishra/ Sudhakar Mishra and Dharmendra Yadav @ Babloo and their supporters.

**(VI) Case Crime No. 233/2007 dated 22.08.2008 U/s 198(Ka), 323, 504, 506, 452, 307, 394, 147, 148 IPC PS Mau Aima, Allahabad. (placed at serial no.4 in the preceding paragraph no.7)**

**Findings of State Police**: Chargesheet has been filed by State Police before the competent Court

**Enquiry of CBI:** The accused have stated that no such incident had taken place and that due to the political rivalry, this FIR was filed by Sh. Diwakar Mishra against them. It has come to notice that accused Balbir Singh Yadav was only 11 years old at the time of incident.

Shri Harikesh Pandey, an accused in his statement stated that some quarrel had taken place. He stated that he was in his house when he heard a loud hue and cry. He went to the spot and saw Devanand and other people near the house of Banshi Mishra Soon after police came and took away Diwakar with them on motor cycle. He was not involved in the fight but had been made as an accused

**Finding of the CBI:-** From the statements of both parties and independent witnesses and documents available on record it is inferred that some fight had actually taken place between Diwakar and Devanand on the date of incident. Role of accused can at best be appreciated during the trial.

**(VII) Case Crime No. 112 of 2010 dated 10.03.2010 U/s 307, 323, 504, 506, 324 IPC of Police**

**Station:- Mauaima, Prayagraj (placed at serial no.5 in the preceding paragraph no.7)**

**Findings of State Police:** On conclusion of investigation, State police filed chargesheet against Devanand Yadav. The other accused Lavkush committed suicide during investigation. The accused has been convicted after trial.

**Findings of CBI:** Diwakar Mishra handed over the judgement dated 04.07.2012 of the A.D.J., Allahabad. Perusal of the judgement revealed that Devanand Yadav was convicted for 10 years of rigorous imprisonment. The said time period of punishment has already expired on 03.07.2022. Since, a judicial finding is already on record in this case, one of the accused namely Lavkush Vishvakarma had expired during investigation and the other accused Devanand Yadav has completed his sentence pursuant to the judicial verdict, no further enquiry was conducted as of now.

**(VIII) Case Crime No. 270 of 2019 dated 18.06.2019 U/s 147, 323, 392, 504, 506 of IPC and 7 of Criminal Law Amendment Act 1932 of Police Station: Mauaima, Prayagraj (placed at serial no.27 in the preceding paragraph no.7)**

**Findings of State Police:** After completion of investigation chargesheet dated 23.10.2019 u/s 147, 323, 504, 506 IPC was filed against Dharmendra Kumar Yadav & 17 others. The matter is under trial. Accused Om Prakash Patel and Punwasi Bind were not chargesheeted.

**Findings of CBI:** During the course of enquiry it is revealed that there was an election for allotment of Government Food Shop in Gram Panchyat Chhata. There were two candidates vying for the Government shop, one was Shri Ram Bahadur Bind (who was supporter of Dharmendra Yadav @ Babloo whose mother was Gram Pradhan of Chhata) and other was Shri Chedi Patel (who was supporter of Diwakar & Sudhakar Mishra). During the course of election, the differences between two opposite parties led to the fight amongst the villagers.

Enquiry further revealed that a cross FIR No. 271 of 2019. PS Mau Aima, u/s 147, 223 and 506 IPC was lodged by Smt. Kanchan Devi W/o Munshi Lal

@ Chinni, Rio Vill. Chhataa Prayagraj against Diwakar Mishra, Sudhakar Mishra & 3 others alleging that her husband (Shri Munshi Lal Patel) was badly beaten by the accused persons. This case has also been charge sheeted. Thus trial of both the cases is pending in the Court at Prayagraj and the role of respective accused can be appreciated during the course of trial.

**(IX). Case Crime No. 142/2012 dated 08.05.2012 U/s 149, 323, 452, 504, 308, 508, 506 IPC PS Mau Aima, Allahabad.(placed at serial no.23 in the preceding paragraph no.7)**

**Findings of State Police:** Details are awaited from State Police. Case was charge sheeted U/s 323, 324, 504, 506, 308 IPC.

**Findings of CBI:** Complainant Sudhakar and Shobhnath (main accused) were having a land dispute between them. On 08.05.2012, at about 17:00 hrs Diwakar and Shobhnath came across each other at the Tea shop of Ashok Jaiswal, Chhata Chaurah and an argument ensued which led to a fight amongst them. The incident had taken place, role of individual accused persons can be looked into during the course of trial.

**(X) Case Crime No. 416 of 2011 dated 23.10.2011 U/s 147, 392, 452, 504, 506 and 427 IPC and Section 7 CLA of Police Station: Mauaima, Prayagraj (placed at serial no.6 in the preceding paragraph no.7).**

**Findings of State Police:** Chargesheet dated 28.11.2011 was filed against Doodh Nath & 8 other all residents of Village- Gharauta, Police Station. Mau Aima, Allahabad u/s 147, 323, 504, 506 and 427 IPC before the Court of Ld. Special CJM, Prayagraj Eight persons including Devanand etc., all residents of Village- Chhata, Police Station: Mau Aima. Allahabad were not chargesheeted.

**Findings of CBI:** There are two rival groups in Village- Chhata one group stands in support of Shri Diwakar Mishra and his family members and other group support Devanand Yadav (whose wife has been/is Gram Pradhan of Village- Chhata). It is revealed that incident as alleged in the FIR took place at the Ram Leela. But Shri Diwakar Mishra had not only named

the persons involved in the quarrel in his complaint but also named the supporters of rival group of his village-Chhata who were actually not present in the fair.

Enquiry has further revealed that during the trial of the instant case, all the witnesses including the complainant turned hostile and the learned Court of Special Chief Judicial Magistrate, Allahabad vide judgment and order dated 12.09.2014 acquitted all the accused persons.

**(XI). Case Crime No. 30/2013 dated 01.02.2013 U/s 506, 507, 115, 120- B IPC of Police Station: Shivkuti, Prayagraj (placed at serial no.9 in the preceding paragraph no.7)**

**Findings of State Police:** After investigation chargesheet dated 07.04.2013 was filed before the concerned trial Court. The case is presently under trial.

**Finding of CBI:** Nothing incriminating has surfaced during the course of enquiry conducted so far to question the findings of State Police in the matter.

**(XII) Case Crime No. 97 of 2022 dated 05.03.2022 U/s 147, 323, 504, 506, 452 and 427 IPC of Police Station: Mauaima, Prayagraj: (placed at serial no.23 in the preceding paragraph no.7)**

**Findings of State Police:** This case is still under investigation

**Enquiry of CBI:** It has been revealed that on 04.03.2022. Vijay Kumar, Driver of Diwakar Mishra/ Sudhakar Mishra was transporting produce of their mustard crop from the agricultural field. On the way his tractor passed through the field of Rakesh Kumar, where there were trees of Eucalyptus. Wife of Sushil Mishra objected to this trespass and there was altercation between her and mother of Diwakar Mishra. Vijay Kumar, Driver of Sudhakar Mishra stated that only altercation had taken place and none was beaten/ threatened. He has also stated that Rakesh Mishra, Sushil Mishra and Piyush Mishra were not present at the time of altercation. He has further revealed that it is not correct that Rakesh Mishra, Sushil Mishra, Piyush Mishra, Chhaya Mishra and Neetu Mishra entered into the

house of Sudhakar Mishra and beaten up the family members and also damaged the property.

The accused persons have stated that on 05.03.2022, on the issue of passage of tractor through the fields of Rakesh Mishra, the family members of Diwakar Mishra entered into the house of Rakesh Mishra and beaten his family members. Despite the fact that the family members of Rakesh Mishra were beaten, FIR was lodged by Diwakar Prasad Mishra against them. Piyush Mishra Slo Sushil Mishra has stated that at the time and date of incident, he was at Prayagraj for coaching and he was not aware about the incident.

Enquiry further revealed that in the same matter, a cross FIR No. 101 of 2022 dated 09.03.2022 u/s 147, 452, 323, 504, 506 and 354 IPC was lodged by Shri Rakesh Mishra at Police Station. Mau Aima, Prayagraj against Diwakar Mishra brother of Sudhakar Mishra and 6 others.

**Finding**: On the basis of above facts, it appears that Shri Sudhakar Mishra and his family members were the agressors but got an FIR registered against the victim by misrepresenting the facts. Subsequently, a counter case has also been registered by the other party on the same incident. Both these cases are still under investigation.

**(XIII) Case Crime No. 218/2012 U/s 279/337/338 IPC. Police Station: Shivkuti, Prayagraj (placed at serial no.19 in the preceding paragraph no.7)**

**Findings of State Police and present status of the case:** The alleged incident was found truthful and FIR named accused Ramesh Kumar was charge-sheeted.

**Findings of CBI:** Nothing has come on record during the course of enquiry conducted so far to contradict the chargesheet filed by State Police

**(XIV). Case Crime No. 154/2016 dated 10.09.2016 U/s 147, 323, 447, 452, 504, 506, 427 IPC Police Station: Baharia, Prayagraj (placed at serial no.11 in the preceding paragraph no.7)**

**Findings of State Police:** On conclusion of investigation, chargesheet was filed against the FIR named accused person U/s 147, 323,

447, 452, 504, 506, 427 IPC. The case is under trial.

**Enquiry of CBI:** Enquiry has revealed that Om Prakash borrowed Rs 1.6 lacs from Radheshyam and purchased a piece of Abadi land from Bhola Harijan on 08.09.2016. He was constructing a boundary wall on the said land on 10.09.2016. When Prabhat Mishra got to know about this, he reached his village with his associates and beaten Om Prakash Mishra and demolished the said boundary. The piece of said land does not belong to Prabhat Kumar Mishra. Prabhat Kumar Mishra objected to the said construction because he was annoyed at the said deal which was done without his knowledge. Further, he had some land disputes with Om Prakash Mishra and Bhola separately.

The said incident took place but the incident was represented with distorted facts. Actually, Prabhat Kumar Mishra and his associates lodged another FIR No. 299/2016 dated 10.09.2016 against Om Prakash Mishra & others U/s 447, 507, 506 IPC Police Station: Shivkuti, Prayagraj before reaching his village Hariram Patti @Katnai, where they had beaten Om Prakash Mishra and demolished his boundary and also lodged an FIR against Om Prakash Mishra & others as victim of this case.

During investigation, the State Police had not collected CDRs of the accused persons. No efforts were made to find out the truth by knowing the location of accused persons as one of the accused persons Sushil Kumar is the employee of IFFCO, Phoolpur Prayagraj. He was present at home within the premises of IFFCO and was in office from 02:00 PM to 06:00 PM at his work at IFFCO on the relevant day.

**Finding**: Prabhat Kumar Mishra alongwith his associates Sudhakar Mishra and others, reached Prabhat's village. Prabhat and his advocates outnumbered his opponents Om Prakash & others. They beat Om Prakash and demolished his boundary wall. Though Prabhat appears to be the offender and did the crime but he represented himself as victim and lodged two FIRs against Om Prakash Mishra and others on that day.

**(XV) Case Crime No. 277 / 2017 dated 14.09.2017 u/s 323, 504, 506 of IPC Police Station:**

**Shivkuti, Prayagraj: (placed at serial no.15 in the preceding paragraph no.7)**

**Findings of State Police:** The State Police chargesheeted the FIR named accused persons on the basis of oral evidence of Shiv Kumar Gupta and Vijay Pandey. The matter is under trial.

**Findings of CBI:** The FIR named accused persons have denied that any such incident took place. Witnesses, Shiv Kumar Gupta and Vijay Pandey are close associates of Prabhat Kumar Mishra and the veracity of their statements cannot be verified at this stage ile. after more than 05 years of the alleged incident and the threats about registration of false cases against him and others. Since the case is under trial, the roles of respective accused can be better appreciated by the Ld. Trial Court.

**(XVI) Case Crime No.299/2016 under Sections 447, 507, 506 IPC Police Station: Shivkuti, Prayagraj: -(placed at serial no.10 in the preceding paragraph no.7)**

**Findings of State Police:** The alleged incident was found to be false and IO filed the closure report in this matter.

**Finding of CBI:** Nothing incriminating has surfaced so far during the course of enquiry to question the finding of State Police

**(XVII) Case Crime No. 381/2017 dated 20.04.2017 U/s 506 IPC Police Station: Colonelganj, Prayagraj (placed at serial no.29 in the preceding paragraph no.7)**

**Findings of State Police:** During investigation, the alleged incident of SMS was found truthful and Harshu Prasad was chargesheeted accordingly. The case is under trial.

**Findings of CBI:** Nothing incriminating has surfaced during the enquiry to question the findings of the State Police

**(XVIII) Case Crime No. 47/2016 (NCR) dated 22.09.2016 U/s 323, 504, 427 IPC, Police Station: Kydganj Prayagraj (placed at serial no.12 in the preceding paragraph no.7)**

**Findings of State Police and present status of the case:** After concluding

investigation, state police chargesheeted FIR named accused u/s 323, 504, 427 IPC on 26.11.2016.

**Enquiry of CBI:** Enquiry revealed that all the FIR named accused persons were not given the opportunity to explain their version regarding the alleged incident. On being shown the notice u/s 41(1) of Cr.P.C., 1973 accused Om Prakash Mishra denied his signatures on the said notice. Accused Dharayandra Mishra was not contacted by the IO regarding this case. However, in the case diary it is mentioned that Dharayandra Mishra had refused to put his signatures on the notice u/s 41(1) Cr.P.C., 1973 Accused Harshu Mishra was called by IO of this case at IO's residence near Kutchehry. When he reached there, he got to know that Prabhat Kumar Mishra had lodged an FIR as mentioned above He informed the IO that the alleged incident was false and at the alleged time of incident he was present at his work place. He was assured by the IO that he would do fair investigation and asked him to sign notice u/s 41(1) Cr.P.C.. 1973 Signatures of Harshu (as per his version) were taken by the IO on blank notice u/s 41(1) Cr.P.C. 1973.

Further, CDRs of the accused persons, the complainant and the witnesses namely Vikas Shukla, Satya Sakshi Tiwari, Nangi Lal were not taken to establish the exact locations of the concerned person to find out the truth. One of the accused Harshu Prashad, Helper in NCR, Allahabad was attending his duties at Chivki Railway Station from 2.00 pm to 10.00 pm on the date of incident. Hence, the allegation of the complainant that he was beaten up by Harshu Prasad & others on 21.09.2016 at around 19:00 PM did not appear to be correct.

**Finding:** Therefore, this case lodged by Prabhat Kumar Mishra against his rivals Harshu Mishra, Om Prakash Mishra and Dharayandra Mishra might be a motivated case in which investigation does not appear to have been conducted appropriately by the State Police.

**(XIX) Case Crime No. 557/2017 U/s 147, 323, 504, 506, 427, 394 IPC, Police Station: Cantt.**

**Prayagraj (placed at serial no.18 in the preceding paragraph no.7)**

**Findings of State Police:** The state police filed closure report in this case.

**Enquiry of CBI:** Enquiry has revealed that on 16.11.2017 at around 10:00 AM Dr. Ramesh Singh Thakur was abused and beaten by Prabhat Kumar Mishra, Sudhakar Mishra, Satish Shukla and Ajay Mishra, all advocates because Dr. Ramesh Singh Thakur had refused to entertain them in issuing forged medical certificate. Dr. Thakur was misbehaved and brutally beaten by them. His FIR could not be registered till night as there was tremendous pressure from Prabhat Kumar Mishra, Sudhakar Mishra and their associates. After intervention by District Magistrate, Prayagraj Cant. Police registered FIR No. 553/2017 U/s 352, 353, 332, 504, 506, 427, 511 IPC and u/s 3 Medicare Act late in the night.

After registration of this FIR. Dr. Ramesh Thakur stated that he was pressurised to withdraw his FIR. When he denied. Prabhat Kumar Mishra and Sudhakar Mishra lodged this false FIR No. 557 /2017 dated 17.11.2017 U/s 147, 323, 504, 506, 427, 394 IPC against Dr. Ramesh Thakur and Dr. Dwivedi to compel him to compromise in this matter.

Despite knowing the facts, Police lodged the false cross FIR under pressure from Advocate Prabhat Kumar Mishra, Sudhakar Mishra and their associates. As there was no other way left for Dr. Ramesh Thakur, he compromised with Prabhat Kumar Mishra and Sudhakar Mishra. IO Brijesh Kumar Gautam, SI filed the closure report mentioning that he was unable to find the name and address of the accused persons.

**Finding of the C..B.I.**: Thus, this case appears to have been falsely lodged by Prabhat Kumar Mishra and Sudhakar Mishra against Dr. R.S. Thakur to compel him to withdraw FIR No. 553/2017 lodged by Dr. Ramesh Singh Thakur against them.

**(XX) Case Crime No. 361/2016 dated 26.10.2016 u/s 147, 323, 504, 506 and 379 of IPC and Section 3(2) (v) of SC & ST Act. Police Station: Shivkuti, Prayagraj (placed at serial no.13 in the preceding paragraph no.7)**

**Findings of State Police**: IO received the affidavit of four advocates namely Mayank Mishra, Shivji, Rakesh Kumar and Rajesh Kumar regarding the truthfulness of the incident as alleged by Sunil Kumar in the capacity of eyewitness of the incident disclosing the name of two unknown persons as Ashutosh Mishra S/o Harshu Prashad and Suraj Mishra S/o Om Prakash Thereafter, their names were added as accused in the case. On conclusion of investigation, charge-sheet was filed against Rohit Mishra, Om Prakash, Dharmendra Kumar, Harshu Prashad Ashutosh Mishra and Suraj Mishra u/s 147, 323, 504, 506 and 379 of IPC and Section 3(2) (v) of SC & ST Act. The case is presently under trial.

**Enquiry of CBI:** The complainant Sunil Kumar was saved by Shivji & others from beating as per FIR However, four advocates as eyewitness to the incident gave affidavits to IO subsequently The names of three advocates out of four were not mentioned in the said complaint although all three advocates are well known to the complainant. It raises suspicion as to why complainant had forgotten their names at the time of filing of the complaint. Dharayandra Kumar is the junior of Sh. Girja Pati Tripathi, Advocate and was present with him during the day at the court on the date of incident. At the time of incident i.e. from 05:00 PM to 05:45 PM, Dharayandra Kumar was with him at his work place ie seat no. 15, 84 Khambha District Court, Prayagraj. At that time there were other advocates namely Ramesh Kumar Tiwari, K.K. Shukla, S.K. Tripathi, A.K. Mishra, S.K. Mishra and A.K. Rai who were also present at his work place. Sh. Girja Pati Tripathi and his senior Ramesh Kumar Tiwari both had given affidavits dated 18.11.2016 to SSP and CO in this regard but the same were not taken on record did not record the defence of accused persons and their plea of alibi was not taken on record. Harshu Prasad was present at his work place in Railway Office and two officials/officers had given affidavits about his presence at the work place at the time of alleged incident. Om Prakash Mishra was present at village Dighwat. Pratapgarh in a Pooja, Sh. Anil Kumar Ojha had given the

affidavit regarding his presence there at the time of alleged incident. Sh. Abhishek Shukla had given his affidavit regarding presence of Rohit Mishra in Jhalwa College, Allahabad at the time of alleged incident. Principal of School gave certificate regarding presence of Suraj Mishra in the school at the time of incident.

**Finding of the C.B.I.:** IO of State Police did not make any effort to establish the truthfulness of the incident. No CDR of alleged accused persons or the complainant and the four advocates who gave the affidavits in the capacity of eyewitness were obtained. Suraj Mishra was just 14 years old boy (born on 25.07.2002) at that time. He was chargesheeted as adult not as juvenile.

Sunil Kumar had received 1.5 lacs as Govt. compensation in this case.

**(XXI) Case Crime No. 90/2021 dated 01.03.2021 U/s 342, 376D, 506 IPC of Police Station:-Mauaima, Prayagraj (placed at serial no.39 in the preceding paragraph no.7)**

**Findings of State Police:** On the basis of victim's statement recorded u/s 164 Cr.P.C., 1973 accused Md. Wasim and Chandrabhusan were arrested. Presently both are on bail. In this matter, chargesheet has been filed against 04 accused persons namely Wasim, Samlagiri, Chandrabhusan Singh and Rakesh Nath Pandey Investigation is pending in respect of remaining 04 accused persons namely Rajesh Kumar Patel, Deva, Indradev and Brijesh Kumar all resident of village Gheenpur.

**Enquiry of CBI:** Initially complainant Archana Singh filed a complaint u/s 156 (3) of Cr. PC, 1973 through her counsel Sudhakar Mishra, Advocate on 07.01.2020 in the Lower Court to register an FIR against Rajesh Patel S/o Ramadhar, Wasim S/o Sabbir, Shubham @ Sonu S/o Ram Sevak, Mahendra Slo Sukhambar and Brijesh Kumar S/o Ram Charan all residents of Village Gheenpur, Mauaima, Prayagraj alleging therein that all of them raped her. When the Court of Judicial Magistrate called for the police to report in the matter of rape of Archana

Singh, Police filed a report dated 21.01.2020 stating that allegations of rape were found to be false.

In response to the above mentioned application, on 03.12.2020, Wasim Ali through his counsel Rakesh Nath Pandey, Advocate filed an application u/s 156(3) Cr.P.C. against Smt. Archana Singh, Awdhesh Singh, Brijesh Shukla, Rajesh Shukla, Ram Sajiwan Patel and Radheysham Saroj alleging that they had filed an application u/s 156(3) Cr.P.C. to lodge an FIR with the malafide intention to implicate him and others in the false rape case of Archana Singh. The Hon'ble Court called for report from the SP. crime, Prayagraj in this regard. In response, the police registered FIR No. 90/2021 dated 01.03.2021 U/s 342, 376D, 506 IPC of Police Station:-Mauaima, Prayagraj after getting a fresh application from Archana Singh. After the registration of FIR, Archana Singh withdrew the application u/s 156(3) Cr.P.C. informing the Hon'ble Court that FIR in her rape case has been registered in Police Station: Mauaima.

It is pertinent to mention that in the application on the basis of which the said FIR was registered, the entire facts regarding rape time, incident and number of accused persons are different from the facts mentioned in application filed u/s 156(3) Cr.P.C., 1973

These variations are highlighted here as under-

* In the FIR, Archana Singh had alleged that she was called from her home by Samlagiri on 21.12.2019 at 09:00 PM whereas in the application u/s 156(3) filed on 07.01.2020 she had alleged that she was kidnapped by 04 named persons at 07:00 PM when she had gone out for toilet.

In the FIR she had named Rajesh, Deva, Inderdev, Wasim. Brijesh Kumar, Rakesh Nath Pandey, Chandrabhushan and Samlagiri for the rape offence whereas, in the complaint u/s 156 (3) Cr.PC she had named Rajesh Patel, Wasim, Shubham @ Sonu, Mahindra and Brijesh Kumar as the offenders.

* Out of five alleged offenders mentioned in the application u/s 156(3) Cr.PC only 03 were mentioned in the complaint which contained five new names which were not initially

mentioned in the application u/s 156(3) Cr. PC.

Rakesh Nath Pandey was stated to be implicated in false Rape case as he was representing Wasim Ali against Archana Singh in the Magistrate Court as mentioned above.

Rajesh Patel stated that he was framed due to his political rivalry with Ram Sajiwan (close associate of Sudhakar Mishra) He was not present on 21.12.2019 (date of alleged rape incident) in his village as he was at the residence of Dr. R.K. Verma, M.L.A in Lucknow. Due to his political aspirations for Gram Pradhan, he had also been targeted previously in another fake case bearing FIR No. 588/2019 Police Station: Mau Aima dated 15.12 2019 against him and one Deva on the complaint of Anita Devi (sister in law of Deva) W/o Shri Rajendra Kumar Pasi at the behest of Shri Ram Sajiwan. The State Police had filed closure report in this case. Shri Rajesh Patel had submitted 01 audio of Shri Awadhesh, husband of Smt. Archana Singh asking money for removing his name from the alleged rape case. Rajesh Patel paid Rs. 50,000/- in cash after which Archana and Awadhesh accepted that Rajesh had been falsely implicated in said rape case which was recorded by Rajesh Patel in a video Further, Smt. Archana Singh gave an affidavit dated 25.09.2021 stating that Rajesh Patel had not committed any offence and his name was included by mistake.

Another accused Shri Chandra Bhushan Singh is brother of Sh. Awadhesh Singh, husband of Smt. Archana Singh. Sh. Awadhesh Singh and his wife demanded money from him and his wife; threatening him that otherwise he would be implicated in the false rape case by Smt. Archana Singh. He did not pay any money. therefore, he was implicated in the false rape case by Archana Singh. Chandra Bhushan Singh was sent to Jail in this case.

When he was in Jail, Awadhesh Singh demanded Rs. 1 lac from Devraj Pandey @ Bhola (his friend) and Balendra Bhushan @ Lal (his elder brother) for removing his name from the alleged rape case. No money was paid by him. Deva had submitted 01 audio clip having the voice of

Awadhesh asking money from him Sh. Chandra Bhushan Singh is on bail. Deva stated that he was implicated in this false rape case to extract money. Deva's brother Mahindra was demanded money to remove his name from the rape case. Mahindra paid Rs. 14000/- to Awdhesh. He paid Rs 9000/- in cash and Rs. 5000/- was paid from the account of his wife to the account of Sh. Awdhesh Singh. After taking money. Smt. Archana Singh gave an affidavit dated 23.05.2022 stating that Deva had not committed any offence and his name was included by mistake

Archana Singh had given an affidavit that Samlagiri was not involved in her rape case.

Due to filing of the case in the court of CO Sadar Allahabad (now Prayagraj) regarding illegal possession on Govt. land (ie Talab & Naveen Parti land) by Ram Sajiwan Patel and Rajesh Shukla by Inderdev Prasad, Wasim and Brijesh Kumar enmity was created between both the groups. Ram Sajiwan Patel and Rajesh Shukla both are close associates of Sudhakar Mishra and Diwakar Mishra. This appears to be the reason that Inderdev Prasad, Wasim and Brijesh Kumar were implicated in false case of Archana Singh.

**Finding of C.B.I:-** Thus, it appears that FIR No 90/2021 was registered by Archana Singh in conspiracy with her husband Awadhesh Singh. Ram Sajiwan Patel, Rajesh Shukla and Sudhakar Mishra to settle their scores and to extort money from the accused In this case, four accused persons have been chargesheeted by the State Police and further investigation is pending against remaining four FIR named persons.

**(XXII) Case Crime No. 317/2018 U/s 452, 323, 504, 427, 394, 354 (Kh), 324 of IPC and Section 7 of Criminal Law Amendment (CLA) Act of Police Station: Mauaima, Prayagraj (placed at serial no.40 in the preceding paragraph no.7)**

**Findings of State Police:** After completion of investigation chargesheet dated 07.02.2021 was filed against Ram Padarath Yadav, Kuldeep Yadav, Rakesh Kumar Yadav and Yamraj Yadav U/s 323, 504, 427 and 336 IPC before the Court of Ld. Spl. CJM. Prayagraj.

**Findings of CBI:** Nothing incriminating has surfaced so far during the course of enquiry to question the findings of the State Police.

**(XXIII) Case Crime No. 72/2018 dated 13.02.2018 U/s 147, 452, 323, 506 and 436 IPC of Police Station: Mauaima, Prayagraj (placed at serial no.41 in the preceding paragraph no.7)**

**Findings of State Police:** After completion of investigation chargesheet dated 21.06.2018 was filed against Lalji & 5 others u/s 247, 323, 504, 506 and 435 IPC before the Court of Ld Chief Judicial Magistrate. Prayagraj Three of the accused have not been chargesheeted

**Enquiry of CBI:** Enquiry has revealed that on 13.02.2018 at about 07:00 AM, the Bhabhi of Ram Padarath was dumping earth on the Gram Samaj land and when objected to by the complainant, the accused persons reached there, beat him up and forcibly released the cattle of the complainant and burnt his hut.

Phool Chandra Yadav, Ram Sevak Yadav, Ram Kailash Yadav, Prithwi Pal and Amraj Yadav, cited as witnesses by State Police were examined during the course of enquiry and they have stated that at that time they were not present at the place of incident.

Accused Ram Lal, Subhash Chandra Yadav, Kuldeep Kumar Yadav and Rakesh Kumar were also examined during the course of enquiry, they have stated that Anil Kumar Yadav S/o Ram Khelavan Yadav was encroaching the land of widow Bhabhi of Rakesh Yadav, when she opposed, they started quarreling. This incident was brought to the knowledge of Rakesh Yadav and his family members by his Bhabhi. Anil Kumar called the Police and Police brought the family members of Rakesh Yadav at the Police Station. In the meantime mother of Anil Kumar burnt the hut of the Bhabhi of Rakesh Kumar. Upon this an FIR no. 69/2018 u/s 436 IPC, PS Mau Aima was registered on 13.02.2018 on thecomplaint of Smt Kamla Devi against Ram Khelavan,

Chatkola Devi, Anil Kumar, Sunil Kumar and Sandeep Kumar.

Finding of C.B.I: From the above facts, it is clear that FIR No. 72/2018, Police Station Mau Aima was a cross FIR to the FIR No. 69/2018 of the same Police Station. While most of the witnesses have not corroborated the incident, the accused and complainant have both confirmed the incident.

**(XXIV) Case Crime No. 218/2018 dated 17.05.2018 U/s 323 and 308 IPC of Police Station: Mauaima, Prayagraj (placed at serial no.42 in the preceding paragraph no.7)**

**Findings of State Police:** After completion of investigation chargesheet dated 27.01.2019 was filed against Kuldeep Yadav & others u/s 323 and 308 IPC before the Court of Ld. ACJM, Prayagraj.

**Enquiry of CBI**: Enquiry has revealed that on 17.05.2018, Sushil Kumar stated that upon his return to his house, Sushil Kumar. found his brother Pradeep unconscious on the ground with blood oozing from his mouth and nose. On the way he had seen Kuldeep, Subhash, Rakesh, Ram Lal running from his house but he did not see them beating his brother. Shri Jagat Bahadur Yadav and Prithvi Pal cited as witnesses in this case have stated that they had never witnessed the incident. They further stated that one day prior to the examination by CBI in the present Preliminary Enquiry, Shri Ram Khelavan visited their residence and told them that they should state before CBI that they had witnessed the incident and his son Pradeep got fainted.

The accused persons have denied any such incident. Kuldeep Kumar Yadav has stated that during the period of incident he was residing at Prayagraj. Shri Subhash Chandra Yadav has stated that during the relevant period he was residing at Mumbai. Ram Lal and Rakesh Kumar stated that Pradeep Kumar S/o Ram Khelavan was connecting electric wire on the electricity pole and due to heavy sparking he fell down from the Pole and became unconscious but Ram Khelavan along with Diwakar Mishra and Sudhakar Mishra alongwith the members of the Kishan Union, got a

false FIR registered against the accused.

**Finding of C.B.I:** On the basis of above facts, it appears that proper investigation was not conducted by the State Police in the matter.

**(XXV) Case Crime No. 82 of 2008 dated 06.06.2008 U/s 147, 148, 149, 302, 34, 120-B of IPC of Police Station:- Baharia, Prayagraj (placed at serial no.17 in the preceding paragraph no.7)**

**Findings of State Police:** Charge-sheet was filed on 06.06.2008 against all FIR named accused persons on the basis of statements of the witnesses who had eye-witnessed the incident as per the complaint.

In the year 2016, this case was further investigated on the order dated 22.03.3016 of the Sr. Supdt. of Police, Prayagraj which was based on audio video recording of confession of crime by one Vijay Mishra. During further investigation, Vijay Mishra was arrested. Later, his involvement was not found in the alleged crime and on the report u/s 169 Cr.P.C. of CrPC, 1973 the Ld. Court exonerated him. The case is presently under trial.

**Enquiry of CBI:** In 2016, police conducted further investigation on the basis of audio video recording of confession of crime by one Vijay Mishra but State Police did not investigate the motive of murder by Vijay Mishra, presence of accused at the crime scene scrutiny of audio video contents and it's scientific examination etc Initially police found sufficient evidence to prove the involvement of Vijay Mishra in the murder, however, later Vijay Mishra was given clean chit on the basis of a character certificate by his employer and the statement of witnesses mentioned in this FIR.

**Finding of CBI:-** Thus, the points on which further investigation was ordered by SSP, Prayagraj were not found to be complied with during further investigation. It would be appropriate if the same were probed thoroughly.

**(XXVI) Case Crime No. 370 of 2019 dated 20.08.2019 U/s 366 IPC of Police Station: Mauaima,**

**Prayagraj (placed at serial no.21 in the preceding paragraph no.7)**

**Findings of State Police:** During State Police investigation. allegation u/s 366 of IPC was substantiated against Surya Prakash S/o Mishri Lal Saroj, R/o Village- Sarai Lalu, Mau Aima, Prayagraj Accordingly, Chargesheet dated 07 10 2019 was forwarded to the Senior Officers for approval but Section 363 and 376 of IPC were also added in the chargesheet which was filed before the Court of Ld. Special CJM, Prayagraj

**Findings of CBI:** It was revealed that on the night of 20.08.2019 daughter of Magru (aged about 19 years) was missing from her home and was found at about 0130 Hrs in the house of Mishri Lal. It has been revealed that there was love affair between Madhuri (then aged 19 years) and Surya Prakash. On the night of incident Madhuri on her own had gone to the house of Surya Prakash to meet him and was found there. Medico Legal Examination of Madhuri revealed that "There are no signs of use of force, however, final opinion is reserved pending availability of FSL Report. Sexual violence cannot be ruled out." Trial of this case is pending in Fast Track Court at Prayagraj and the facts of the case can be appropriately appreciated during the course of trial.

**(XXVII) Case Crime No. 128/2005 dated 29.08.2005 U/s 323, 504, 506, 452, 394, 307 IPC PS Mau Aima, Allahabad (placed at serial no.3 in the preceding paragraph no.7)**

**Findings of State Police:** Both parties lodged complaint. Cross FIR was lodged by the other party. Both cases have been closed after mutual compromise between the parties.

**Findings of CBI:** Nothing incriminating has surfaced during the enquiry conducted so far regarding falsity of this case.

**(XXVIII) Case Crime No. 420/2021 dated 24.07.2021 U/s 307, 341, 504 IPC PS Mau Aima, Allahabad.(placed at serial no.46 in the preceding paragraph no.7)**

**Findings of State Police:** Investigation revealed that at the time of incident, the location of accused was proved to be at some other place. Thus, the FIR named

accused persons were not found to be involved in the incident. The complainant created a false story against the accused person to grab the disputed land. Accordingly. a closure report was filed on 25.01.2022 against them

**Findings of CBI:** The Enquiry revealed that the State Police appear to have arrived at a just conclusion and filed closure against the FIR named accused.

**(XXIX) Case Crime No. 240 of 2017 dated 20.06.2017 U/s 323, 427, 504, 506 of IPC and Section 3(2)(v) of SC/ST Act of Police Station: Mauaima, Prayagraj (placed at serial no.43 in the preceding paragraph no.7)**

**Findings of State Police:** Chargesheet dated 31.08.2017 was filed before the Court of Ld. Special Judge, SC/ST Cases, Prayagraj u/s 323, 427, 504 and 506 of IPC and Section 3 (2) (5-a) of SC/ST Act against accused persons. Trial of this case is pending in the Court of Ld. Special Judge, SC/ST Act, Prayagraj Govt. of U.P. has given compensation of Rs. 75,000/- each to Phool Chandra and Vijay Kumar.

It has been revealed that Phool Chandra and Vijay Kumar both Rio Chhata and drivers of Diwakar Prasad Mishra of Chhata Mauaima, Prayagraj had gone to the residence of Ram Khelawan Rio Village-Katbhar for collecting rent. At the Pulia situated near Village-Katbhar they were stopped, beaten up and abused by the accused persons who were already sitting there. Both of them rushed into the nereby house of Ram Khelawan to save themselves.

**Finding of CBI:** No evidence regarding falsity of the case has come to notice in this matter, during the course of enquiry conducted so far.

**(XXX) Case Crime No. 87/2012 dated 12.03.2012 U/s 323, 452, 504 and 506 IPC of Police Station: Mauaima, Prayagraj (placed at serial no.8 in the preceding paragraph no.7)**

**Findings of State Police:** After investigation, chargesheet dated 12.04.2012 was filed before the Ld.

Court against Dara Patel and the case is pending trial.

**Findings of CBI:** It appears that the incident had taken place and it is a genuine case.

**(XXXI) Case Crime No. 30/2013 dated 23.01.2013 U/s 110 (g) of Cr.PC, 1973 of Police Station: Mauaima, Prayagraj (placed at serial no.9 in the preceding paragraph no.7)**

**Findings of State Police:** In this case the accused was bound down.

**Findings of CBI:** Nothing incriminating has surfaced to question the findings of State Police, during the course of enquiry.

**(XXXII) Case Crime No. 106/2002 dated 08.03.2002 U/s 323 and 504 IPC of Police Station: Mauaima, Prayagraj (placed at serial no.24 in the preceding paragraph no.7)**

**Findings of State Police:** After investigation Report was filed in the Court of Executive Magistratete Sub Divisional Magistrate (SDM) u/s 107/116 of Cr PC, 1973 on 10.03.2002 against Mithilesh Kumar S/o Radhe and Radhe.

**Finding of CBI**: Nothing incriminating has surfaced to question the findings of State Police, during the course of enquiry conducted so far.

**(XXXIII) Case Crime No. 302/2007 dated 01.10.2007 U/s 504, 506 and 379 IPC of Police Station: Mauaima, Prayagraj (placed at serial no.7 in the preceding paragraph no.7)**

**Findings of State Police:** After completion of investigation, chargesheet was filed on 09.12.2007 U/s 504, 506 and 379 IPC against Devanand, Raju Singh and Smt Anara Devi before the Ld. Court.

**Finding of CBI:** It has been revealed that accused Devanand has already pleaded guilty in this matter and vide order dated 06.04.2022. Ld Trial Court (CJM), Allahabad has sentenced him to imprisonment for the period already undergone.

**(XXXIV) Case Crime No. 125 of 2005 dated 18.09.2005 U/s 279, 304-A, 427 IPC of Police Station: Mauaima, Prayagraj (placed**

**at serial no.25 in the preceding paragraph no.7)**

**Findings of State Police:** During investigation the State Police had identified Md. Mustafa S/o Abdul Gaffur, R/o Ram Nagar Galsiyari, Police Station: Mauaima, Prayagraj as the driver of tractor. After completion of investigation State Police had filed a charge-sheet dated 19.10.2005 u/s 279 and 304-A IPC against Mohd. Mustafa before the Concerned Court at Prayagraj.

**Finding of CBI:** Nothing incriminating has surfaced to question the findings of State Police during the course of enquiry conducted so far.

**(XXXV) Case Crime No. 92/2017 dated 06.03.2017 U/s 147, 379, 447, 323, 504, 506, 427 IPC & Sec 3(2)(v) SC/ST Act, Police Station: Baharia, Prayagraj (placed at serial no.16 in the preceding paragraph no.7)**

**Findings of State Police:** It was concluded that Om Prakash and his son Rohit were not involved in the alleged incident, hence, the SC/ST Act was removed from the case as other accused persons also belonged to the same community. On conclusion of investigation, chargesheet was filed against Bhola, Chamela and Sonu U/s 323, 504, 506, 427 IPC on 30.01.2019. The case is under trial.

**Findings of CBI:** Nothing has surfaced during the course of enquiry conducted so far to contradict the findings of State Police.

**(XXXVI). Case Crime No. 406/2002 dated 22.09.2002 U/s 323, 504, 506, 452, IPC PS Mau Aima, Allahabad (placed at serial no.2 in the preceding paragraph no.7).**

**Findings of State Police:** Details are awaited from State Police.

**Findings of CBI:** As the case is more than 20 year old, not much headway could be made in the matter in the absence of police records.

**(XXXVII) Case Crime No. 181/2002 dated 20.04.2002 U/s 147, 323, 504, 506 IPC PS Mau Aima, Allahabad (placed at serial no.1 in the preceding paragraph no.7).**

**Findings of State Police:** After completion of investigation, a

chargesheet was filed against the accused persons u/s 147, 323, 504, 506 IPC During the trial, prosecution could not produce any witness. Complainant and accused entered into a compromise. On the basis of the same the accused persons were acquitted.

**Findings of CBI:** Sh. Om Prakash, the complainant, has admitted that he had filed complaint for the FIR, however, he was 50 meter away from the spot and the accused persons compromised with him and his brothers. The accused persons have denied any such incident.

**(XXXVIII) Case Crime No. 29/2016 dated 28.01.2016 U/s 452, 504, 506 IPC of Police Station: Shivkuti, Prayagraj (placed at serial no.28 in the preceding paragraph no.7).**

**Findings of State Police:** A chargesheet was filed on 31.05.2016 U/s 323, 504 IPC against Roopchand. Pramod Kumar Bhartiya, Manoj Kumar Bhartiya and Shankar Bhartiya. The case is still under trial.

**Finding of CBI:** Nothing incriminating has surfaced during the course of enquiry conducted so far to question the findings of the State Police.

Perusal of the preliminary enquiry report conducted by the C.B.I. shows the status of the cases, as under:-

| Number of cases enquired by CBI | No. of cases under trial | Cases Concluded after trial | | Cases Under Investigation | Cases Closed | | Details awaited from Police |
|---|---|---|---|---|---|---|---|
| | | Conviction | Acquittal | | Closure report | Preventive Cases | |
| 38 | 21 | 03 | 05 | 02 | 04 | 02 | 01 (pertaining to 2002 |

**The preliminary enquiry report of the CBI being PE 0532022S0001 also shows that the Advocates are involved as complainant or otherwise.**

| Sl. No. | Name of Advocates behind the registration | No. of Cases | Against the Advocates or others due to political rivalry | Remarks |
|---|---|---|---|---|

| | of cases as complainant or otherwise | | | |
|---|---|---|---|---|
| 1. | Sri Vinod Shanker Tripathi | 02 | Bhupendra Kumar Pandey and others | Filed by Nikki Devi and Mansi Srivastava each at the behest of Vinod Shanker Tripathi. |
| 2. | Sri Bhupendra Kumar Pandey | 05 | Vinod Shanker Tripathi, his father and others. | Filed by Smt. Kumsum Lata, her interest lies with Bhupendra Kumar Pandey.<br><br>Filed by Smt. Samla Giri at the behest of Bhupendra Kumar Pandey.<br><br>Three cases filed by Bhupendra Kumar Pandey. |
| 3. | Sri Sudhakar Mishra and his brother Sri Diwakar Prasad Mishra. | 08 | Devanand Yadav (Political rival of Diwakar Prasad Mishra and other villagers | Filed by Ms. Anita at the behest of Diwakar Prasad Mishra.<br><br>Four cases have been lodged on the complaints of Sri Sudhakar Mishra.<br><br>Three cases have been lodged on the complaints of Sri Diwakar Prasad Mishra, brother of Sri Sudhakar Mishra. |
| 4. | Sri Prabhat Kumar Mishra and his associate Sri Sunil Kumar. | 08 | Om Prakash and others. Dr. R.S.Thankur and another | Cases related to property and personal disputes. |

24. This Court vide order dated 20.10.2022 passed on the modification application no.03 of 2022 filed by Sri Vinod Shanker Tripathi, Advocate, had directed the C.B.I. to conduct the preliminary enquiry with respect to 23 cases as has been mentioned in preceding paragraph no.11. Pursuant to which, the learned counsel for the C.B.I. had placed the Preliminary Enquiry report submitted by the C.B.I. being No. PE 0532022S0002, which are in the following terms:-

(I) Case Crime No. 563/2012 (wrongly transcribed as 562 of 2012 in the order dated 20.10.2022), under Sections 457, 380, 419, 420, 467, 468, 471 I.P.C., Police Station Colonelganj, Prayagraj, (placed at serial no.1 in the preceding paragraph no.11).

**Findings of State Police:** After completion of investigation, the State Police filed chargesheet on 08.01.20214, U/s 457, 380, 419, 420, 467, 468 & 471 IPC against Shri Bhupendra and his brother Shri Arun Pandey both S/o late Mrityunjay Pandey.

**Finding of CBI:** In the year 2011 complainant Smt. Reena Agrawal had given one portion of her parental house to Shri Bhupendra Pandey on rent. Other

portion of the house was being used by one Chaudhary Sahab. Due to the day to day activities of Shri Bhupendra in the house, Chaudhary Sahab had left the house. Shri Anupam Jain, immediate neighbour of the said house, had good relations with Smt. Reena Agrawal. When she asked Shri Anupam Jain to take the keys from Chaudhary Sahab, then Shri Bhupendra Pandey objected to the same. Thereafter, Shri Bhupendra Pandey filed a Civil Suit claiming the ownership over the said house on the basis of forged and bogus documents. On this Smt. Reena Agarwal lodged an FIR No. 363/2012, PS Colonelganj u/s 457, 380, 419, 420, 467, 468, 471 IPC, against Shri Bhupendra Pandey, his brother Shri Arun Pandey and others. The same was charge sheeted. As Smt. Reena Agarwal was based at Gorakhpur with her family, Shri Anupam Jain was pursing her case in the court.

Enquiry has revealed that, subsequently, Shri Bhupendra Pandey had lodged an FIR Case Crime No. 549/ 2015 dated 05.08.2015 U/s 354 and 504 IPC, Police Station: Colonelganj, Prayagraj through his sister Smt. Manta Pandey against Shri Anupam Jain and his driver Shri Surendra. Details of the same also discussed below.

**(II) Case Crime No. 549/2015 dated 05.08.2015, U/s 354 and 504 IPC, Police Station Colonelganj, Prayagraj, (placed at serial no.7 in the preceding paragraph no.11):-**

**Findings of State Police:** The alleged incident was found to be false and IO filed closure report dated 30.12.2015 in this matter.

**Findings of CBI:** Enquiry has revealed that, in the year 2011, Smt. Reena Agrawal had given one portion of her parental house bearing R/o 54/17-A, B.K. Banarjee Road, PS: Colonelganj, Prayagraj to Shri Bhupendra Pandey on rent. Smt. Mamta Tripathi, sister of Shri Bhupenda Pandey used to reside with him. Another portion of the house was rented to one Mr. Chaudhary. Due to the day to day activities of Shri Bhupendra in the house, Mr. Chaudhary left the said rented house and Shri Anupam Jain, immediate neighbour, having good relations with Smt. Reena Agrawal, collected keys from Mr. Chaudhary to which Shri Bhupendra Pandey objected. Subsequently, Shri Bhupendra Pandey filed a Civil Suit claiming purchase of the said house from mother of Smt. Reena Agarwal. On this, Smt. Reena Agarwal lodged an FIR No. 363/2012, PS Colonelganj u/s 457,

380, 419, 420, 467, 468, 471 IPC, against Shri Bhupendra Pandey, his brother Shri Arun Pandey and others. The same was charge sheeted. As Smt. Reena Agarwal was based at Gorakhpur with her family, Shri Anupam Jain was pursuing her case in the court.

Enquiry has revealed that to pressurize Shri Anupam Jain, the Case Crime No. 549/ 2015 was got lodged by Shri Bhupendra Pandey though his sister Smt. Mamta Tripathi (Pandey) against Shri Anupam Jain and his driver Shri Surendra Kumar.

Enquiry revealed that subsequently, Shri Surendra Kumar had also lodged an FIR no. 554/ 2012 u/s 323, 504, 506 IPC and 3(1)(10) SC/ST Act against Shri Bhupendra Pandey, Smt. Mamta Tripathi & her husband Shri Dheeraj Tripathi.

Enquiry has revealed that after registration of the above case, Shri Bhupendra Pandey arrived at a compromise with Shri Anupam Jain and Shri Surendra Kumar in Case Crime No. 549/ 2015. Shri Bhupendra Pandey also compromised with Smt. Reena Agarwal and evacuated her house, chargesheet in the case was quashed vide order dated 16.10.2015 by moving an application before the Hon'ble High Court on the basis of the compromised arrived.

Enquiry has revealed that instant Case Crime No. 549/ 2015 dated 05.08.2015 U/s 354 and 504 IPC, Police Station Colonelganj, Prayagraj was got registered on the basis of false facts due to property dispute.

**(III) Case Crime No. 82/ 2010 dated 13.03.2010 U/s 308 and 406 IPC, Police Station Civil Lines, Prayagraj, which is shown at (placed at serial no.3 in the preceding paragraph no.11).:-**

**Findings of State Police:** After investigation, State Police had filed chargehseet on 01.04.2010 in the Court of Ld. Chief Judicial Magistrate, Allahabad against accused Shri Arun Pandey and Shri Bhupendra Pandey U/s 406, 323, 504 and 506 IPC. The case is still under trial.

**Findings of CBI:** The medical records of the complainant Shri Bal Krishan Tiwari reflect that he had received grievous injuries on 13.03.2010. Durng course of enquiry nothing incriminating has surfaced to question the findings of the State Police. It is clear that the incident had taken place and it is a genuine case. The facts of the case can be

appropriately appreciated during the course of trial. Shri Bal Krishan Tiwari has expired in September, 2011.

**(IV) Case Crime No. 798 of 2021 dated 14.10.2021 U/s 504 and 506 IPC, Police Station Civil Lines, Prayagraj, (placed at serial no.5 in the preceding paragraph no.11).**

**Findings of State Police:** In this case State Police has filed chargesheet against Shri Bhupendra Pandey, Shri Arun Pandey and Shri Arvind Pandey both brothers of Shri Bhupendra Pandey U/s 504 and 506 IPC on 05.11.2021.

**Findings of CBI:** Complainant is a contractor, who undertakes contract for construction of houses and also supplies building material. One day he was contacted by Shri Bhupendra Kumar Pandey (Advocate), who introduced himself as a Contractor and asked him to supply one truck sand and concrete. Thereafter, the complainant visited at the site near Baghambari Gaddi, Prayagraj and supplied the required building material worth Rs. 84,000/- to Shri Bhupendra Pandey. Sh Bhupendra Pandey issued two cheques of Rs. 40,000/- and 44,000/. for payment to the complainant. On being presented, the cheque of Rs. 40,000/- was declined due to insufficient funds in the account. Thereafter, complainant asked Shri Bhupendra Pandey for payment but no payment was made by him. After about ten months, on 13.10.2021 the complainant met Shri Bhupendra Pandey and his brothers, near their residence near Gate No. 2 of Public Service Commission, Civil Lines, Prayagraj, but he was abused and threatened for life.

In this case, State Police has filed charge sheet against S/Shri Bhupendra Pandey, Arun Pandey and Arvind Pandey U/s 504 and 506 IPC on 05.11.2021. The incdent had taken place and role of accused persons can be looked into during the course of trial by Ld. Trial Court.

**(V) Case Crime No. 312/ 2022 dated 18.06.2022 U/s 323, 506, 406 IPC, Police Station Civil Lines, Prayagraj, (placed at serial no.6 in the preceding paragraph no.11).**

**Findings of State Police:** The FIR no. 312/ 2022 was registered U/s 323, 506, 406 IPC at PS : Civil Lines, Prayagraj on the directions dated 14.06.2022 of Learned CJM, Allahabad passed in the Complaint no. 144/12/22 dated 06.05.2022 u/s 156(3) Cr.P.C. of Smt. Vinita Jaiswal. During investigation the State Police recorded

statement of the complainant to the effect that she had arrived at a compromise with the accused and hence she does not want any further legal proceedings in the matter. Accordingly, Police has filed a Closure Report dated 29.10.2022 I the Court of Ld. Chief Judicial Magistrate, Allahabad which is still pending for consideration.

Enquiry has revealed that on the same facts of above said Case Crime No. 312/ 2022 of PS : Civil Lines, Prayagraj, Shri Bhupendra Kumar Pandey had filed a complaint u/s 156(3) Cr.P.C. against Shri Shatrughan Lal Jaiswal as well as his wife Smt. Vinita Jaiswal and his family members on which the following cross Case Crime No. 379/2022, P.S. Civil Lines, Prayagraj, has been registered.

**(VI) Case Crime No. 379/2022 dated 14.07.2022 U/s 147, 452, 427, 392, 504, 506 IPC, Police Station Civil Lines, Prayagraj, (placed at serial no.10 in the preceding paragraph no.11).**

**Findings of State Police:** Presently, this case is under investigation by State Police.

**Findings of CBI:** In respect of above mentioned two cases, enquiry has revealed that the EWS house at EH-49, Avantika Colony, Naini, Prayagraj was allotted by Allahabad Development Authority to Smt. Vinita Jaiswal and her husband. On 29.11.2019 Shri Bhupendra Kumar Pandey (Advocate) entered into an oral agreement with Smt. Vinita Jaiswal for reconstruction of the first and second floor of the said house for an amount of Rs. 10,30,000/- on the agreed terms and conditions of the construction. As per agreement, a sum of Rs. 10,30,000/- was paid by Smt. Vinita Jaiswal to Shri Bhupendra Pandey through cheque/ cash and construction of the house started. However, Shri Bhupendra Pandey left the construction incomplete and told Smt. Vinita Jaiswal that construction has been completed as per sum of Rs. 10,30,000/- received and further no construction will be done. Aggrieved, Smt. Vinita Jaiswal filed a Complaint no. 144/12/222 dated 06.05.2022 u/s 156(3) Cr.P.C. before Ld. CJM, Allahabad and on the directions dated 14.06.2022 of Learned CJM, Allahabad, FIR No. 312/2022 was registered U/s 323, 506, 406 of IPC at PS Civil Lines, Prayagraj on 18.06.2022.

Enquiry has revealed that on the same facts, Shri Bhupendra Kumar Pandey had filed a complaint u/s 156(3) Cr.P.C. on which the present FIR no/ 379/ 2022, PS Civil Lines, Prayagraj has been registered.

It is a cross case of FIR No. 312/2022 of the same Police Station involving dispute between two parties. However, as discussed above, the FIR No. 312/2022 has been closed by the State Police citing compromise between the two parties and investigation of FIR No. 379/ 2022.

During present Enquiry, Smt. Vinita Jaiswal was examined and therein she stated contrary to the findings of State Police that she had not arrived at any compromise with Shri Bhupendra Kumar Pandey or his brothers. She further stated that her statement was not recorded by any officer/ official of State Police on the said matter. It is apparent that the State Police has not conducted proper investigation of the case.

**(VII) Case Crime No. 243/2018 dated 18.05.2018 U/s 419, 420, 147, 323, 504, 506 IPC and Section 3(2)(V) and 3(2)(VI) SC/ST Act of Police Station Civil Lines, Prayagraj, (placed at serial no.8 in the preceding paragraph no.11).**

**Findings of State Police:** In this case Police has filed chargesheet against Shri Krishna Kumar Patel, Smt. Arti Patel, Shri Chandrajit Singh and Shri Brijendra Singh on 02.08.2018 before the Ld. Court u/s 147, 323, 504 & 506 IPC and Section 3(2)(va) of SC/ST Act.

**Findings of CBI:** Findings of CBI: Enquiry has revealed that the property bearing Kothi No. 2/2, T.B. Sapru Road, Prayagraj measuring about 1 ½ Beegha was in the name of Late Chhote Lal Patel and his younger brother Late Jang Bahadur Patel. Smt. Kusum Lata used to live in the house of Late Chhote Lal Patel for house hold works and also used to take care of Late Chhote Lal Patel. Shri Chhote Lal Patel had obliged Smt. Kusum Lata and willed about 1 biswaof the property bearing Kothi No. 2/2, T.B. Sapru Road, Prayagraj, to Smt. Kusum Lata through Sale Deed dated 15.03.2014 and possession of the same was with Smt. Kusum Lata.

Enquiry has also revealed that Smt. Arti Patel was the only child of Late Chhote Lal Patel. On 05.02.2018, Smt. Arti Patel executed a sale deed selling the above said 1 Biswa land (which was in the possession of Smt. Kusum Lata) to Shri Brijendra Singh and Shri Chandrajit Singh through registered Sale Deed. Shri Brijendra Singh and Shri Chandrajit Singh had taken possession of the said land.

Enquiry has revealed that on 12.04.2018 there was dispute for possession of the land between Smt. Kusum Lata and Shri Brijendra Singh & Shri Chandrajit Singh. Smt Arti Patel and her husband were not present at that time. However, Smt. Arti Patel & her husband Sri Krishan Kumar Patel along with Shri Brijendra Singh and Shri Chandrajit Singh were named as accused by Smt. Kusum Lata in the FIR lodged by her U/s 419, 420, 147, 323, 504, 506 IPC and Sec. 3 (2) (V) and 3 (2) (VI) SC/ST Act of Police Station: Civil Lines, Prayagraj.

Enquiry has revealed that State Police has filed chargesheet against Shri Krishna Kumar Patel, Smt. Arti Patel, Shri Chandrajit Singh and Shri Brijendra Singh on 02.08.2018 before the Ld. Court u/s 147, 323, 504 & 506 IPC and Sec. 3 (2) (va) of SC/ST Act. Nothing incriminating has surfaced during the course of enquiry to question these findings of State Police.

**(VIII) Case Crime No. 558/2021 dated 29.06.2021 U/s 147, 447, 323, 504 I.P.C. and Sec. 3 (2) (V) SC/ST Act. of Police Station: Civil Lines, Prayagraj. (placed at serial no.9 in the preceding paragraph no.11).**

**Findings of State Police:** In this case Police had filed chargesheet against Shri Vinod Shankar Tripathi on 29.03.2022.

**Findings of CBI:** Enquiry has revealed that Shri Vinod Shankar Tripathi and Smt. Kusum Lata were known to each other previously. Smt. Kusum Lata offered her own disputed residential plot No. 2/2/2R, Sapru Marg Cuil Line Prayagraj to Sri Vinod Shankar Tripathi for purchase. At that time Sri Vinod Shankar Tripathi and Shri Bhupendra Pandey were good friends and both agreed to jointly purchase this residential plot at No. 2/2/2R, Sapru Marg for Rs. 20 lacs. They entered into an agreement to sale dated 13.11.2018 with Smt. Kusum Lata and an advance of Rs. 50001/- was paid to her.

Enquiry has also revealed that Sri Bhupendra Pandey and Sri Vinod Shankar Tripathi mutually agreed by that the ground floor will be used for chambers/offices and parking space for both and the first and second floor will be used by them as residence. Accordingly construction was carried out on this plot by both collectively. After completion of construction Sri Bhupendra Pandey got the sale deed executed on 25.02.2020 for first floor and on the same day Smt. Kusum Lata executed

a new agreement to sale with Sri Vinod Shankar Tripathi for second floor. Till then Sri Vinod Shankar Tripathi had paid Rs. 5.5 lacs to Smt. Kusum Lata and took some more time for making balance payment to her.

However, dispute arose between them with regard to the clearance of the respective dues. Some part of the property was occupied by Shri Bhupendra Kumar Pandey and later Sri Vinod Shankar Tripathi occupied the other part of the property which was lying vacant. This was not to the liking of Sri Bhupendra Kumar Pandey who felt that he had born the cost of construction of the property himself without fully receiving the consideration from Sri Vinod Shanker Tripathi,

Enquiry has further revealed that in November 2020, when Shri Vinod Shankar Tripathi asked Smt. Kusum Lata for registration of sale deed for second floor of above mentioned property. She asked him to first clear the dues of Shri Bhupendra Pandey, which were incurred on construction of house.

Enquiry has revealed that since the sale consideration was not fully paid by Shri Vinod Shankar Tripathi to the vendor Smt. Kusum Lata but the former took the property in his possession, Smt. Kusum Lata lodged FIR No. 558 of 2021 at PS-Civil Lines, Prayagraj U/s 147, 447, 323, 504 IPC and 3(2)(v) SC & ST Act against Shri Vinod Shankar Tripathi and his family members on 29.06.2021 for criminal trespass and forcible occupation. In this case, charge-sheet has been filed against Shri Vinod Shankar Tripathi, Advocate in the Competent Court which is under trial. As per Shri Vinod Shankar Tripathi, Advocate, he tried to settle the issue amicably a number of times but due to the intervention of Shri Bhupendra Kumar Pandey, Advocate, the matter could not be resolved either with Smt. Kusum Lata or Shri Bhupendra Kumar Pandey.

**(IX) Case Crime No. 289 /2022 dated 05.06.2022 U/s 386 and 506 IPC Police Station: Civil Lines, Prayagraj (placed at serial no.11 in the preceding paragraph no.11).**

**Findings of State Police:** After completion of the investigation, the State Police filed chargesheet against Shri Mukhtar Ahmad, Miss. Khushboo and Smt. Reshma on 26.11.2022 before the concerned Court.

**Findings of CBI:** Enquiry revealed that complainant Smt. Rupali Singh Adhikari

resides in Shailabh Height Apartment and accused persons used to work as her domestic servants for last 7-8 years. During investigation, the State Police had recovered Rs 1,00,000/- from accused persons and State Police has filed chargesheet against Shri Mukhtar Ahmad, Miss Khushboo and Smt. Reshma on 26.11.2022. The incident appears to be genuine.

**(X) Case Crime No. 114 / 2022 dated 21.04.2022 U/s 147, 148, 149, 323, 504, 506, 307 IPC, Police Station: Phaphamau, Prayagraj (placed at serial no.12 in the preceding paragraph no.11).**

**Findings of State Police:** Investigation by State Police established that the alleged incident was false and a closure report dated 05.06.2022 was filed in this matter.

**Findings of CBI:** During enquiry Shri Bhupendra Kumar Pandey has stated that between 3.00 pm to 4.00 pm, he met with an accident on 16.06.2021 at Gohari More, Phaphamau, Prayagraj when his motorcycle was hit by a red car driven by Shri Vinod Shankar Tripathi, his father Shri Vijay Shankar Tripathi and some unknown persons. When he fell down both Shri Vinod Shankar Tripathi and Shri Vijay Shankar Tripathi fired bullets at him. Luckily the bullets did not hit him.

Enquiry has revealed that on 16.06.2021 Shri Bhupendra Kumar Pandey received first aid at 3.35 pm at Community Health Centre, Chaka, Naini, Prayagraj reportedly after a Road Side Accident. He was referred to SRN Hospital, Prayagraj. However, at 5.30 pm on 16.06.2021 he was admitted and took treatment at Priti Nursing and Maternity Home, George Town, Prayagraj. He was relieved from the hospital on 20.06.2021.

Enquiry has also revealed that FIR on the incident was registered on the complaint of Shri Bhupendra Kumar Pandey on 21.04.2022.

Enquiry has revealed that the reported site of accident at Gohari More, Phaphamau, Prayagraj was about 35 Km from Community Health Centre, Chaka, Naini, Prayagraj and Priti Nursing and Maternity Home, George Town, Prayagraj lies in between about 25 Km from Community Health Centre (CHC), Chaka.

The CDR analysis of mobiles of Shri Vinod Shankar Tripathi & his father Shri Vijay Shankar Tripathi has revealed that between 3.00 P.M. 4.00 P.M. on 16.06.2021, their locations were as under:

i. Shri Vijay Shankar Tripathi (Mob no. 9935341097) was mostly located in the vicinity of Krishna Dev Chaurasiya Arazi No.- 394 to 397, Mauza- Mahdauri

Uparhar, Teliarganj, Rasulabad, Prayagraj. However, his location was not available during the period between 3.00 P.M. 4.00 P.M. on 16.06.2021.

ii. Shri Vinod Shankar Tripathi (Mob No. 8787272838 & 9956487136), for the time period between 3.00 P.M. 4.00 P.M. on 16.06.2021, he was located in the vicinity of (a) A-189, Mahdauri Colony, Teliarganj, Prayagraj (b) Arazi No. 394 to 397, Mauza-Mahdauri. Uparhar, Teliarganj, Rasulabad, Prayagraj.

The location of Shri Vinod Shankar Tripathi was about 9.0 Km from the reported point of accident. Hence, the allegation of Shri Bhupendra Kumar Pandey that both Shri Vinod Shankar Pandey and Shri Vijay Shankar Pandey were instrumental in causing his accident at Gohari More, Phaphamau, Prayagraj does not appear to be true.

Enquiry has also revealed that on 16.06.2021, Shri Bhupendra Kumar Pandey was using mobile number 9792866999. Scrutiny of the CDR of this number has revealed that at 12.40.57 hrs on 16.06.2021, he was near his residence at Stanley Road, Civil Lines, Prayagraj. Thereafter, he moved towards Dandi, Prayagraj and remained stationed in that area till 07.26.59 P.M.. The CHC (Community Health Centre). Chaka is located in that area Thereafter, he moved to George Town area in the vicinity of Priti Nursing & Maternity Hospital, Georgetown.

On the basis of the medical records of CHC, Chaka, Prayagraj. Priti Nursing & Maternity Hospital, Georgetown and CDR of the mobile No. 9792866999 of Shri Bhupendra Kumar Pandey, it is clear that he must have met with road accident in Dandi / Chaka area only and was given first aid at CHC, Chaka. Thereafter, he was admitted at Priti Nursing & Maternity Hospital, Georgetown where he remained admitted till 20.06.2021. Scrutiny of CDR has also revealed that on 16.06.2021 Shri Bhupendra Kumar Pandey never visited the Gohari Road, Phaphamau which is more than 12 kms from his residence in a direction diagonally opposite to Chaka/Dandi, Prayagraj.

Thus, it appears that no such firing accident had taken place at Gohari Road, Phaphamau, Prayagraj on 16.06.2021 and the FIR was lodged on the basis of false facts.

**(XI). Case Crime No. 424/ 2022 dated 04.08.2022 U/s 420 IPC, Police Station: Civil Lines, Prayagraj (placed at serial no.13 in the preceding paragraph no.11)**

**Findings of State Police:** Despite lodging the FIR, the complainant Shri

Bhupendra Kumar Pandey did not provide the alleged forged document / Court order. This case is still under investigation at the initial level, by the State Police.

**Findings of CBI:** During enquiry it was revealed that the complainant Shri Bhupendra Kumar Pandey did not provide the alleged forged document / Court order to the conducting IO of the State Police. He also failed to provide the said document in this enquiry despite being aware about the fact that this enquiry was being conducted on the directions of the Hon'ble High Court to ascertain the veracity of the facts. In view of the above, it is apparent that the present FIR lodged by Shri Bhupendra Kumar Pandey is due to his animosity with Shri Vinod Shankar Tripathi and the same does not appear to be based on genuine facts.

**(XII) Case Crime No. 447/2022 dated 31.08.2022 U/s 147, 148, 149, 323, 504, 506, 395, 34 IPC, Police Station: Colonelganj, Prayagraj (placed at serial no.14 in the preceding paragraph no.11).**

**Findings of State Police:** The case is presently under investigation.

**Findings of CBI:** Enquiry revealed that on 31.08.2022 at about 02:00 PM during lunch hour, Shri Bhupendra Pandey abused Shri Prabhat Mishra that since the CBI is conducting enquiry, they are not happy and were not feeling well. On this issue, Shri Bhupendra Pandey was asked by Shri Prabhat Mishra why he was abusing in that way. On this Shri Bhupendra Pandey, his munshi Shri Wasim and 2-3 unknown persons started beating Shri Prabhat Mishra. Shri Prabhat was saved by the other Advocates of the District Court. In this regard, Case Crime No. 446/2022 U/s 147, 323, 504, 506 IPC against Shri Bhupendra Pandey and 04 unknown persons were got registered.

During enquiry, Call Detail Records (CDRs) of mobile phones of the FIR named accused persons were obtained and it was revealed that three of them namely Shri Ramesh Chandra Ojha, Advocate, Shri Ajay Kumar Mishra, Advocate & Shri Vinod Shankar Tripathi, Advocate were not present in the vicinity of scene of crime at the time of alleged incident on 31.08.2022 in the District Court (Kuchahri), Allahabad.

Enquiry revealed that instant Case Crime No. 447 / 2022 dated 31.08.2022 U/s 147, 148, 149, 323, 504, 506, 395, 34 IPC was got registered by Shri Bhupendra Pandey at Police Station: Colonelganj. Prayagraj as a

cross FIR of Case Crime No. 446/2022U/s 147, 323, 504, 506 IPC against Shri Bhupendra Pandey and 04 unknown persons. He also named Advocates in the FIR on the basis of false facts in order to take revenge from the Advocates who are connected with the person with whom Shri Bhupendra Pandey had dispute. Both these cases are still under investigation.

**(XIII) Case Crime No. 361/2021 dated 23.10.2021 U/s 279 and 304A of IPC, Police Station: Cantt., Prayagraj (placed at serial no.15 in the preceding paragraph no.11)**

**Findings of State Police:** During investigation, the State Police could not identify the vehicle causing accident and filed Closure Report No. 113/2022 dated 17.04.2022 before the Court of Ld. ACJM-17, Allahabad.

**Findings of CBI:** Enquiry revealed that Smt. Raisa Bano, Khala (Mausi) of Shri Mohd. Harum used to live with him and on the day of incident i.e., 22.10.2021, she had left for the office of Shri Salim Shervani seeking some financial help. Shri Salim Shervani was a known person of the area extending help to the poor. When she did not return by late night, the complainant thought that she might had gone to her home situated at Phaphamau and contacted her neighbours at Phaphamau who informed him that two Police personnel had visited her house and informed that his mausi had met with an accident. When complainant reached the Police Station-Cantt, he came to know that his mausi had expired in the road accident.

Shri Harun subsequently visited the place of accident and tried to identify the vehicle which had hit his Khala (Mausi). After 5-6 days, the complainant again visited PS-Cantt. Where he was informed by IO of the case that as per CCTV footage his Khala (Mausi) was hit by a motorcycle ridden by an Advocate aged about 40-42 years.

Thereafter, Mohd. Harun contacted Shri Arun Kumar Srivastava. Advocate and informed him about the circumstances. After about 2- 2% months, Shri Arun Srivastava contacted Harun and told him to go to the place of incidence where some person might inform about the registration number of vehicle which caused the accident. When he visited at the place of accident, a person riding a scooter came and gave him a piece of paper mentioning the vehicle number of the vehicle which hit his Khala (Mausi). Thereafter, with the help of Shri Arun Kumar Srivastava, Advocate

he submitted an application mentioning the vehicle number to the SSP, Prayagraj and also made an application for claim before the L earned Court.

During enquiry, Shri Mohd Harun has submitted that registration details of the vehicle UP 70 CE 8529 was submitted by him on 05.01.2022 to the SSP, Prayagraj. This motorcycle was registered in the name of Shri Vibhav Shankar Tripathi, brother of Shri Vinod Shankar Tripathi, Advocate.

Enquiry has also revealed that the Case Diaries do not mention time of the incident on 22.10.2021. On the basis of the statement of witnesses it is apparent that the accident had taken place in the afternoon of 22.10.2021.

During enquiry CDR of mobile number 9839422649 of Shri Mohd. Harun has revealed on 04.01.2022 he was contacted by Shri Bhupendra Pandey (Mob No. 9792866999) and the call lasted for 274 seconds. Thereafter, there were calls between Shri Mohd. Harun & his advocate Shri Arun Kumar Srivastawa& also between Shri Arun Kumar Srivastava and Bhupendra Kumar Pandey. Shri Mohd Harun has stated that on 04.01.2022 he received details of the vehicle used in the hit and run case involving his khala and the same were filed by him with Sr. SP Prayagraj on 05.01.2022. There was no previous contact between Shri Mohd Harun and Shri Bhupendra Kumar Pandey.

The scrutiny of the CDRs could not confirm locations of the family members of Shri Vinod Shankar Tripathi to be in the vicinity of the point of accident on 22.10.2021. It is relevant here that on 04.01.2022, Shri Mohd Harun was contacted by Shri Bhupendra Kumar Pandey and on 05.01.2022 he had submitted the motorcycle number of Shri Vibhav Shankar Tripathi, brother of Shri Vinod Shankar Tripathi to the Police alleging that the said Motorcycle was used in the hit and run case on 22.10.2021.

In view of the above it is clear that an accident had taken place in which the lady had expired. However, it is also apparent that due to his animosity with Shri Vinod Shankar Tripathi, Shri Bhupendra Kumar Pandey had provided the registration number of the motorcycle of Shri Vibhav Tripathi.

**(XIV) Case Crime No. 239/2012 dated 20.07.2012 U/s 376, 354, 504, 5061PC of Police Station:Mauamia, Allahabad (placed at serial no.16 in the preceding paragraph no.11)**

**Findings of State Police:** In compliance with the orders of Ld. Special Judicial Magistrate, Allahabad on the application U/s 156 (3), Cr.PC filed by Smt. Samla Giri, the State Police had registered FIR bearing Case Crime No. 239/2012 dated 20.07.2012 U/s 376, 354, 504, 506 IPC of PS: Mauamia, Allahabad. After investigation of case State Police has filed closure report on 22.07.2012.

**Findings of CBI:** Enquiry revealed that Smt. Samla Giri was earlier married to Shri Ram Sevak Giri. Due to their difference Ram Sevak Giri sold his agriculture land to one Shri Rajesh Patel, Advocate and left the village. Smt. Samla Giri, left by her husband, remained in the village and refused to hand over the possession of the agriculture land to Shri Rajesh Patel. Efforts made by Shri Rajesh Patel to obtain possession of the land purchased by him were apparently resisted by Smt. Samla Giri who filed the present FIR alleging various offences against him including her rape. Enquiry has also revealed that Smt. Samla Giri had earlier filed complaint with the PS- Mau Aima on similar allegation. However, as no case was registered on her complaint, she filed Complaint U/s 156 (3) Cr.PC on which directions were issued and the present case was registered. Further, investigation by Local Police established that this FIR has been registered by Smt. Samla Giri only to create pressure on Shri Rajesh Patel to desist him from taking possession of her land. With these findings, the Local Police had closed the case recommending action against her U/s 182/211 IPC. Nothing incriminating has surfaced during the course of enquiry to question these findings of State Police.

**(XV). Case Crime No. 181 / 2018 dated 16.04.2018 U/s 323 and 354B IPC and of Police Station: MauAima, Prayagraj (placed at serial no.17 in the preceding paragraph no.11)**

**Findings of State Police:** Police has filed charge sheet against Shri Chandra Babu Naidu and Shri Kushlesh s/o Bhai Lal u/s 323, 325 and 354-kh IPC.

**Findings of CBI:** Enquiry revealed that accused Shri Chandra Babu Naidu had kept his sand and bricks on the Gram Samaj land situated in front of agricultural field of Smt. Samla Giri. On the day of incidence Shri Chandra Babu Naidu received telephonic call from Shri Om Prakash that someone was loading the said sand and bricks on a tractor. Thereafter, he approached at the site and saw that Shri

Rajendra Patel @ Govardhan was standing there alongwith his tractor and trolley. Seeing Shri Chandra Babu Naidu, Shri Rajendra Patel @ Govardhan reached on the road alongwith tractor and came towards Shri Chandra Babu Naidu and took the keys of his motorcycle. In the meantime Smt. Samla Giri alongwith her daughter reached there and took the key of motorcycle with her. This led to altercation & exchange of blows between Shri Chandra Babu Naidu and Smt. Samla Giri. Thereafter, the instant case was got registered by Smt. Samla Giri.

In view of the above it appears that the incident had taken place. The facts of the case can be appropriately appreciated during the course of trial.

**(XVI)** Case Crime No. 105/2022 u/s 376-D, 328, 506 I.P.C. & sec 5/6 of POCSO Act of Police Station: Mau Aima, Prayagraj **(placed at serial no.18 in the preceding paragraph no.11)**

Enquiry has also revealed that the modification application of Shri Vinod Shankar Tripathi has mentioned the case filed by Smt. Samla Giri against Shri Vinod Shankar Tripathi, his father & others as Case Crime No. 105/2022 U/s 376-D, 328, 506 IPC and Section 5 /6 of POCSO Act of PS Mau Aima when in fact, it registered at Police Station Daraganj in Case Crime No. 105/2022, details of the enquiry in respect of the same are as under:

Case Crime No. 105/2022 dated 10.03.2022 U/s 376-D, 328, 506 I.P.C. 5/6 of POCSO Act of Police Station: Daraganj, Prayagraj. **(placed at serial no.18 in the preceding paragraph no.11)**

**Findings of State Police State:-** Police has filed Closure Report on 29.07.2022. Proceedings U/s 182 IPC were initiated against complainant.

**Findings of CBI:** Enquiry revealed that Shri Vinod Shankar Tripathi and his father were arraigned as accused on 15.05.2022 in FIR No. 105/2022, Police Station: Daraganj filed by Smt. Samla Giri alleging gang rape of her daughter Miss Sweta Girion 08.05.2022 at about 07:30 PM. Investigation by the State Police established that no such incident had taken place. In fact, the victim, daughter of Smt. Samla Giri in her statement u/s 164 Cr.PC stated that no such incident had taken place and the FIR was got registered on the directions of her mother. The CDR locations of Mobile numbers of accused S/Shri Vinod Shankar Tripathi, Brijesh, Rajesh Shukla, Sudhakar Mishra and Vijay

Shankar Tripathi were collected by the State Police during investigation which reflected that at the time of incident, the accused persons were not present at the scene of crime. Shri Vinod Shankar Tripathi has alleged that Smt. Samla Giri is an associate of Shri Bhupender Kumar Pandey, Advocate and this FIR was lodged by her at his behest only. Enquiry revealed that during that period Smt. Samla Giri was a client of Advocate Bhupendra Kumar Pandey and on 10.03.2022, for registration of the above FIR, Miss Sweta Giri& her mother, Smt. Samla Giri were accompanied by Mohd. Wasim (Munshi of Shri Bhupendra Pandey, Advocate). Shri Bhupendra Pandey had also sent an Advocate at Police Station Daraganj, Prayagraj to help Smt. Samla Giri in registration of FIR.

Enquiry has further revealed that State Police has filed Closure Report in this case on 29.07.2022. Proceedings U/s 182 IPC have also been initiated against complainant, Smt. Samla Giri. Nothing incriminating has surfaced during the course of enquiry to question these findings of State Police.

**(XVII)** Complaint Case No. 908/2022 U/s 138 NI Act filed before the Court of Ld. Judicial Magistrate Court No-04, Allahabad. **(placed at serial no.19 in the preceding paragraph no.11)**

**(XVIII).** Complaint Case No. 885 / 2022 U/s 138 NI Act before the Court of Ld. Judicial Magistrate- Court No-04, Allahabad. **(placed at serial no.20 in the preceding paragraph no.11)**

(I) In the aforesaid Complaint Cases No. 908 of 2022 and 885 of 2022 pertains to Section 138 of Negotiable Instruments Act the complainant is Ayana Bose whereas, the accused is Bhupenda Kumar Pandey and findings recorded by the C.B.I. in respect of both the cases as under:-

**Findings of CBI:** Enquiry has revealed that during Feb-Aug 2017, Smt. Ayana Bose Chatterjee had lent an amount of Rs 28,21,800/- through cheques / RTGS to Shri Bhupendra Kumar Pandey on interest. Enquiry revealed that subsequently Shri Bhupendra Kumar Pandey failed to return the amount to Smt. Ayana Bose Chatterjee. thereafter, on 25.06.2021, she lodged a complaint at PS- Civil Lines, Prayagraj for registration of case against Shri Bhupendra Kumar Pandey later on, i.e. 01.07.2021, Shri Bhupendra Kumar Pandey agreed to return money and issued 18 post-dated cheques total amounting to Rs. 22,29,000/-

to Smt. Ayana Bose Chatterjee. These cheques were dated for the period from Aug 2021 to November 2022. However, only two of these cheques amounting to Rs. 1.5 lacs were cleared and the remaining cheques were dishonoured when she presented the same in the Bank

Smt. Ayana Bose Chatterjee had filed the above mentioned two complaint cases u/s 138 NI Act against Shri Bhupendra Kumar Pandey in the Court of Learned Additional Chief Judicial Magistrate, Allahabad.

Enquiry has revealed that in the above matter, the Complaint Case of Smt Ayana Bose under NI Act was bearing No. 1308/2022 which has been incorrectly mentioned as No.908/2022.

Both these cases are genuine complaint cases filed u/s 138 NI Act by Smt. Ayana Bose before the Ld. ACJM-04, Allahabad against Shri Bhupendra Kumar Pandey (Advocate). Both these complaints are still pending in the Court.

**(XIX).** Complaint Case No. 125 of 2022 under Sections 354 & 452 I.P.C. and Section 3 (2) (V) SC/ST Act filed before the Court of Ld. Special Judicial Magistrate, SC/ST Act, Allahabad. **(placed at serial no.21 in the preceding paragraph no.11)**

**Findings of State Police and present status of the case:** The complaint is still pending before the concerned Court below.

**Findings of CBI:** Enquiry has revealed that on 21.06.2021 Shri Vinod Shankar Tripathi was using mobile no. 8787272838 and from 19:47:31 to 23:47:14 he was located in Daraganj area, Prayagraj (Long 25.445, Lat 81.8815) which was about 9 Kms away from the residence of Smt. Kusum Lata at Rajapur, Prayagraj. Hence, it is highly improbable that Shri Vinod Shankar Tripathi could have gone to her house at 11.30 pm.

Enquiry has revealed that the complaint was filed by Smt. Kusum Lata on 22.04.2022 through Shri Bhupendra Kumar Pandey. Advocate who has a running dispute with Shri Vinod Shankar Tripathi over a property jointly purchased by them from Smt. Kusum Lata. As a result of this dispute, Smt. Kusum Lata had lodged another FIR No. 558/2021 dated 29.06.2021 under Sections 147, 447, 323, 504 I.P.C. and Sec. 3(2)(V) SC/ST Act against Shri Vinod Shankar Tripathi, his wife Smt. Priti Tripathi, his father Shri Vijay Shankar Tripathi, his brother Shri Sandeep Tripathi & 22-25 unknown advocates for forcibly taking possession of her house at Civil Lines on 25.6.2021. It has also revealed that Shri Vinod Shankar Tripathi has already filed a Civil Suit for the purpose of giving outstanding amount of the sale consideration of said property to

Smt. Kusum Lata. Enquiry has also revealed that on 21.04.2022 Shri Bhupendra Kumar Pandey, Advocate himself had lodged FIR No. 114/2022 U/s 147, 148, 149, 323, 504, 506, 307 IPC, Police Station- Phaphamau, Prayagraj against Shri Vinod Shankar Tripathi & his father Shri Vijay Shankar Tripathi. As discussed above, the said case was not based on genuine facts.

In view of the above, it is apparent that the allegation on Shri Vinod Shankar Tripathi alongwith his brother and father for visiting the residence of the complainant and threatening her does not appear to be genuine.

**(XX).** Complaint Case No. 06 of 2020 U/s 323, 504, 506 and 376-D IPC of Police Station: Mau Aima, Prayagraj: **(placed at serial no.22 in the preceding paragraph no.11)**

**Findings of State Police:** Smt. Samla Giri submitted complaint through IGRS against S/Shri Ram Sajivan Patel, Radhey Shyam S/o Ram Raj, Rajesh Kumar Shukla at PS- Mau Aima, Prayagraj alleging therein her rape, beating, abusing and threatening by the persons named in the complaint. The complaint was examined by CO- Sorao, Prayagraj and the incident was found to be false and the complaint was closed.

**Findings of CBI:** Enquiry revealed that Smt. Samla Giri was earlier married to Shri Ram Sevak Giri but later she came in contact with Shri Goverdhan Patel and started residing with him. Thereafter, Ram Sevak Giri sold his parental land to one Shri Rajesh Patel, Advocate of Pratapgarh but the possession of the land/house was still with Samla Giri. When Rajesh Patel came to take the possession of the land there was an altercation between Shri Rajesh Patel and Smt. Samla Giri. In the meantime, Kamlesh Kumar who was playing cricket nearby with 20-25 boys, saw that Smt. Samla Giri and her supporters damaged the vehicles of Rajesh Patel and started beating him. Thereafter, Shri Kamlesh Kumar and others reached there and tried to pacify the situation. They helped Shri Rajesh Patel (opponent of Smt. Samla Giri in land dispute) for loading the damaged vehicles on the Pickup, on this Smt. Samla Giri got angry and threatened them to lodge a criminal case against them.

Smt. Samla Giri submitted complaint through IGRS against Sri Ram Sajivan Patel, Radhey Shyam S/o Ram Raj, Rajesh Kumar Shukla at PS- Mau Aima, Prayagraj

alleging therein her rape, beating, abusing and threatening by the persons named in the complaint. The complaint was examined by Circle Officer Soraon, Prayagraj who found the incident false and closed the complaint. Thereafter, Smt. Samla Girihad filed application u/s 156 (3) Cr.PC before the concerned Court which is pending. Nothing incriminating has surfaced during the course of enquiry to question these findings of State Police.

**(XXI).** Complaint Case No. 17145 of 2022 filed by Shubham Giri @ Sonu S/o Smt. Samla Girl: **(placed at serial no.23 in the preceding paragraph no.11)**

**Findings of CBI:** Enquiry has further revealed that on the complaint of Shri Shubham Giri, an order dated 23.08.2022 passed by of the Ld. Court of Special Chief Judicial Magistrate, Allahabad for enquiry into the matter. The matter was enquired by Circle Officer, Soraon, Prayagraj who found that earlier, on the complaint of Smt. Archana Singh, an FIR No. 90/2021 dated 01.03.2021 U/s 342, 376-D, 506 IPC was registered at PS- Mau Aima, Prayagraj against Smt. Samla Giri and others and after investigation accused persons including Smt. Samla Giri and 03 others were chargesheeted. It was concluded by the State Police that the present complaint has been filed before the Ld. Court by Shri Shubham Giri for saving himself. On the findings of CO, Soraon, Prayagraj, the Court of Ld. Special Chief Judicial Magistrate, Allahabad vide order dated 28.09.2022 rejected the complaint of Shri Shubham Giri with the observation that if a false complaint is received by the Police, then proceedings U/s 182 IPC be initiated by the State Police against the complainant.

The complaint has already been dismissed with the orders of learned Special Chief Judicial Magistrate , Allahabad, which appear to be just and proper.

25. That so far as Case Crime No. 144 of 2022 under Section 376 (D), 328 I.P.C. Police Station Phaphmau, District Prayagraj is concerned, a detailed preliminary enquiry has already been submitted by the C.B.I. vide PE No. 0532022S0001 which has already been taken note of in paragraph 23 (II).

26. This Court vide order 20.10.2022 had also directed the C.B.I. to conduct preliminary enquiry with respect to Case Crime No. 599 of 2016 under Sections 147, 148, 149, 376, 354, 397, 452, 427, 504, 506 I.P.C. registered at Police Station Sarai

Inayat, District Prayagraj as stated in preceding paragraph no.13, pursuant to which, C.B.I. in its preliminary enquiry 0532022 S0002 had submitted the report in the following terms:-

**Findings of State Police:** The alleged incident was found to be false and IO filed the closure report dated 01.03.2017 in this matter.

**Findings of CBI:** Enquiry revealed that there was property dispute between Shri Ram Siromani Mishra and Shri Ashish Jaiswal. The present case is a cross case of FIR No. 365/2016 U/s 307, 394, 504, 506 IPC of PS- Sarai Inayat, Prayagraj registered on the complaint of Shri Abhishek Jaiswal alleging therein that Shri Ram Siromani Mishra and his two sons Shri Vivek Mishra and Shri Vikas Mishra had badly beaten Shri Ashish Jaiswal @ Saritend Jaiswal and his friend Shri Nitin Kesarwani on 13.09.2016 at about 04:25 PM on the way to Village- Fatuha. In furtherance of investigation of the said case, medical examination of Shri Ashish Jaiswal was conducted between 05.50 pm to 6.15pm on 13.09.2016 at Community/ Primary Health Centre Kotawan (Bani), Allahabad. Thereafter, he was admitted at TB Sapru Hospital, Prayagraj. In this case after conclusion of investigation the State Police has filed chargesheet U/s 308, 504, 506 IPC against Shri Ram Shiromani Mishra and Shri Vivek Mishra.

Enquiry has also revealed that subsequently Miss Babita D/o Shri Ram Shiromani Mishra approached PS- Sarai Inayat, Prayagraj by way of a complaint dated 14.09.2016 alleging therein that on 13.09.2016 at about 06.00 pm when she had gone to the field on natural call, Shri Ashish Jaiswal and Shri Nitin Kesarwani tried to molest her. This was contrary to the fact that as at that time Shri Ashish Jaiswal was admitted at TB Sapru Hospital, Prayagraj due to the injuries caused by Ram Shiromani Mishra and his sons on 13.09.2016 and remained under treatment for 10-12 days there. As the local Police was aware about the incident of 13.09.2016, no FIR was registered by PS- Sarai Inayat, Prayagraj.

Enquiry further revealed that subsequently, on 28.09.2016 Smt. Santosh Mishra w/o Shri Ram Shiromani Mishra filed an application u/s 156 (3) Cr.PC before Ld ACJM (9), Allahabad alleging therein her rape, theft and molestation of her daughter on 13.09.2016 at about 12.00 noon by Shri Ashish Jaiswal & others. On

the order dated 26.11.2016 of the Ld ACJM, Case Crime No. 599 of 2016 was registered on 23.12.2016 at PS- Sarai Inayat, Prayagraj.

From the above it is observed that while in the complaint filed by Miss Babita on 14.09.2016, she had alleged that on 13.09.2016 at 6.00 pm, Shri Ashish Jaiswal and Shri Nitin Kesarwani tried to molest her but in the complaint dated 28.09.2016, Smt. Santosh Mishra (mother of Miss Babita) had alleged her rape, theft and molestation of her daughter (Miss Babita) on 13.09.2016. It is, therefore, clear that the alleged incident had not taken place and the State Police has rightly filed the closure report in this matter.

27. This Court vide order dated 13.02.2023 had directed the C.B.I. to conduct the preliminary enquiry on the intervener/impleadment applications (as has been stated in preceding paragraph nos. 14, 15, 16, 17, 18), with respect to the following cases:-

(I) Case Crime No. 224 of 2022 under Sections 147, 323, 504, 506, 452, 354Kha, Police Station Sarai Inayat, District Prayagraj.

(II)Case Crime No. 255 of 2022 under Sections 307, 504, 506, I.P.C. Case Crime No. 244 of 2021 under Sections 147, 323, 504, 506, 452, 354B I.P.C. Police Station Sarai Inayat, District Prayagraj.

(III) Case Crime No. 90 of 2022 under Sections 494, 504, 506 I.P.C. Police Station Industrial Area, District Prayagraj.

(IV) Case Crime No. 91 of 2020 under Sections 354Kh, 147, 148, 323, 308, 427, 452, 504, 506 I.P.C. Police Station Hanumanganj, District Kushinagar.

(V) Criminal Complaint Case No. 429 of 2019 (old no. 180 of 2019) Police Station Kotwali Hata, District Kushi Nagar.

(VI)Criminal Complaint Case No. 13615 of 2020 (Old Case No. 801 of 2020 ) under Sections 323, 504, 506, 427 I.P.C. Police Station Hanumanganj, District Kushinagar.

(VII) Case Crime No. 195 of 2020 under Sections 376D, 406, 342, 506 I.P.C. Police Station Kareilly, District Prayagraj.

(VIII) Case Crime No. 141 of 2020 under Sections 468, 467, 420, 419, 406 I.P.C. Police Station Kydganj, District Prayagraj.

28. Pursuant to the order dated 13.02.2023, the C.B.I. had submitted Enquiry Report being PE 0532023 S0001 with regard to the aforesaid cases and the outcome of the preliminary enquiry of the aforesaid cases are as under:

**(I) Case Crime No. 224 of 2022 under Sections 147, 323, 504, 506, 452, 354Kha I.P.C. Police Station Sarai Inayat, District Prayagraj.**

**Findings of State Police:** After completion of investigation, State Police forwarded charges heet No. 70/22 dated 27.04.2022 against S/Shri Padamdhar Dwivedi, Alokdhar Dwivedi, Anuragdhar Dwivedi, Ashutosh Ojha, Ramesh Ojha U/s 147, 323, 504, 452 and 506 IPC

**Findings of CBI:** Enquiry has revealed that Late Premdhar Dwivedi and Late Laxmidhar Dwivedi were two brothers living jointly. Late Laxmidhar Dwivedi expired in the year 1973 and his 4 sons were looked after by Late Premdhar Dwivedi. Late Prendhar Dwivedi was having only one son namely, Shri Padamdhar Dwivedi. Shri Padamdhar Dwivedi after his marriage got 32 Bighas agricultural land & other properties from his in-laws at Puremaharath, Phoolpur, Prayagraj and after some time he started residing with his in-laws at their home.

Enquiry has further revealed that Late Premdhar Dwivedi, a pensioner, was being looked after/served by his nephews. Shri Premdhar Dwivedi settled the issues of his property by giving agricultural lands including residential property to his nephews and commercial land measuring about 2.5 bighas and 10 shops in favour of his son Shri Padamdhar Dwivedi.

Enquiry has revealed that Late Premdhar Dwivedi expired on 14.06.2021. In his last stage he was not allowed by his nephews to meet his son Shri Padamdhar Dwivedi or grandsons. In the meantime, Will / Gift Deed was executed by Late Premdhar Dwivedi in favour of his nephews. Shri Padamdhar Dwivedi S/o Late Premdhar Dwivedi and his sons usually used to visit to meet his father/grandfather but they were not allowed by his cousins to meet his father and used to quarrel with them.

Enquiry has further revealed that Shri Padamdhar Dwivedi S/o Late Premdhar Dwivedi had submitted an application dated 11.06.2021 to the Sr. SP. Prayagraj that his father be allowed to stay at his residence at Phoolpur or at his residence at

Sahson, Prayagraj and he may also be allowed to meet and take care of him.

On 13.06.2021, S/Shri Padamdhar Dwivedi, Alokdhar Dwivedi, Anuragdhar Dwivedi (both S/o Shri Padamdhar Dwivedi) & his relatives, namely, Ramesh Ojha, Advocate, Ashutosh Ojha, Advocate, Siyaram Tiwari (maternal uncle) visited PS- Sarai Inayat, Prayagraj and requested about above application and informed about directions of the CO, Phoolpur, Prayagraj. Then SHO Sarai Inayat, Prayagraj told them to visit Police Chowki, Sahso to take the assistance of police personnel. Shri Padamdhar Dwivedi visited his village alongwith the Police personnel and relatives but the gate was not opened by his cousin. After some time when the gate was opened, a fight took place between the two parties. Persons from both the parties have stated that Advocate Ramesh Ojha and Ashutosh Ojha did not take part in the fight and were standing far from the place of incident. In this incident Shri Padamdhar Dwivedi, his son and Shri Siya Ram Tiwari were beaten by Shri Shashankdhar Dwivedi and his family members and they got injuries. Shri Padamdhar Dwivedi went to the Police Station- Sarai Inayat and submitted complaint regarding the incident and FIR bearing No. 223 of 2021 U/s 147, 323, 504, 506 and 342 IPC on 13.06.2021 at PS: Sarai Inayat, Prayagraj against S/Shri Dharnidhar Dwivedi, Chandradhar Dwivedi, Shyamdhar Dwivedi, all S/o Shri Late Laxmidhar Dwivedi, Sudhanshudhar Dwivedi, Shashankdhar Dwivedi, both S/o Shri Dharnidhar Dwivedi, Abhishekdhar Dwivedi, Shubhamdhar Dwivedi, both S/o Shri Rajdhar Dwivedi, Kushaldhar Dwivedi S/o Shri Shyam Dhar Dwivedi, all R/o Sahson, PS- Sarai Inayat, Prayagraj was registered.

Enquiry has also revealed that on 14.06.2021, in the same matter, a cross FIR bearing Case Crime No. 0224/2021 U/s 147, 323, 504, 506, 452, 354 (kh) of IPC was got registered by Shri Shashankdhar Dwivedi. However, during enquiry Smt. Shrishti Dwivedi W/o Shri Sudhandhudhar Dwivedi and sister-in-law (Bhabhi) of Shri Shashankdhar Dwivedi, Advocate (complainant) as well as other witnesses have denied any type of outrage of her modesty by FIR named accused persons. This fact mentioned in the FIR is totally false. It is further revealed that Shri Padamdhar Dwivedi and other had not entered the house of complainant on

13.06.2021. All the incident took place at the gate of house of Shri Shashankdhar Dwivedi.

Enquiry further revealed that on 14.06.2021 in the morning Shri Premdhar Dwivedi, father of Shri Padamdhar Dwivedi expired.

On the basis of above facts, it appears that Shri Shashankdhar Dwivedi and his family members were the aggressors but got an FIR registered against the victim by misrepresenting the facts. Subsequently, a counter case has also been lodged to mount pressure on Shri Padamdhar Dwivedi on the same incident.

Hence, enquiry has revealed that the instant FIR bearing Crime No. 0224/2021 dated 14.06.2021 U/s 147, 323, 504, 506, 452, 354 (kh) of IPC is a cross FIR of the case bearing Case Crime No. 223 of 2021 U/s 147, 323, 504, 506 and 342 IPC on 13.06.2021 and the name of Shri Ramesh Ojha and Shri Ashutosh Ojha are mentioned in this FIR to falsely implicate them.

**(II) Case Crime No. 255 of 2022 under Sections 307, 504, 506, I.P.C. Case Crime No. 244 of 2021 under Sections 147, 323, 504, 506, 452, 354B I.P.C. Police Station Sarai Inayat, District Prayagraj.**

**Findings of State Police:** Investigation of the case is continuing.

**Findings of CBI:** Enquiry revealed that on 09.09.2022, Shri Ramesh Kumar Ojha, Advocate met Shri Ashish Mishra, Advocate in front of Court No. 69-70 of Hon'ble Allahabad High Court, Prayagraj and asked him as to why he had got registered Case Crime No. 447/2022 dated 31.08.2022 at PS- Colonelganj, Allahabad against him through Shri Bhupendra Pandey, Advocate and got the same investigated byCBI. On this, scuffle occurred between them in front of Court No. 69- 70 of Hon'ble High Court, Allahabad. Some Advocates, present there separated them. Shri Ashish Mishra submitted a written complaint at PS- Cantt., Prayagraj on which the instant FIR was registered.

Enquiry has revealed that the incident of scuffle between advocates in Court premises had taken place on 09.09.2022 and facts of the present FIR will be subject matter of investigation being conducted by State Police.

**(III) Case Crime No. 90 of 2022 under Sections 494, 504, 506 I.P.C. Police Station Industrial Area, District Prayagraj.**

**Findings of State Police:** After investigation, State Police has forwarded chargesheet No. 123/22 dated 29.07.2022 to the Court of Special Judge SC/ST Act, Allahabad against accused Shri Kamta Prasad S/o Shri Brijlal Adiwashi, Smt. Pramila Devi W/o Shri Kamta Prasad Adiwasi, Shri Suraj Adiwashi S/o Shri Kamta Prasad Adiwasi, Shri Man S/o Jayprakash Adiwasi U/s 323, 504, 506 IPC and Shri Vikas S/o Kamta Prasad U/s 494, 323, 504, 506 IPC and Shri Lavkush Maurya S/o Shri Rishi Ram Maurya R/o Ravanika, PS- Karchana, Prayagraj U/s 376 IPC and Section 3(2) (v) SC/ST Act.

**Findings of CBI:** Enquiry has revealed that Ms. Savita was married to Shri Sharda Prasad but he expired about 05 months after the marriage. After about 1 year she came in contact with one Buddhan and married him. She resided with him for about one week and thereafter left him and returned to her parents' house. After about 3 years, she married one Sh. Bhondal and with whom she lived for about 10-15 days and left him because he used to drink liquor.

Enquiry has also revealed that during September 2019 to December, 2019, Ms. Savita came in contact with one Vikas and went with him to Surat in July, 2021 and resided with him there. When the family members of Vikas came to know about the fact of him living with Ms. Savita, they objected and pressurized Vikas. Upon this, Vikas returned to Prayagraj on 12/13.07.2021 without informing Ms. Savita. After 2-3 days Ms. Savita also returned to Prayagraj from Surat and lodged a complaint with PS- Karchana, Prayagraj on 20.07.2021. On 07.09.2021, their matter was taken up before Shri Babbu Adiwasi, Village Pradhan and it was decided to get them married on 14.09.2021 at Gauri Mandir, near Kabra Ganga Ghat but the marriage could not be solemnized as Vikas did not turn up.

Enquiry has also revealed that subsequently, Lavkush Maurya, the then Gram Pradhan of Kabra and Thakur, brother of Gram Pradhan of Village Nainua Bendau visited the residence of Ms. Savita and talked about compromise in the matter. It was further decided at the Ishu Hospital

owned by Shri Lavkush Maurya that both Savita and Vikas be sent to live together and railway ticket was also got booked by Shri Kamta Prasad (father of Vikas). But Savita declined to go with Vikas without marriage and did not turn up at the Railway Station.

On 18.04.2022, she came to know that Vikas was going to be married to a girl of Village- Isauta and in order to stop the marriage she alongwith her father and Bua went to PS- Meja Prayagraj and the family members of the girl were called at the Police Station and narrated her story. Thereafter, a complaint dated 19.04.2022December, 2019, Ms. Savita came in contact with one Vikas and went with him to Surat in July, 2021 and resided with him there. When the family members of Vikas came to know about the fact of him living with Ms. Savita, they objected and pressurized Vikas. Upon this, Vikas returned to Prayagraj on 12/13.07.2021 without informing Ms. Savita. After 2-3 days Ms. Savita also returned to Prayagraj from Surat and lodged a complaint with PS- Karchana, Prayagraj on 20.07.2021. On 07.09.2021, their matter was taken up before Shri Babbu Adiwasi, Village Pradhan and it was decided to get them married on 14.09.2021 at Gauri Mandir, near Kabra Ganga Ghat but the marriage could not be solemnized as Vikas did not turn up.

Enquiry has also revealed that subsequently, Lavkush Maurya, the then Gram Pradhan of Kabra and Thakur, brother of Gram Pradhan of Village Nainua Bendau visited the residence of Ms. Savita and talked about compromise in the matter. It was further decided at the Ishu Hospital owned by Shri Lavkush Maurya that both Savita and Vikas be sent to live together and railway ticket was also got booked by Shri Kamta Prasad (father of Vikas). But Savita declined to go with Vikas without marriage and did not turn up at the Railway Station.

On 18.04.2022, she came to know that Vikas was going to be married to a girl of Village- Isauta and in order to stop the marriage she alongwith her father and Bua went to PS- Meja Prayagraj and the family members of the girl were called at the Police Station and marrated her story. Thereafter, a complaint dated 19.04.2022 was lodged by Ms. Savita at Police Station Industrial Area, Prayagraj on the basis of which, the instant F.I.R. was registered.

Enquiry has revealed that during investigation of above mentioned FIR, statement of Ms. Savita U/s 164 Cr.PC was recorded in which she had narrated all the

facts pertaining to the allegation leveled in this FIR. She also stated that Lavkush Maurya, assured her of help in the lodging of FIR in this matter and had called her at his Ishu Hospital and raped her. Shri Lavkush Maurya was arrested after her statement was recorded u/s 164 Cr.P.C.

In her statement U/s 164 Cr.PC dt. 09.06.2022, Ms. Savita, without mentioning any date, has stated that she was raped by Lavkush Maurya in his Ishu Hospital. During present enquiry, Ms. Savita stated that she was raped by Shri Lavkush Maurya at Ishu Hospital on 18.05.2022.

Enquiry has also revealed that on 25.05. 2022 Ms. Savita Devi made a written complaint to Sr. SP, Prayagraj and alleged that she had gone to Naini, Prayagraj for marketing on 20.05.2022. At about 08:00 PM, while returning from Naini she was waiting for public conveyance, when Shri Suraj brother of Vikas alongwith another person muffling his face came to her and offered to drop her in their vehicle to which she agreed. When she boarded the vehicle she was brought to an isolated place near Amilo Nahar, PS- Karchana, Prayagraj and was raped by both of them. Further, she identified that the person covering his face was Lavkush Maurya. She further mentioned in the complaint that after her rape she was left there and brought to her home by Shri Shiv Kumar, her brother-in-law and one Shri Arvind Patel of her village. In the enquiry conducted by State Police, the matter was found to be false and no FIR was lodged.

Enquiry has also revealed that on 30.05.2022 she filed a complaint U/s 156 (3) Cr PC before the Court of Ld. Special Judge, (SC/ST Act) Allahabad regarding the above incident about her rape by Lavkush Maurya and Suraj on 20.05.2022. The Ld. Court directed State Police (PS-Karchana, Prayagraj) to ascertain about the said rape incident and the State Police submitted a Report mentioning therein that the matter is false. Now, the matter is pending before the Ld. Special Judge, (SC/ST Act), Allahabad.

Enquiry has further revealed that Shiv Kumar and Shri Arvind Patel, who were witnesses cited by her in her complaint to Sr. SP. Prayagraj as well as complaint U/s 156 (3) Cr.PC, have denied any such incident and not supported the version of the Ms. Savita Devi. Shri Hari Ram, father of Ms. Savita Devi has also denied any such incident of her rape by Lavkush

Maurya and Suraj. It was also revealed that after filing the complaint with the Sr.SP, Prayagraj on 25.05.2022, she has not returned to her parents' house.

Enquiry has further revealed that she has also lodged complaint dated 06.08.2022 on the IGRS (Chief Minister portal) against Lavkush and his brother Mahendra Maurya for threatening her for life. On this complaint State Police has submitted a report that the complaint is false because accused Lavkush Maurya was in judicial custody in Case Crime No. 90/2022 of PS-Industrial Area, Prayagraj.

Enquiry has further revealed that after her 164 Cr.PC Statement Section 376 IPC and Section 3 (2) (v) of SC/ST Act were added in the instant FIR, she has been given compensation amounting to Rs. 3.75 lacs by the Govt. of Uttar Pradesh.

Enquiry has revealed that when she came to know that CBI enquiry is to be conducted in the case lodged by her, she contacted Arvind Patel and Shiv Kumar who were cited as witnesses in the complaint filed by her U/s 156 (3) Cr.PC before the Ld. Special Judge (SC/ST Act), Allahabad as well as to the Sr.SP. Shri Arvind Patel and Shiv Kumar have stated that they were offered money by her for supporting her version before CBI and were also threatened to implicate them in false cases just as Lavkush Maurya was implicated.

Enquiry has revealed that initially she had lodged an FIR regarding her marriage dispute against Vikas and his family members. At the time of her statement u/s 164 Cr.PC she added new facts about her rape by Lavkush Maurya without any complaint to Police.

Enquiry has revealed that in her complaint dated 25.05.2022 to Sr.SP. Prayagraj and Complaint dated 30.05.2022 u/s 156(3) Cr.PC before Ld. Special Court (SC/ST), Allahabad, Ms. Savita has alleged her rape by Lavkush Maurya & Suraj at Amilo Nahar, PS Karchhana on 20.05.2022. However, in her statement dated 09.06.2022 recorded u/s 164 Cr.PC. Ms. Savita has stated that she was raped by Lavkush Maurya at Ishu Hospital, PS: Industrial Area, Prayagraj.

Thus, enquiry has revealed that the allegations made by the complainant on her dispute against Vikas & his family members appear to be correct but the allegations of her rape against Lavkush

Maurya do not appear to be genuine at this stage and seems to have been made with a mala fide intention of getting financial benefits from the Government of Uttar Pradesh. She has already received Rs 3.75 lacs in this matter.

**(IV) Case Crime No. 91 of 2020 under Sections 354Kh, 147, 148, 323, 308, 427, 452, 504, 506 I.P.C. Police Station Hanumanganj, District Kushinagar.**

**Findings of State Police:** After investigation, State Police had charge-sheet on 28.11.2020 in the Ld. Judicial Magistr Kushinagar, Padrauna against accused S/Shri Surendra Srivasta Sartej Srivastava U/s 354-Kha, 147, 148, 323, 308, 427, 452, and 506 IPC and S/Shri Subhash Chandra Srivastava, Sant Srivastava, Ram Pyare Lal Srivastava, Rintu Srivasta Shivshankar Lal, Smt. Vimla Devi, Ms. Anchal, Narayan, Lalchar U/s 147, 148, 323, 308, 427, 452, 504, 506 IPC.

**Findings of CBI:** Enquiry has revealed that this matter is relate the property dispute in a family. In this matter, a dispute arose f cutting of Gulmohar tree situated in front of house of the complair Smt. Anju Srivastava on her land by FIR named accused, nam Santosh and Surendra on 20.09.2020 on the instructions of Subhash Chandra Srivastava. When complainant objected, Subhash Chandra Srivastava and Sartej Srivastava had b beaten her. Thereafter, when her family members came to know about the incident, then Subash Chandra Srivastava was beaten by family members of Smt. Anju Srivastava

Smt. Anju Srivastava, after beaten by the accused persons, went the Police Station and lodged a complaint. Thereafter, she wa accompanied by her family members to the CHC from where she wa referred to the District Hospital, Padrauna, Kushinagar for he treatment.

Enquiry has further revealed that after obtaining Medical Repc pertaining to injuries caused to Smt. Anju Srivastava, the said Fl was registered against accused Subhash Chandra Srivastava ar Ram Pyare Lal Srivastava and others all R/o Village-Turkah Hanumanganj, Kushinagar.

In the meanwhile, Case Crime No. 0089/2020 dated 21.09.2020 U 147, 148, 323, 308, 504 and 506 of IPC, Police Statio Hanumanganj, Kushinagar was also lodged by Shri Subhas Chandra Srivastava against Smt. Anju Srivastava and her fami members.

Thus, enquiry has revealed that incident had taken place and th instant FIR was lodged on the basis of genuine facts and presently under trial.

**(V) Criminal Complaint Case No. 429 of 2019 (old no. 180 of 2019) Police Station Kotwali Hata, District Kushi Nagar.**

**Findings of CBI:** Enquiry has revealed that complainant was called and asked by Shri Kajulal Srivastava and his brother Sunil Srivastava to file a complaint before the Ld. Court against his uncles, namely, Shri Ram Pyare Lal Srivastava and Shri Subhash Srivastava. They told him a story and pressurized the complainant to file the complaint which was drafted by Sunil Kumar Srivastava, Advocate. He first time visited the Court alongwith Shri Kajulal Srivastava and all the expenses of the travel were incurred by Shri Kajulal Srivastava. It further revealed that the complainant was accompanied by Shri Sunil Kumar Srivastava, Advocate to the Ld. Court but he was not asked any question either by the Judge or by Shri Sunil Kumar Srivastava in the Court.

During enquiry Shri Ranjeet Kumar Gautam stated that no such incident had taken place with him and he had filed the complaint only on the instructions of Shri Kajulal Srivastava and his brother Sunil Srivastava.

Enquiry has revealed that the instant complaint was filed on the instructions/ pressure of Shri Kajulal Srivastava and Shri Sunil Kumar Srivastava as there was a property dispute with Shri Ram Pyare Lal Srivastava and Shri Subhash Srivastava (who are real uncles of Shri Kajulal Srivastava and Shri Sunil Srivastava).

Enquiry has also revealed that no such incident occurred with the complainant and he had signed the complaint under pressure/promise of Shri Kajulal Srivastava and Shri Sunil Kumar Srivastava, Advocate because they wanted to take revenge from their uncles in a property dispute. Hence, this complaint is apparently not based on true facts.

**(VI)Criminal Complaint Case No. 13615 of 2020 (Old Case No. 801 of 2020 ) under Sections 323, 504, 506, 427 I.P.C. Police Station Hanumanganj, District Kushinagar.**

**Findings of CBI:** Enquiry revealed that Shri Lal Chand had beaten son of Shri

Chhattu and an FIR was lodged against Shri Lal Chand by Shri Chhattu.

During enquiry Shri Chhattu has stated that, to take revenge, Shri Lal Chand burned his hut himself and lodged false FIR against Shri Chhattu on the allegations of burning his hut and he was sent to the Jail and remained there for about 1 month. Shri Chhattu was not happy with the conduct of S/Shri Subhash Chandra Srivastava, Ram Pyare Lal Srivastava as they supported Shri Lal Chand in the case lodged against him.

During enquiry Shri Chhattu has stated that Shri Sunil Srivastava, Advocate taking the advantage of the situation, instigated him to file a complaint against Shri Lal Chand. Thereafter, the complaint was drafted by Shri Sunil Srivastava, Advocate who also got the thumb impression of the complainant as the complainant and her husband were illiterate. The names of Subhash Chandra Srivastava, Ram Pyare Lal Srivastava (both real uncles of Shri Sunil Srivastava with whom he was having property dispute) were mentioned in the complaint by Sunil Srivastava to falsely implicate them.

During enquiry, it has been admitted by the complainant Smt. Sarita Devi that no such incident occurred with her and her husband but the same was filed before the Ld. Court on the instructions of Shri Sunil Kumar Srivastava who also accompanied them to the Court for filing of the complaint against his uncles and Lal Chand.

Hene the instant complaint under Section 156 (3) Cr.P.C. filed in the learned Court by Smt. Sarita Devi against Sri Subhash Chandra Srivastava, Ram Pyare Lal Srivastava, Lal Chand is apparently based on false facts to implicate them in a criminal case.

**(VII) Case Crime No. 195 of 2020 under Sections 376D, 406, 342, 506 I.P.C. Police Station Kareilly, District Prayagraj.**

**Findings of State Police:** After investigation, State Police had filed charge-sheet on 14.04.2021 in the Court of Ld. Judicial Magistrate, 4th, Allahabad against accused Shri Pankaj Tripathi S/o Late Subhash Chandra Tripathi U/s 406, 323, and 506 IPC, Sh. Umesh Chandra Tripathi U/s 323 and 506 IPC and investigation was kept open by Crime Branch, Prayagraj against Dinesh Chandra Tripathi and Rakesh Chandra Tripathi to ascertain their

role for commission of offences u/s 406, 342, 323, 506 and 376-D IPC.

**Findings of CBI:** Enquiry has revealed that on 28.12.1999 dealership of Indian Oil Corporation Petrol Pump in the name & style of "Sangam Service Station" situated at George Town, Prayagraj was allotted to Shri Subhash Chandra Tripathi, Proprietor. Due to financial crisis, in the year 2017, he handed over operation of this Petrol Pump to Shri Anoop Kumar Tiwari and Sri Prashant Kumar Mishra. An agreement to sale & operation of the said Petrol Pump was also executed on 30.08.2017 in their favour for a consideration of Rs. 05.00 crores, out of which, Rs. 1.0 crore was paid in cash at the time of Agreement. Further, amount of Rs. 45,00,000/- was paid on 31.08.2017, Rs. 13,00,000/- on 01.09.2017 and Rs. 50,00,000/- on 17.10.2017 were also paid to Shri Rakesh Chandra Tripathi S/o Late Subhash Chandra Tripathi, which was acknowledged by him through receipts on Non-Judicial Stamp Papers. It has been revealed that Shri Anoop Kumar Tiwari and Sri Prashant Kumar Mishra continued to manage the affairs of the Petrol Pump from 31.08.2017 till February 2020.

Enquiry has further revealed that the file regarding the transfer of Petrol Pump in favour of Shri Anoop Kumar Tiwari and Sri Prashant Kumar Mishra was under process at Indian Oil Corporation (IOC). Prayagraj. In the meantime, Shri Subhash Chandra Tripathi expired on 18.10.2019 and the petrol pump was temporarily transferred for operation for a period of 6 months to Shri Rakesh Chandra Tripathi eldest son of Late Subhash Chandra Tripathi.

Enquiry has also revealed that despite the payments received by Shri Rakesh Chandra Tripathi as well as his family members against sale of the Petrol Pump to Shri Anoop Tiwari and Sri Prashant Kumar Mishra, the sale agreement was not further processed by family members of Late Subhash Chandra Tripathi. Thereafter, both Shri Anoop and Shri Prashant started creating pressure for transfer of the same in their names. Due to this, Shri Rakesh Chandra Tripathi and his family members shifted themselves to Lucknow from Prayagraj. Shri Anoop and Shri Prashant, who were operating the petrol pump since August, 2017, were facing problems in financial transactions as all the Bank accounts of Sangam Service Station were being operated by Shri Rakesh Chandra Tripathi after the death of his father. Due to this, the operation of the petrol pump was stopped by them.

Enquiry has further revealed that on 22.02 2021, the dealership of Sangam Service Station Petrol Pump was transferred in the name of Smt. Shakuntala Tripathi W/o Late Subhash Chandra Tripathi (51%) and Sunil Kumar Pandey (49%). After some time, Smt. Shakuntala Tripathi transferred all her shares of the said petrol pump in favour of Shri Sunil Kumar Pandey. The consideration for transfer of 49% share & remaining 51% share of Sangam Service Station Petrol Pump to Shri Sunil Kumar Pandey could not be established during the enquiry.

Enquiry has further revealed that Shri Anoop Kumar Tiwari and Shri Prashant Mishra who had paid more than Rs 2 crores to Subhash Chandra Tripathi & Rakesh Chandra Tripathi, neither received back the sale consideration paid by them nor got the ownership of the petrol pump in their names. Being aggrieved, they lodged Case Crime No. 253/20 U/s 406 and 506 IPC against four sons of Late Subhash Chandra Tripathi on 22.03.2020 at PS- Colonelganj. Prayagraj in which chargesheet had been filed.

Enquiry has further revealed that Smt. Soni Dubey had issued a cheque of Rs 5 lacs from her A/c No. 3611976337 maintained at Kotak Mahindra Bank, Civil Lines, Prayagraj and the same was encashed by Shri Pankaj Tripathi S/o Late Subhash Chandra Tripathi on 30.01.2018.

Enquiry has revealed that on 07.02.2018 from account No. 1001210007658 of M/s Kesarwani Plywood and Hardware Place maintained at PNB, Allapur, Prayagraj, a sum of Rs. 5 lacs was transferred into the above mentioned account No. 3611976337 of Smt. Soni Dubey. Shri Abhishek Kesarwani, Proprietor, M/s Kesarwani Plywood and Hardware Place has stated that this amount was transferred by him on the request of Shri Pankaj Tripathi who had given him cash against the same.

In view of above, it is clear that the amount of Rs. 5 lacs was received back by Smt. Soni Dubey on 07.02.2018 and, therefore, her claim that loan of Rs 5 Lacs was still outstanding on Shri Pankaj Tripathi & his brothers on the date of above alleged incident in September 2019 appears to be false.

Enquiry has further revealed that the address and contact number given by the complainant Smt. Soni Dubey in the FIR as well as during investigation by State Police, were not in use. Family members of the complainant could not provide the present

whereabouts of Smt. Soni Dubey and informed that they are not in contact with her for more than 5-6 years.

During enquiry, Shri Munish Mishra, Advocate was contacted as hehad earlier produced Smt. Soni Dubey before IO of Crime Branch, Prayagraj. He identified Anoop Kumar Tiwari who was running Sangam Service Station Petrol Pump at that time as the person on whose directions he had accompanied Smt. Soni Dubey to Crime Branch, Prayagraj for her examination. He also informed that FIR lodged by Smt. Soni Dubey is being pursued with him by Shri Anoop Kumar Tiwari who is aware about her whereabouts. However, he declined to record his statement in the present enquiry. Accordingly. Shri Anoop Kumar Tiwari was contacted & requested to ensure presence of Smt. Soni Dubey for enquiry before CBI. After 3-4 days Smt. Soni Dubey contacted CBI telephonically and appeared for her examination. She stated that she had given Rs 5 lacs to Shri Pankaj Tripathi on 30.01.2018 but feigned ignorance about refund of Rs 5.0 lacs in her bank account on 07.02.2018.

Enquiry has further revealed that on the allegations of rape, Smt. Soni Dubey in her complaint as well as statement u/s 164 Cr PC has mentioned the name of the accused as Rakesh Kumar & Dinesh Kumar after being taken to their house on the pretext of returning her money. However, enquiry has established that she had already received back the loaned amount on 07.02.2018, hence, question of the accused persons calling her to their house on pretext of returning the loan and raping her sometime in September 2019 appears to be concocted.

Thus, it seems that the instant Case Crime has been lodged on 26.05.2020 by Smt. Soni Dubey in collusion with the S/Shri Anoop Kumar Tiwari and Prashant Kumar Mishra to falsely implicate the sons of Late Subhash Chandra Tripathi to build pressure on them for coming to a conclusion in respect of the money advanced to them in lieu of sale of the petrol pump.

**(VIII) Case Crime No. 141 of 2020 under Sections 468, 467, 420, 419, 406 I.P.C. Police Station Kydganj, District Prayagraj.**

**Findings of State Police:** The case is presently being investigated by Crime Branch, Prayagraj.

**Findings of CBI:** Enquiry has revealed that Shri Abhishek Kesarwani was well known to Late Subhash Chandra Tripathi

and his family members for last 15 years. They had healthy financial transactions to meet the financial exigencies at the Petrol Pump.

Enquiry has revealed that from the A/c No. 1001050013590 of Shri Abhishek Kesarwani maintained with PNB, Allapur Branch, Prayagraj, Rs. 15 lacs were transferred vide cheque No. 767993 dated 31.10.2018, Rs. 7.65 lacs vide Cheque No. 767994 dated 02.11.2018 and Rs. 4.81 lacs vide Cheque No. 767996 dated 03.11.2018 to Indian Oil Corporation, Mumbai through RTGS on behalf of Sangam Service Station Petrol Pump. Shri Abhishek Kesarwani has stated that he had transferred another Rs. 13 lacs in the A/c of Sangam Service Station Petrol Pump through RTGS by Cheque No. 255992 dated 26.02.2020 on the request of Shri Rakesh Chandra Tripathi, Dinesh Chandra Tripathi and Pankaj Tripathi. The complainant alleged that this amount of Rs. 40.46 lacs was given by him to the accused persons for the purchase of petrol pump and on their directions it was paid directly to Indian Oil Corporation, Mumbai or to Sangam Service Station Petrol Pump.

Enquiry has revealed that Shri Anoop Kumar Tiwari and Shri Prashant Kumar Mishra were managing the affairs of the Petrol Pump from 31.08.2017 till February 2020 but its bank accounts were being operated by Shri Subhash Chand Tripathi & thereafter by Shri Rakesh Kumar Tripathi. The scrutiny of statement of Account No. 1001210007658 of Kesarwani Plywood and Hardware Place maintained at PNB, Allapur, Prayagraj revealed that on 31.10.2018, Rs. 15.00 lacs were deposited in cash in this account and on the same day Rs. 15,00,060/- were transferred to Indian Oil Corporation, Mumbai through RTGS vide cheque No. 767993. On 02.11.2018, Rs. 7.65 lacs were transferred in the above account from account of Sangam Service Station Petrol Pump and on the same day Rs. 7,65,060/- were transferred to Indian Oil Corporation, Mumbai through RTGS vide cheque No. 767994. On 03.11.2018, Rs. 4.81 lacs were transferred in the above said account from Sangam Service Station Petrol Pump and on the same day Rs. 4,81,030/- were transferred to Indian Oil Corporation, Mumbai through RTGS vide cheque No. 767996.

During enquiry Shri Abhishek Kesarwani could not explain the source of Rs. 15 lacs which were deposited in cash in the account of Kesarwani Plywood and

Hardware Place on 31.10.2018. Further, he also could not explain as to why the amounts of Rs. 7.65 lacs and Rs. 4.81 lacs were received in the account of Kesarwani Plywood and Hardware Place from Sangam Service Station Petrol Pump on 2nd & 3rd of Nov 2018.

Enquiry has also revealed that on 26.02.2020, a loan of Rs. 13 lacs were advanced by Shri Abhishek Kesarwani to Shri Rakesh Chandra Tripathi from the account of Kesarwani Plywood and Hardware Place which was credited into the account of Sangam Service Station Petrol Pump and the same is presently outstanding.

Enquiry has revealed that the amount of Rs. 7.65 lacs and Rs. 4.81 lacs belonged to Sangam Service Station and not to the complainant Abhishek Kesarwani.

During enquiry, Shri Abhishek Kesarwani has stated that sometime in May 2020, S/Shri Anoop Kumar Tiwari and Shri Prashant Kumar Mishra approached him (Abhishek Kesarwani) and informed that they had paid about Rs 6.50 crores for purchasing petrol pump from Late Subhash Chandra Tripathi but after his death his sons were not transferring the petrol pump to them and have now shifted to Lucknow thereby cheating them. Shri Anoop Kumar Tiwari and Shri Prashant Kumar Mishra informed that they have already lodged an FIR against the sons of Late Subhash Chandra Tripathi for cheating and encouraged him to lodge FIR to build pressure for return of the outstanding money. Upon this, he also informed them about lending money to Subhash Chandra Tripathi & his sons on several occasions including lending of Rs 13 lacs in Feb 2020 which has not been returned by them.

Enquiry has revealed that on the advice of S/Shri Anoop Kumar Tiwari and Shri Prashant Kumar Mishra, Shri Abhishek Kesarwani provided copy of statement of bank account of his firm to them for drafting of complaint by their Advocate. Subsequently, they had given a written complaint to Shri Abhishek Kesarwani which he signed without reading. Thereafter, all the four persons, S/Shri Anoop Kumar Tiwari, Shri Prashant Kumar Mishra, Abhshek Kesarwani and his advocate visited police station and lodged FIR bearing Case Crime No. 0141/2020 dated 27.05.2020 U/s 406, 419, 420, 467 and 468 IPC at Police Station Kydganj, Prayagraj against the accused persons.

Thus, it appears that the Case Crime No. 253 of 2020 of PS Colonelganj, Prayagraj dated 23.03.2020 by Anoop Kumar Tiwari and Prashant Kumar Mishra, Case Crime No. 195/2020 of PS- Kareli, Prayagraj dated 26.05.2020 and Case Crime No. 0141/2020 dated 27.05.2020 of Police Station: Kydganj, Prayagraj were got registered by Anoop Kumar Tiwari and Prashant Kumar Mishra to build pressure on the four brothers namely S/Shri Umesh Chandra Tripathi, Rakesh Chandra Tripathi, Dinesh Chandra Tripathi and Pankaj Tripathi to obtain/get the ownership over the Petrol Pump.

Hence, it is apparent that the instant FIR bearing Case Crime No. 0141/2020 dated 27.05.2020 U/s 406, 419, 420, 467 and 468 IPC of Police Station: Kydganj, Prayagraj was not based on true facts.

29. Thus this Court had directed the C.B.I to conduct preliminary in respect of 79 cases, regarding which the findings of the State Police as well as findings of the C.B.I. has already been discussed above.

30. Apart from the aforesaid, an intervener application no. 22 of 2023 was also filed by Sri Mujib Ahmad @ Mujib Ahmad Siddiqui as well as Sri Mushir Ahmad Siddiqui, one of whom, is a practising Advocate of this Court. They were also victimised on false accusation by one Roshan Jahan Siddiqui, a practising Advocate, by way of lodging a F.I.R. in Case Crime No. 310 of 2021 under Sections 354Ka, 354Gha, 504, 506 I.P.C. and Section 7/8 of POSCO Act, Police Station Cantt., district Prayagraj. In the aforesaid application it was prayed that the C.B.I. may be directed to conduct preliminary enquiry with respect to the aforesaid case, however during the pendency of the aforesaid intervener application, it was brought to the notice of this Court vide supplementary affidavit dated 06.10.2023 that the said Roshan Jahan Siddiqui is a gang leader and had connections in various States, such as Delhi, Madhya Pradesh, Uttar Pradesh and Maharashtra details of which had already been given in paragraph no.3 of the supplementary affidavit. Due to which, a complaint was filed by the applicant no.2 Mushir Ahmad before the Bar Council of Uttar Pradesh U.P. at Allahabad being its Disciplinary Committee Complaint Case No. 31 of 2022 (Mushir Ahmad Siddiqui Vs. Roshan Jahan Siddiqui) in which, after considering the evidence adduced by the

applicant no.2, the Disciplinary Committee found the allegations to be true. Consequently, vide order dated 05.08.2023 the Disciplinary Committee Bar Council of Uttar Pradesh U.P. at Prayagraj has cancelled her Advocate Practice Licence for a period of ten years and also debarred her from practising in the country for a period of ten years, copy of which order has already been annexed as Annexure-SA-1 to the supplementary affidavit. Thus this Court considering the facts and circumstances of the case as well as the order dated 05.08.2023 passed by the Bar Council of Uttar Pradesh, opined that the conduct, atrocities and act of informant of Case Crime No. 310 of 2021 had already been brought to fore by the Bar Council of Uttar Pradesh and had disposed of the intervener application vide order dated 31.10.2023 with an observation that no order was required to be passed for conducting preliminary enquiry by the C.B.I.

31. After perusing the preliminary enquiry reports submitted by the C.B.I. on different dates, this Court vide order dated 13.02.2023 had directed the C.B.I as well as Special Investigation Team to conduct investigation. Following were the cases to be investigated by the C.B.I :-

(A) Case Crime No. 361 of 2016 under Sections 147, 323, 504, 506, 379 I.P.C., Section 3 (2) (V) SC/ST Act, Police Station Shivkuti, District Prayagraj.

(B) Case Crime No. 617 of 2018, under Sections 376, 313, 504, 506 I.P.C. Police Station Mau Aima, District Prayagraj.

(C) Case Crime No. 90 of 2021 under Sections 342, 376-D, 506 I.P.C. Police Station Mau Aima, District Prayagraj.

(D) Case Crime No. 150 of 2021 under Sections 376-D, 506 I.P.C. and Section 3 (2) (V) SC/ST Act, Police Station Daraganj, District Prayagraj.

Following cases were directed to be investigated by Special Investigation Team of Uttar Pradesh Police.

(A) Case Crime No. 47 of 2016 under Sections 323, 427, 504 I.P.C. Police Station Kydganj, District Prayagraj.

(B) Case Crime No. 154 of 2016 under Sections 447, 452, 504, 505, 427 I.P.C. Police Station Baharia, District Prayagraj.

(C) Case Crime No. 218 of 2018 under Sections323, 308 I.P.C. Police Station Mau Aima, District Prayagraj.

(D) Case Crime No. 82 of 2008 under Sections 147, 148, 149, 302/34, 120-B I.P.C. Police Station Baharia, District Prayagraj.

(E) Case Crime No. 379 of 2022 under Sections 147, 452, 427, 392, 504, 506 I.P.C. Police Station Civil Lines, District Prayagraj.

(F) Case Crime No. 424 of 2022 under Section 420 I.P.C. Police Station Civil Lines, District Prayagraj

(G) Complaint Case No. 125 of 2022 under Sections 354, 452 I.P.C. and Section 3 (2) (V of SC/ST Act.

H) Complaint Case No. 06 of 2020 under Sections 323, 504, 506, 376D I.P.C.

32. Pursuant to the order dated 13.02.2023, the C.B.I., SCB Lucknow had registered regular case being RC0532023S0001 with respect to Case Crime No. 90 of 2021 under Sections 342, 376D, 506 I.P.C. Police Station Mauaima, District Prayagraj. RC0532023S0002 in relation to Case Crime No. 150 of 2016 under Sections 147, 323, 504, 506, 379 I.P.C. and Section 3(2)(V) SC/ST Act, Police Station Shivkuti, District Prayagraj. RC0532023S0003 with regard to Case Crime No. 150 of 2021 under Sections 376D, 506 I.P.C. and Section 3 (2)(V) SC/ST Act, Police Station Daraganj, District Prayagraj. RC0532023S0004 with respect to Case Crime No. 617 of 2018 under Sections 313, 376, 380, 506 I.P.C. Police Station Mauaima, District Prayagraj and had submitted the status report as under:-

(I) RC0532023S0001 with respect to Case Crime No. 90 of 2021 under Sections 342, 376D, 506 I.P.C. Police Station Mauaima, District Prayagraj. In this case, the State Police had filed a Charge-sheet dated 05.10.2021 against named accused Wasim Ali followed by Supplementary Charge-sheet dated 07.07.2022 against FIR named accused Shri Chandra Bhushan, Shri Rakesh Nath Pandey (Advocate) and Smt. Samla Giri in the Court of Ld. Special Chief Judicial Magistrate, Allahabad and further investigation was kept open qua remaining four FIR named accused persons namely S/Shri Rajesh Kumar, Brijesh Patel, Indra Dev and Deva. Investigation conducted by CBI has established that in Case Crime No. 90/2021 U/s 342, 376D, 506 IPC, PS Mau Aima, Prayagraj, thereis no evidence to suggest involvement of any FIR named accused in any such incident. The evidence

collected during investigation has revealed that no such incident of alleged gang rape upon the complainant Smt. Archana Singh has been committed by the FIR named accused persons. Thus, a Closure Report has been filed on 21.05.2024 in the Court of Ld. Special Judicial Magistrate, CBI/Pollution cases, Lucknow.

(II) RC0532023S0002 in relation to Case Crime No. 150 of 2016 under Sections 147, 323, 504, 506, 379 I.P.C. and Section 3(2)(V) SC/ST Act, Police Station Shivkuti, District Prayagraj.

During investigation, the allegations against the accused persons made in the FIR by the complainant have not been substantiated. Investigation has established that Shri Sunil Kumar (Advocate) lodged a false case against Shri Om Prakash and his 5 other family members. On completion of investigation of this case, a Closure Report has been filed on 29.01.2024 in the Court of Ld. Special Judge, SC & ST Act, Prayagraj.

(III) RC0532023S0003 with regard to Case Crime No. 150 of 2021 under Sections 376D, 506 I.P.C. and Section 3 (2)(V) SC/ST Act, Police Station Daraganj, District Prayagraj.

It goes without saying that it is the aforesaid case in which the informant Nikki Devi, the applicant in the present application under Section 482 Cr.P.C. has sought for a direction to the concerned trial Court to consider and decide the trial of the aforesaid case expeditiously. The status report of the aforesaid case is as under:-

Initially, this case was investigated by State Police case and after investigation by the State Police and after investigation, State Police filed a charge-sheet against Bhupendra Kumar Pandey U/s 376D, 506 IPC and 3 (2) (v) of SC/ST Act on 13.11.2021 in the Court of learned Special Judge, SC & ST Act, Prayagraj. Investigation conducted by CBI has established that accused Bhupendra Kumar Pandey has been falsely implicated in this case. The evidence collected during investigation clearly revealed that there was property dispute between Shri Vinod Shanker Tripathi, Advocate and Sri Bhupendra Kumar Pandey. Shri Vinod Shanker Tripathi and Shri Sudhakar Mishra both are known to each other and they conspired to settle their score with Shri Bhupendra Kumar Pandey and used Smt. Nikki Devi for lodging this false FIR against Shri Bhupendra Kumar Pandey. In

furtherance of the said conspiracy with intent to cause injury to Shri Bhupendra Kumar Pandey, Smt. Nikki Devi gave false complaint on the basis of which FIR was registered U/s 376D, 506 IPC against Shri Bhupendra Kumar Pandey and another. Accordingly, on completion of investigation, a Closure Report has been filed on 11.01.2024 in the court of Ld. Special Judicial Magistrate, CBI/Pollution cases, Lucknow along with an application for initiating proceedings under Section 120B r/w Sec. 211 IPC and substantive offences against Smt. Nikki Devi (Complainant), Shri Vinod Shankar Tripathi and Shri Sudhakar Mishra in this case.

(IV) RC0532023S0004 with respect to Case Crime No. 617 of 2018 under Sections 313, 376, 380, 506 I.P.C. Police Station Mauaima, District Prayagraj.

State Police filed a charge-sheet against Shri Akash Kumar Harijan and Shri Ashish Mishra (name emerged in the statement of victim recorded U/s 164 Cr.PC only) for commission of offence U/s 376 and 506 IPC and against Dharmendra Kumar Harijan U/s 506 IPC. The complainant Smt. Sanju Devi expired on 05.07.2022 due to some complications at the time of child birth. Investigation by CBI has established that incident of rape on complainant and the theft committed by the accused persons alleged by Late Sanju Devi (complainant) had never occurred. Name of Shri Ashish Mishra, Advocate was falsely mentioned by the complainant Smt. Sanju Devi in her statement recorded u/s 164 Cr.PC at the instance of her associates. Thus, a Closure Report has been filed on 09.01.2024 in the Ld. Court of Special Judicial Magistrate, CBI/ Pollution cases, Lucknow.

33. The Special Investigation Team of Uttar Pradesh Police was directed to conduct investigation with regard to eight cases, details of which has already been given in foregoing paragraph no.31. Pursuant to which, an affidavit of compliance dated 20.05.2024 has been filed by Sri Rajeshwar Singh, learned A.G.A. wherein it has been stated that eight cases were required to be investigated by S.I.T. team and out of eight cases, in six cases charge sheet has been filed whereas in Case Crime No. 379 of 2022 under Sections 147, 452 427, 392, 504, 506 I.P.C. Police Station Civil Lines, District Prayagraj, final report has been submitted in absence of evidence, however in one case being Case Crime No.

06 of 2020 under Sections 323, 504, 506, 376-D I.P.C. Police Station Mau Aima, District Prayagraj, investigation is going on against the accused-applicant.

**34. Perusal of the aforesaid preliminary report as well as investigation conducted by the C.B.I. and also the Special Investigation team, shows that the Advocates, who are officers of the Court, are being victimised and harassed on false accusations by an Advocate when as a matter of fact advocacy is a noble profession. It cannot be compared with any other profession because it is a part and parcel of judiciary and administration of justice. Bar and Bench are two eyes of the 'Justice'. There are judicial ethics and etiquettes for Judges. There are professional ethics and etiquettes for advocates. Every advocate should follow them in his profession. Besides the fact that Advocates are not born stalwart but by giving their most of the life in the field of law, they become stalwart, an advocate is also a key person in conducting a proceeding before the court. An advocate is considered as an officer of the court, honoured member of the community, and a gentleman, thinking to become a member of the Bar he has not only to be lawful and moral in his professional capacity but also in his non–professional capacity. An advocate has to courageously support the interest of justice and also have to follow the ethics and etiquettes.**

**An advocate has to do several functions which are necessary in conducting proceedings. While carrying out these functions, an advocate must act prudently, legally and cautiously. There are several ethics and etiquettes controlling the conduct of advocates. These ethics and etiquettes impose certain duties upon advocates. Ethics and etiquette means ethics are morals, a moral philosophy or moral science. It is the first stage of society. To become a lawyer is not only a profession for earning livelihood rather it is more onerous responsibility to play active role in the system to prevent miscarriage of justice.**

**Etiquette is the second stage, which formulates the rules of behaviour standard in polite society. Humans have experienced ethics in their life. They are inherent in every religion. Along with the**

**civilization of humans there were Ethics. Every religion preached morals and ethics. Etiquette is restricted to particular kind of profession. It is nothing but regularization of ethics. In simple words ethics are bundle of habits whereas etiquette is bundle of rules of ethics. Advocates are the part and parcel of the administration of justice. They strive for justice. They struggle for the welfare and good of the society in general and their clients in particular. It does not mean that the advocate and the opponent advocate are rivals. There may be conflict of opinion on the issue but not between them. Their conflict ends as soon as they come out of the court premises. If they quarrel with each other like ordinary persons it affects the bar-bench relations. It may part the noble profession of advocacy into groups which may largely affect the society. But exception in every field may not be ignored. Owing to intrusion of black sheep into the noble profession of advocacy, the reputation of good lawyers in the society is at the verge of fall.**

35. The applicant in the instant case has been used as tool by an Advocate.The investigation conducted by the CBI with respect to case crime No. 150 of 2021 under Section 376D, 506 IPC, Section 3(2)(5) SC/ST Act, police station Daraganj, District Prayagraj (for expedition of which case present 482 application has been moved) clearly reveals the false implication of the opposite party No. 2, at the instance of practising advocate. It is a venom and if it is allowed to be mingled with other members of the Bar freely, the entire profession would be ruined, like a single drop of poison if put in a pot of milk turns the whole milk into poison. Lawyers are globally recognised as Officers of the Court and agents of the administration of justice and they are imposed with the social duty to promote rule of law in the society and fight for protecting the fundamental rights and freedom of the citizens as guaranteed in the Constitution.

36. In the instant matter, though the applicant has approached this Court seeking direction for the trial Court to consider and decide the trial of Sessions Trial No. 560 of 2021 (State Vs. Bhupendra Pandey) arising out of Case Crime No. 150 of 2021 under Sections 376-D, 506 I.P.C. and Section 3 (2) (V) SC/ST Act, Police Station Daraganj, District Prayagraj pending before learned Special Judge

SC/ST Act, Prayagraj, District Prayagraj but when the matter came up for consideration before this Court on 21.07.2022, it has come to light that a gang of Advocates is operating, even in this Court, who used to trap innocent people in fake/false cases with the intent to extract money from them. The members of this gang trap the innocent persons under SC/ST Act cases and after receiving money from the Government (as compensation), they distribute the money amongst themselves, which has become their habit. This Court cannot sit like a mute spectator by merely considering the case of the litigant. A society that will allow its members to misuse its courts, will ultimately suffer and pay a huge cost. Litigants, both genuine and bogus, will always continue to stand in the same queue. The courts have no mechanism to pre-identify and distinguish between the genuine and the bogus litigant. That becomes known only after hearing is concluded in a case. Hearing requires time. In fact, even if the courts were to take punitive action against a bogus litigant, being bound by rules of procedure and fairness, such cases would require more time to be devoted to them than a case of genuine litigants and therefore, to bring the cat out of the bag, this Court had directed for preliminary enquiry into the matters by the C.B.I. and after considering the preliminary enquiry reports, this Court found it essential that investigation be conducted by the C.B.I. in four cases as well as in eight cases by the Special Investigation Team, as stated in the preceding paragraph and after investigation, the entire position of the cases became crystal clear and it is apparent by perusal of the preliminary enquiry reports that innocent persons have been trapped in fake and bogus cases at the behest of Advocates.

37. After investigation by the C.B.I. in the instant case, it has borne out that closure report has been filed on 11.01.2024 in the court of learned Special Judicial Magistrate, CBI/Pollution cases, Lucknow along with an application for initiating proceedings under Section 120B r/w Sec. 211 IPC and substantive offences against Smt. Nikki Devi (applicant in the present case), Shri Vinod Shankar Tripathi and Shri Sudhakar Mishra and therefore, the real fact emerged in the instant case, which was more essential.

38. Considering the fact that closure report has been filed by the C.B.I. after investigation in the matter with respect to Case Crime No. 150 of 2021 (registered as Sessions Trial No. 560 of 2021 (State Vs. Bhupendra Pandey), under Sections 376D, 506 I.P.C. and Section 3 (2)(V) SC/ST Act, Police Station Daraganj, District Prayagraj, for which the instant 482 application has been filed seeking expeditious disposal of the case, the relief sought by the applicant-Nikki Devi has become infructuous.

39. The powers vested under Section 482 Cr.P.C. are inherent and wide powers, which ought to exercised by the High Court to prevent the abuse of process of law and to secure the ends of justice, however caution must be there while exercising such powers. In the cases, in which preliminary enquiry was directed to be conducted by the C.B.I. material fact and truth has been brought to the notice of this Court out-tracking the black sheep, on whose behest, the malicious prosecution has been launched, as has been stated in the preceding paragraphs, this Court directs the concerned trial Courts to consider and decide the pending trial in accordance with law after applying its judicial wisdom, after taking into consideration the said preliminary enquiry reports submitted by the C.B.I. as well as investigation reports of the S.I.T. as detailed in paragraph nos. 23, 24, 26, 27, 28, 31 of this order.

40. The Inspector General of Police (SIT), Lucknow is directed to furnish the investigation report conducted by Special Investigation Team, as has been directed by this Court vide order dated 13.02.2023, with respect to eight cases, to the concerned trial Court expeditiously.

41. The Registrar (Compliance) is directed to sent a copy of this order to the concerned District Judge to ensure its production before the concerned trial Court as well as Inspector General of Police (SIT), Lucknow forthwith for necessary compliance.

42. The preliminary enquiry reports as well as status report submitted by C.B.I. are sealed again and are sent to the Registrar General of this Court to keep the same in his safe custody.

43. Interim order, if any stands vacated.

44. The connected cases are de-linked and be placed before appropriate Court.

45. With the aforesaid direction, the instant petition stands **disposed of.**

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**(2024) 7 ILRA 1435**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 09.07.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Application U/S 482. No. 194 of 2024

**Anuj Gupta & Ors. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Akash Mishra

**Counsel for the Opposite Parties:**
G.A., Manoj Kumar Singh, Rishi Kant Singh Chauhan

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 156(3) , 200, 202 ,204 - complaint - Indian Penal Code, 1860 - Section 420 - Cheating - Section 406 - Criminal Breach of trust - Civil disputes should not be disguised as criminal offenses - Criminal proceedings are not a short cut of other remedies available in law - Criminal courts must exercise caution before issuing process - Accused face serious consequences, and jurisdiction under Section 482 CrPC should prevent abuse of process or secure justice - where a dispute which is essentially of a civil nature, is given a cloak of a criminal offence, then such disputes can be quashed, by exercising the inherent powers under Section 482 of the Code of Criminal Procedure.(Para - 9,16)**

Allegation of cheating and criminal breach of trust - Payment of Rs. 20 lacs to Vikas Sharma (not an accused) - Land sale negotiation – dispute over area of land - Earlier sale deed executed - dispute regarding second sale deed - Complainant filed criminal complaint (instead of civil suit).(Para - 1 to 10)

**HELD: -** Lack of dishonest intention. No entrustment of property. Dispute is civil, not criminal. Impugned summoning order quashed. (Para -13 to 17)

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

**<u>List of Cases cited</u>:**

1. A.M. Mohan Vs St. Represented by SHO & anr., 2024 SCC OnLine SC 339

2. Vijay Kumar Ghai & ors. Vs St. of W.B. & ors., (2022) 7 SCC 124

3. Naresh Kumar & anr. Vs The St. of Karn. & anr., 2024 INSC 196

4. Randheer Singh Vs St. of U.P. (2021) 14 SCC 626

5. Usha Chakraborty & Anr. Vs St. of W.B. & anr. 2023 SCC OnLine SC 90

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. In the present case parties have negotiated to execute a sale deed with regard of certain plot. Complainant in pursuance of negotiation has paid some money in advance. After much negotiation finally a sale deed was executed by applicants in favour of wife of Complainant. However, the dispute remained about adjustment of some money.

2. It is further revealed from facts of present case that parties have further negotiated to execute another sale deed and finally a sale deed was prepared. However, again a dispute arose with regard to area of land. According to Complainant it ought to be 17x70 sq. ft. whereas as per applicants the area was about 8x70 sq. ft. and ultimately sale deed was not executed. It

was alleged by Complainant that neither sale of larger area was executed nor money was adjusted nor it was returned back.

3. In aforesaid circumstances, Complainant filed an application under Section 156(3) Cr.P.C. alleging above referred allegations and that when Complainant asked to applicants to return the money which was not adjusted, they extended threats.

4. Aforesaid application filed under Section 156(3) Cr.P.C. was considered as a complaint and statement of Complainant as well as witnesses were recorded under Sections 200 and 202 Cr.P.C. respectively. Relevant statement of Complainant is reproduced hereinafter:

"अनुज व अतुल प्रपर्टी डीलिंग का काम करते हैं। इन्होने मुझे बताया कि मैं आई०टी०आई० चौराहे के पास जमीन खरीद रहे हैं और अगर मैं भी पैसे दे दूं तो खरीद रेट पर ही ये लोग मुझे प्लाट दे देगे। मैने विश्वास कर 10 लाख के 2 चेक विक्रेत विकास शर्मा के नाम के दिनांक 23.07.21 को देवेश दीक्षित को दे दिये। पांच महीने बीत जाने पर जब कोई प्लाट नही मिला तो मैने अनुज व अतुल से पूछा तो बोले की उस जमीन पर तो झगडा है हम आपको प्रतापनेर कचौरा रोड पर प्लाट दे दूंगा जहां मैने जमीन खरीद कर प्लाटिंग कर रहा हूँ। उसके लिए मै मानग वो बोले कि ये पैसा जो दे दिया है वो एडजस्ट कर लेगे। तो 3340 वर्ग फुट के प्लाट को खरीदने की बात 69 लाख में तय हुई। मैने ये 69 लाख रूपयें कुछ नगद 5 लाख जिसकी रसीद 14.11.21 की दी है साढे तीन लाख 06.12.21 को दिया 15 लाख नगद 10.02.22 को दिये। 15 लाख आर०टी० जी०एस० 11.02.2022 को किया। 5 लाख का चैक 14.2.2 को दिया। साढे 11 लाख खाते से खाते में दि० 18.... चार लाख बैनामे की दिनांक 18.02.2021 तहसील पर नगद दिये। पूर्व में दिये गये 20 लाख रुपये एडजस्ट नहीं हुए क्योकि अलग अलग जमीन के अलग अलग मालिक थे। जब मैने ये 20 लाख मांगे तो बोले कि इस खरीदे हुए प्लाट के बराबर में 20 X 70 फीट फीट जमीन की है वो तो 20 लाख दे चुके हो बाकी ढाई लाख रूपये और दे दो। मैने ये ढाई लाख रूपये अनिरूद्ध गुप्ता को दिये कैश दुकान पर जिसकी दि० 04.05.22 की रसीद हस्तलिखित भी मुझे दी गयी। मैने अतुल गुप्ता को फोन कर बोला कि ढाई लाख रूपये दे दिया हूँ जमीन 17 X 70 फीट की रखना उतनी ही खरीदूंगा। और ये तय हो गया कि इस प्लाट को बैनामा 03.08.22 को करेगे। ये प्लाट साढे पच्चीस लाख में तय हुआ था तो 3 लाख शेष थे जिनके देने के लिए अतुल गुप्ता ने फोन किया 03.08.22 को कि विक्रेता किसान रूपेन्द्र को ये बचे तीन लाख रूपये खाते में आर०टी०जी०एस० कर दो। और बैनामें के लिखाने के पैसे जमा कर दो तो मैने 50 हजार मनोज राजपूत के पास जमा किया। बैनामा लिखाते समय मेरी पत्नी और बेटे से साइन करा लिये जब मैं वहां पहुंचा तो मैने देखा कि बैनामें में तय 17 X 70 फीट की जगह 8 X 70 फीट का बैनामा कर लिया है। जब मैने आपतित की तो विक्रय पत्र न पेश किया न विक्रेता के हस्ताक्षर शाम तक कराये तो मैने 100 नम्बर पर काल किया। वो बैनामा पुलिस ने आकर बैनामा लेखक से मुझे दिलाया। इन लोगो ने फर्जी तरीके से प्लाटिंग

का नक्शा बनवाकर फर्जी तरीके से प्लाट बेच रहे है। पुलिस से सहायता प्राप्त न होने पर मैने ये परिवाद प्रस्तुत किया है।"

5. Trial Court concerned after considering statements passed impugned order dated 02.09.2023 under Section 204 Cr.P.C. whereby applicants have been summoned to face trial under Sections 420 and 406 IPC. Relevant part of impugned order is reproduced hereinafter:

"सुना तथा पत्रावली का अवलोकन किया।

परिवादी द्वारा अपने परिवाद-पत्र में कथन किया गया है कि प्रार्थी द्वारा विपक्षीगण से अचल संपत्ति के क्रय-विक्रय हेतु बातचीत की गयी थी, जिसके सम्बंध में परिवादी की ओर से दिनांक 23.07.2021, 24.07.2021, 14.11.2021, 18.02.2022, 04.05.2022, 03.08.2022 को विपक्षीगण को विक्रीत धनराशि के रूप में पैसे प्रदत्त किये गये, परन्तु विपक्षीगण द्वारा दिनांक 03.08.2022 को परिवादी की पत्नी सुधा पाण्डेय के पक्ष में विक्रय पत्र निष्पादित नहीं किया गया। विक्रयपत्र निष्पादित न होने के पश्चात् बैनामा लेखक द्वारा उसे विक्रयपत्र के कागजात स्टाम्प के साथ, जिस पर विक्रेता का प्रमाणित फोटो लगा हुआ है, परन्तु विक्रेता के हस्ताक्षर नहीं बनाये गये हैं, प्रस्तुत किया गया है। परिवादी की ओर से परिवाद कथानक के समर्थन में प्रस्तावित विक्रयपत्र की मूल प्रति जो मूल स्टाम्प सहित है जिस पर परिवादी की पत्नी सुधा पाण्डेय के हस्ताक्षर व फोटो लगे हैं तथा एक अन्य व्यक्ति का फोटो लगा है तथा उक्त प्रस्तावित विक्रयपत्र के अंत में परिवादी राकेश कुमार पाण्डेय के पुत्र यश पाण्डेय के हस्ताक्षर व फोटो भी लगे हुए हैं, को कागज संख्या 10 क के रूप में प्रस्तुत किया गया है। इसके अतिरिक्त परिवादी राकेश कुमार पाण्डेय की ओर से उसके खाता संख्या 312378324621 स्टेट बैंक संख्या के खाते का स्टेटमेंट प्रस्तुत किया गया है, जिसमें दिनांक 26.07.2021 व 27.07.2021 को 10-10 लाख रूपये की धनराशि प्रस्तुत किया जाने का अंकन है तथा दिनांक 11.02.2022 व 14.02.2022 को क्रमशः 1500047/- रूपये तथा 300000/-रूपये आर०टी०जी०एस० के द्वारा विपक्षी रूपेन्द्र सिंह व कोमल सिंह को प्रेषित किये जाने की प्रविष्टि भी अंकित है। इसेक अतिरिक्त दिनांक 18.02.2022 को 11,50,000 रूपये की धनराशि प्रेषित किये जाने की पृविष्ठि अंकित है। दिनांक 03.08.2022 को तीन लाख रूपये की धनराशि विपक्षीसंख्या 3 के पक्ष में प्रेषित किये जाने की प्रविष्टि भी अंकित है। परिवादी की ओर से अपने परिवाद कथानक व अपने बयान अन्तर्गत धारा 200 दं०प्र०संहिता में विपक्षीगण संख्या 1 व 2 के प्रापर्टी डीलिंग का काम करने तथा उनके कहने पर 10-10 लाख रूपये के दो चेक विक्रेता विकास शर्मा को दिये जाने तथा विपक्षीगण द्वारा परिवादी को प्रतापनेर कचौरा रोड पर 3340 वर्ष फीट के प्लाट के क्रय हेतु बात-चीत करने के पश्चात् धनराशि विपक्षीगण के बताये अनुसार दिये जाने के कथन किये गये हैं, परन्तु विपक्षीगण द्वारा धनराशि प्राप्त करने के पश्चात् भी परिवादी के पक्ष में विक्रयपत्र निष्पादन की दिनांक को विक्रयपत्र निष्पादित न करने के कारण यह परिवाद प्रस्तुत किया गया है।

थाना कोतवाली जनपद इटावा द्वारा प्रेषित आख्या अन्तर्गत धारा 202(1)

दं०प्र०संहिता कागज संख्या 8 ख में भी विपक्षी संख्या 1 व 2 द्वारा परिवादी से पैसा के लेन-देन तथा प्लाट विक्रय के सम्बंध में बात-चीत होना स्वीकार किया गया है।

परिवादी के बयान अन्तर्गत धारा 202 दं०प्र०संहिता व पुलिस की आख्या अन्तर्गत धारा 202 (1) दं०प्र० संहिता तथा सूची 9 ख से प्रस्तुत प्रपत्रों के अवलोकन से प्रथम दृष्टया विपक्षीगण द्वारा परिवादी के साथ धोखाधड़ी कर पैसा प्राप्त किये जाने के पश्चात् भी विक्रयपत्र निष्पादित न करने के कारण धारा 420, 406 भा०दं० संहिता के अन्तर्गत अपराध बनना प्रथम दृष्टया दर्शित होता है। अतः विपक्षीगण अनुज गुप्ता, अतुल गुप्ता, रूपेन्द्र सिंह, कोमल सिंह अन्तर्गत धारा 420, 406 भा०दं० संहिता में तलब किये जाने योग्य है।"

6. Sri Akash Mishra, learned counsel for applicants has vehemently urged that factum of transaction of money and sale deed is not under much dispute though according to Complainant money was paid to one, Vikas Sharma, who was not proposed as accused in complaint. Applicants have executed a sale deed which has not been disputed as well as there is no challenge to it. The controversy is with regard to second sale deed which was not executed mainly on ground that there was a dispute with regard to area of land. Learned counsel submitted that such dispute is within the realm of civil dispute. Ingredients of Sections 420 and 406 IPC are not made out. There is no dishonest intention on behalf of applicants nor there is any entrustment over any property by applicants. Applicants are still ready to execute sale deed of lesser area.

7. Sri Mithilesh Kumar, learned AGA for State and Sri Rishi Kant Singh Chauhan, Advocate for Complainant, have opposed the aforesaid submissions. They submitted that since inception of negotiation applicants have intention to deceive and despite payment of large amount, sale deed with regard to corresponding area of land was not executed and money was also not returned back, though on basis of record it was undisputed that no complaint was made against Vikash Sharma, to whom Complainant has paid Rs. 20 lacs, which is the amount alleged to be not returned.

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

9. Before adverting to rival submissions it would be relevant to refer few paragraphs of a recent judgement passed by Supreme Court in **A.M. Mohan Vs. State Represented by SHO and another, 2024 SCC OnLine SC 339,** as the facts of said case and discussion on law, would be relevant for consideration of present case:-

*"9. The law with regard to exercise of jurisdiction under Section 482 of Cr. P.C. to quash complaints and criminal proceedings has been succinctly summarized by this Court in the case of Indian Oil Corporation v. NEPC India Limited1 after considering the earlier precedents. It will be apposite to refer to the following observations of this Court in the said case, which read thus:*

*"12. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this*

*Court in several decisions. To mention a few—Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [(1988) 1 SCC 692 : 1988 SCC (Cri) 234], State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426], Rupan Deol Bajaj v. Kanwar Pal Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059], Central Bureau of Investigation v. Duncans Agro Industries Ltd. [(1996) 5 SCC 591 : 1996 SCC (Cri) 1045], State of Bihar v. Rajendra Agrawalla [(1996) 8 SCC 164 : 1996 SCC (Cri) 628], Rajesh Bajaj v. State NCT of Delhi [(1999) 3 SCC 259 : 1999 SCC (Cri) 401], Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [(2000) 3 SCC 269 : 2000 SCC (Cri) 615], Hridaya Ranjan Prasad Verma v. State of Bihar [(2000) 4 SCC 168 : 2000 SCC (Cri) 786], M. Krishnan v. Vijay Singh [(2001) 8 SCC 645 : 2002 SCC (Cri) 19] and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque [(2005) 1 SCC 122 : 2005 SCC (Cri) 283]. The principles, relevant to our purpose are:*

*(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused. For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.*

*(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.*

*(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.*

*(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.*

*(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.*

***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. In G. Sagar Suri v. State of U.P. [(2000) 2 SCC 636 : 2000 SCC (Cri) 513] this Court observed : (SCC p. 643, para 8)***

***"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."***

*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. Be that as it may."*

***10. The Court has also noted the concern with regard to a growing tendency in business circles to convert purely civil disputes into criminal cases. The Court observed that 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. The Court also recorded that there is an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. The Court, relying on the law laid down by it in the case of G. Sagar Suri v. State of U.P. held that 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. The Court also observed that though 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 misconceive criminal proceedings, in accordance with law.***

*11. This Court, in the case of Prof. R.K. Vijayasarathy v. Sudha Seetharam has culled out the ingredients to constitute the offence under Sections 415 and 420 of IPC, as under:*

*"15. Section 415 of the Penal Code reads thus:*

***"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"."*

*16. The ingredients to constitute an offence of cheating are as follows:*

*16.1. There should be fraudulent or dishonest inducement of a person by deceiving him:*

*16.1.1. The person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or*

*16.1.2. The person so induced should be intentionally induced to do or to omit to do anything which he would not do or omit if he were not so deceived; and*

*16.2. In cases covered by 16.1.2. above, the act or omission should be one which caused or is likely to cause damage or harm to the person induced in body, mind, reputation or property.*

*17. A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.*

*18. Section 420 of the Penal Code reads thus:*

***"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."*

*19. The ingredients to constitute an offence under Section 420 are as follows:*

*19.1. A person must commit the offence of cheating under Section 415; and*

*19.2. The person cheated must be dishonestly induced to*

*(a) deliver property to any person; or*

*(b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security.*

*20. Cheating is an essential ingredient for an act to constitute an offence under Section 420."*

*12. A similar view has been taken by this Court in the cases of Archana Rana v. State of Uttar Pradesh, Deepak Gaba v. State of Uttar Pradesh and Mariam Fasihuddin v. State by Adugodi Police Station.*

***13. It could thus be seen that for attracting the provision of Section 420 of IPC, the FIR/complaint must show that the ingredients of Section 415 of IPC are made out and the person cheated must have been dishonestly induced to deliver the property to any person; or to make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. In other words, for attracting the provisions of Section 420 of IPC, it must be shown that the FIR/complaint discloses:***

***(i) the deception of any person;***

***(ii) fraudulently or dishonestly inducing that person to deliver any property to any person; and***

***(iii) dishonest intention of the accused at the time of making the inducement."*** *(Emphasis supplied)*

10. Further, in order to consider the submission of learned counsel for applicants that ingredients of Section 406 IPC are made out or not, it would be apposite to refer a judgement passed by Supreme Court in ***Vijay Kumar Ghai and others vs. State of West Bengal and others, (2022) 7 SCC 124*** wherein the ingredients for criminal breach of trust were discussed and relevant paragraphs thereof are mentioned hereinafter:

*"27. Section 405 of IPC defines "Criminal Breach of Trust" which reads as under: -*

***"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".*

*The essential ingredients of the offence of criminal breach of trust are:-*

*(1) The accused must be entrusted with the property or with dominion over it,*

*(2) The person so entrusted must use that property, or;*

*(3) The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation,*

*(a) of any direction of law prescribing the mode in which such trust is to be discharged, or;*

*(b) of any legal contract made touching the discharge of such trust.*

*28. "Entrustment" of property under Section 405 of the Indian Penal Code, 1860 is pivotal to constitute an offence under this. The words used are, "in any manner entrusted with property'. So, it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of "trust'. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code.*

*29. The definition in the section does not restrict the property to movables or immoveable alone. This Court in R K Dalmia vs Delhi Administration, (1963) 1 SCR 253 held that the word "property' is used in the Code in a much wider sense than the expression "moveable property'. There is no good reason to restrict the meaning of the word "property' to moveable property only when it is used without any qualification in Section 405.*

*30. In Sudhir Shantilal Mehta Vs. CBI, (2009) 8 SCC 1 it was observed that the act of criminal breach of trust would, Interalia mean using or disposing of the property by a person who is entrusted with or has otherwise dominion thereover. Such an act must not only be done dishonestly but also in violation of any direction of law or any contract express or implied relating to carrying out the trust."*

11. I have carefully perused the statement of Complainant which has referred that Rs. 20 lacs was paid to Vikas Sharma under negotiation with applicants, however neither it was adjusted nor a subsequent sale deed of corresponding area was executed. The factum of execution of earlier sale deed was not disputed. Dispute remains with regard to sale deed which was

though agreed but not executed since a dispute arose with regard to area of land.

12. As referred above, evidently it is a case where second round of negotiations of sale deed were failed and for that a civil remedy was an appropriate remedy. However, instead of approaching Civil Court, Complainant has alleged that offences under Sections 420 and 406 IPC are committed by applicants. Conspicuously, the person in whose Bank account Rs. 20 lacs were alleged to be paid, was not even made accused in complaint.

13. The ingredients of Section 420 IPC, i.e., intention to deceive since beginning of negotiation or act, even prima facie is not present in the present case since during negotiation one sale deed was admittedly executed and dispute remained with regard to second sale deed, so far as area of land is concerned. Therefore, intention to deceive since inception does not exist. The dispute is essentially of in regard to second sale deed which could not be executed as there was a dispute of area of land and failed negotiations in given facts and circumstances could not make out a case under Section 420 IPC.

14. So far as offence under Section 406 IPC is concerned, there must be some entrustment. However, money was deposited in the Bank account of one, Vikas Sharma, therefore, allegation of entrustment, if any, would be against said person but admittedly said Vikas Sharma was not arrayed as one of the proposed accused in complaint. A reference that it was paid on instruction of applicants would itself not make out a case for not making any allegation against said Vikas Sharma or entire responsibility could not be shifted on applicants and statement also does not indicate the same.

15. In aforesaid circumstances, considering that ingredients of Sections 420 and 406 IPC are absent as well as Complainant has tried to give criminal colour to a civil dispute, therefore, I find that it is a fit case where in exercise of inherent power under Section 482 Cr.P.C. the impugned summoning order as well as entire proceedings can be quashed.

16. At this stage, it would be appropriate to mention following paragraph of a recent judgment passed by Supreme Court in Naresh Kumar and another vs. The **State of Karnataka and another, 2024 INSC 196,** that in similar circumstances inherent power could be exercised:

*"6. In the case of Paramjeet Batra v. State of Uttarakhand (2013) 11 SCC 673, this Court recognized that although the inherent powers of a High Court under Section 482 of the Code of Criminal Procedure should be exercised sparingly, yet the High Court must not hesitate in quashing such criminal proceedings which are essentially of a civil nature. This is what was held:*

*"12. While exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal*

*offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash the criminal proceedings to prevent abuse of process of the court."*

***Relying upon the decision in Paramjeet Batra (supra), this Court in Randheer Singh v. State of U.P. (2021) 14 SCC 626, observed that criminal proceedings cannot be taken recourse to as a weapon of harassment. In Usha Chakraborty & Anr. v. State of West Bengal & Anr. 2023 SCC OnLine SC 90, relying upon Paramjeet Batra (supra) it was again held that where a dispute which is essentially of a civil nature, is given a cloak of a criminal offence, then such disputes can be quashed, by exercising the inherent powers under Section 482 of the Code of Criminal Procedure."***

(Emphasis supplied)

17. In view of above, application is allowed. Impugned summoning order dated 02.09.2023 as well as entire proceedings in Complaint Case No. 223 of 2023 (Rakesh Kumar Pandey vs. Anuj Gupta and others), under Sections 420, 406 IPC, Police Station Kotwali, District Etawah, are hereby quashed.

18. Registrar (Compliance) to take steps.

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**(2024) 7 ILRA 1444**

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 16.07.2024**
**BEFORE**

**THE HON'BLE ARUN BHANSALI, C.J.**
**THE HON'BLE VIKAS BUDHWAR, J.**

Writ A No. 68817 of 2015

**U.O.I. & Ors. ...Petitioners**
**Versus**
**Dr. Shiv Poojan R. Singh & Anr. ...Respondents**

**Counsel for the Petitioners:**
Sri Saurabh Srivastava, Sri Gyanu Shukla, Sri Manoj Kumar Singh, Sunil

**Counsel for the Respondents:**
Sri Ashish Kumar Srivastava, S.C., Sri Sunil

**A. Service Law – Pension/Benefits – Voluntary retirement - CCS (Pension Rules), 1972 - Rule 48 -Fundamental tight 56(c) - While the Government reserves its right to compulsorily retire a Government servant, even against his wish, there is a corresponding right of the Government servant u/Fundamental Right 56(c) to voluntarily retire from service by giving the Government three months' notice in writing. There is no question of acceptance of the request for voluntary retirement by the Government when the Government servant exercises his right under Fundament Right 56(c).** (Para 31)

In the present case, neither on the date when the original applicant applied for voluntarily retirement i.e. 26.06.2013 nor the effective date of voluntarily retirement i.e. 30.09.2013, there was any order of appointing authority either placing the original applicant under suspension or any departmental enquiry initiated or pending. It has come on record that the departmental charge sheet has been issued on 10.10.2013 i.e. much after the effective date of voluntarily retirement. (Para 35)

**B. Rule 48 of the Rules, 1972 stipulates that it is the right of the government servant to claim voluntarily retirement, however, subject to completion of 30 years of qualifying service and not placed under suspension.** The original applicant has to his credit 30 years of qualifying service and

he was not placed under suspension. The theory propounded by the writ petitioners that since a decision had been taken on 19.09.2013 for holding departmental proceedings against the original applicant also stands eroded particularly when the charge sheet is dated 10.10.2013 much after the effective date of voluntarily retirement. (Para 36, 37)

Original Application No.330/00944/2014 has been instituted by the original applicant (respondent herein) before the tribunal challenging the charge sheet dated 10.10.2013 and Original Application No. 762 of 2014 whose order whereof has been impugned in the writ petition was filed challenging the rejection of VR and for the retirement benefits. Therefore, **the cause of action and subject matter in both the original applications are distinct and different in that regard** and it was appropriate to decide the OA 762/2014 in isolation order in the wake of the pendency of OA 330/2014. (Para 7, 38)

Writ petitioners could not place any provision which gave handle to the writ petitioners/employers to withhold the retiral benefits in the wake of the explicit provision contained u/Rule 48 of the Rules, 1972. (Para 39)

**Writ petition dismissed**. (E-4)

**Precedent followed**:

1. Dinesh Chandra Sangma Vs State of Assam & ors., (1977) 4 SCC (Para 31)

2. St. of Har. & ors. Vs S.K. Singhal, (1999) 4 SCC 293 (Para 32)

3. Tek Chand Vs Dile Ram, (2001) 3 SCC 290 (Para 33)

4. U.O.I. & ors. Vs Sayed Muzaffar Mir, 1995 Supp (1) SCC 76 (Para 34)

**The present writ petition assails order dated 4.8.2015, passed by CAT, Allahabad Bench, Allahabad whereby the Original Application preferred by Dr. Shiv Poojan R. Singh (original applicant) was allowed, the orders dated 30.03.2014 and 06.05.2014 of the writ petitioners were set aside with a direction to the writ petitioners herein to treat original applicant to have deemed to be voluntarily retired w.e.f. 30.9.2023 while extending all the consequential benefits arising out of voluntarily retirement in accordance with rules within a period of three months.**

(Delivered by Hon'ble Arun Bhansali, C.J.
&
Hon'ble Vikas Budhwar, J.)

1. Impugned in the present proceedings at the instance of Union of India through its Secretary/Director General, Department of Posts India, Dak Bhawan Sansad Marg, New Delhi (In short "writ petitioner") is the order dated 4.8.2015 of the Central Administrative Tribunal, Allahabad Bench, Allahabad (In short "Tribunal") whereby the Original Application No.762 of 201 preferred by Dr. Shiv Poojan R. Singh (In short original applicant) was allowed, the orders dated 30.3.2014 and 6.5.2014 of the writ petitioners was set aside with a direction to the writ petitioners herein to treat original applicant to have deemed to be voluntarily retired w.e.f. 30.9.2023 while extending all the consequential benefits arising out of voluntarily retirement in accordance with rules within a period of three months.

2. A joint statement has been made by the counsel for the rival parties that the writ petition be decided at the admission stage as they do not propose to file further affidavits. With the consent of the parties, the Court is proceeding to decide the writ petition at the admission stage.

3. The case projected by the original applicant before the Tribunal was that he was initially inducted in

the postal department on 13.1.1981 and thereafter accorded promotion as Superintendent of Post Office, Basti. In terms of Rule 48 CCS (Pension Rules), 1972, (In short Rules, 1972) the original applicant sought voluntarily retirement after satisfactorily completing 30 years of service by virtue of an application dated 26.6.2013 seeking to retire him w.e.f. 30.9.2013 (AN).

4. It is also the case of the original applicant that the said application seeking voluntarily retirement was forwarded by the Assistant Director (Staff) on behalf of Post Master General, Gorakhpur Region, Gorakhpur to Assistant Post Master General in the office of Chief Post Master General, Lucknow.

5. A communication is stated to have been issued by the A.D.P.S. on behalf of the Post Master General, Gorakhpur Region, Gorakhpur to the original applicant on 5.7.2023 acknowledging receipt of the request letter dated 26.6.2023. On 19.7.2023 a communication came to be issued by A.D.P.S. for the Post Master General, Gorakhpur Region, Gorakhpur addressed to A.P.M.G. (Staff) in the office of the Chief Post Master General, U.P. Circle, Lucknow recommending the case for voluntarily retirement in the wake of the fact that the original applicant was neither under suspension nor any disciplinary/criminal proceedings was pending against him, less to say about punishment/penalty.

6. As per the pleadings an order is stated to have been passed on 31.7.2013 on behalf of Post Master General, Gorakhpur Region, Gorakhpur whereby the original applicant, who was posted as Superintendent of Post Office, Basti was transferred as A.D.P.S. Regional Office, Gorakhpur.

7. The original applicant claims to have proceeded on medical leave due to ill health w.e.f. 1.8.2013. Subsequently on 30.9.2013 the original applicant submitted an informal charge report mentioning therein that w.e.f. 30.9.2013 he as per his request for voluntarily retirement stood voluntarily retired. Since the retiral dues were not paid to the original applicant so he claims to have preferred a request letter on 5.10.2013 followed on 21.10.2013 and 7.11.2013. Since the retiral benefits were not extended to the original applicant so he preferred Original Application No.O.A./330/161 of 2014 (Shiv Poojan R. Singh vs. Union of India and others) which came to be disposed of by the Tribunal vide order dated 6.2.2014 requiring the writ petitioners herein to decide the representation of the original applicant dated 7.11.2013 within a period of three months.

8. According to the original applicant an order is stated to have been passed on 31.3.2014 by the Post Master General, Gorakhpur Region, Gorakhpur rejecting the application of the original applicant for voluntarily retirement on the ground that already a decision has been taken on 20.9.2013 by the writ petitioners refusing the request of voluntarily retirement and further a decision has also been taken to hold disciplinary proceedings against the original applicant. Another order is stated to have been passed on 6.5.2014 by the Assistant Director General (SGP) Government of India Ministry of Communications & IT Department of Posts (Personal Division) in compliance of the order of the Tribunal wherein the similar stand has been taken that the request of the original applicant for voluntarily

retirement has been declined and he has been denuded of the post retiral benefits.

9. Challenging the orders dated 30.3.2014 and 6.5.2014 of the writ petitioners the Original Application No.762 of 2014 seeking following reliefs:-

*"(i) This Hon'ble Tribunal may be pleased to quash the impugned orders dated 30.03.2014 & 06.05.2014 passed by the respondent Nos. 3 and 1, (Annexure Nos. A-1 & A-2 to the original application).*

*(ii) This Hon'ble Tribunal may be pleased to direct the respondents to deem the applicant retired from service on 30.09.2013 and consequently pay him all retiral dues with admissible interest thereupon.*

*(iii) This Hon'ble Tribunal may be pleased to direct the respondents to release the salary of the applicant for the month of August & September, 2013.*

*(iv) Any other relief, which this Hon'ble Tribunal may deem fit and proper in the circumstances of the case may be given in favour of the applicant.*

*(v) Award the costs of the original application in favour of the applicant."*

10. On being noticed a detailed counter affidavit has been filed on behalf of respondents therein/writ petitioners herein sworn by the then Director Postal Services Gorakhpur dated 3.8.2014.

11. The Original Application came to be allowed by the Tribunal while quashing the orders dated 30.3.2014 and 6.5.2014 holding that the original applicant shall be deemed to have been voluntarily retired w.e.f. 30.9.2013 extending all consequential benefits arising out of voluntarily retirement in accordance with rules.

12. Questioning an order dated 4.8.2015 passed in Original Application No.762 of 2014 (Dr. Shiv Poojan R. Singh vs. Union of India and others), the writ petitioners herein have filed the present writ petition. This Court entertained the writ petition on 22.12.2015 while passing the following orders:-

*"Shri Ashish Kumar Srivastava has entered appearance on behalf of applicant-opposite party no.1. He prays for and is granted three weeks' time to file counter affidavit. The appellants will have one week thereafter to file rejoinder affidavit.*

*List this matter on 20.1.2016.*

*On the matter being taken up today, from the side of the appellants it has been sought to be contended that the charge sheet in question has been issued to the claimant-opposite party no.1 and the said charge sheet in question has been subjected to challenge in Original Application No.330/00944/2014 and therein on 11.8.2014 further proceedings pursuant to the charge sheet has been kept in abeyance.*

*The appellants' submission is that once there were two original applications moved by the opposite party no.1, then both the original applications in question ought to have been heard together as decision in one of the original application is going to affect the outcome of second original application. In the present case, the request of the appellants has not been accepted and straightaway the request of applicant-opposite party no.1 for voluntary retirement has been accepted. Petitioners submit that action taken is unjustifiable.*

*The matter requires consideration.*

*In view of this, till the next date of listing, pursuant to the order dated 4.8.2015 passed in Original Application No.762 of 2014 (Dr. Shiv Poojan R. Singh vs. Union of India and ors) no further action be taken."*

13. A counter affidavit has been filed by the original applicant to which a rejoinder affidavit has been filed and as per the joint statement made by the parties, the pleadings are complete.

14. Sri Manoj Kumar Singh, learned counsel appearing for the writ petitioners have sought to argue that the order of the Tribunal cannot be sustained for a single moment. Elaborating the said submissions it has been submitted that though Rule 48 of the Rules, 1972 provides for voluntarily retirement, however, the same does not confer any unfettered right to the retiring employee/officer to insist and claim voluntarily retirement. According to him Rule 48 of the Rules, 1972 only stipulates that a retiring employee/officer can only make an application for voluntarily retirement, however, ultimate decision is to be taken by the employer. To put it otherwise, it has been contended that voluntarily retirement is not a matter of right however, the acceptance of the request is subject to the discretion of the employer that too after consideration of various factors.

15. Submission is that in the present case at hand the original applicant though had requested for voluntarily retirement on 26.6.2013 giving the effective date to be 30.9.2013, however, prior to it on 31.7.2013 an order has been passed by the Appointing Authority being the Post Master General, Gorakhpur Region, Gorakhpur transferring him from the post of Superintendent of Post Office, Basti to A.D.P.S. (Estt.) (Mail) R.O. Gorakhpur, but the original applicant avoided joining in the transfered place and took medical leave for the obvious reasons. It is also submitted that before the effective date i.e. 30.9.2013 a decision has been taken while rejecting the application for voluntarily retirement dated 26.6.2013 on 19.9.2013 and the said order was deliberately not received by the original applicant creating a situation whereby the said order was pasted in the address registered in the office of the writ petitioners by the original applicant.

16. According to the learned counsel for the writ petitioners a decision was taken for holding departmental enquiry against the original applicant and a charge sheet has also been issued dated 10.10.2013. It is thus, contended that the decision taken by the writ petitioners rejecting the request over voluntarily retirement cannot be faulted with, the Tribunal committed manifest error of law in setting aside the said orders as payment of post retiral benefits is always subject to satisfactory service coupled with a decision taken by the employer either to accept or to reject the request for voluntarily retirement. Thus, it is prayed that the order of the Tribunal be set aside.

17. Countering the submission of the learned counsel for the petitioners, Sri Ashish Kumar Srivastava along with Sri Sunil, who appears for the original applicant have submitted that the order of the Tribunal needs no interference

in the present proceedings. According to them the case of the original applicant post completion of 30 years of service stands governed under Rule 48 Rules, 1972 according to which a government servant after completion of 30 years of service has a right to get voluntarily retired. They submit that there is no question of any discretion left at the hands of the employer, however, the application for voluntarily retirement can only be turned down in case the government servant is under suspension.

18. Submission is that neither the original applicant was placed under suspension nor any departmental proceedings was initiated against him as the charge sheet which is alleged to have been served upon the original applicant is dated 10.10.2013 much after the request for voluntarily retirement or the effective date of voluntarily retirement i.e. 30.9.2013.

19. Additionally, it has been submitted that though in the order impugned before the Tribunal shelter has been taken to the provisions contained under Rule 48A of the Rules, 1972 but in view of the specific averments contained in para 28 of the counter affidavit filed before the Tribunal, the writ petitioners have treated the case of the original applicant under Rule 48A of the Rules, 1972, thus post completion of 30 years of service the original applicant became entitled to be voluntary retired irrespective of any order of acceptance.

20. We have considered the submissions made by the learned counsel for the parties and have perused the material available on record.

21. Before delving into the tenability of the arguments of the rival parties, it would be apposite to quote the relevant statutory provisions which are germane to the controversy in question.

**CCS (Pension Rules), 1972**

***48. Retirement on completion of 30 years' qualifying service***

*(1) At any time after a Government servant has completed thirty years' qualifying service –*

*(a) he may retire from service, or*

*(b) he may be required by the appointing authority to retire in the public interest, and in the case of such retirement the Government servant shall be entitled to a retiring pension:*

*Provided that –*

*(a) a Government servant shall give a notice in writing to the appointing authority at least three months before the date on which he wishes to retire; and*

*(b) the appointing authority may also give a notice in writing to a Government servant at least three months before the date on which he is required to retire in the public interest or three months' pay and allowances in lieu of such notice:*

*Provided further that where the Government servant giving notice under clause (a) of the preceding proviso is under suspension, it shall be open to the appointing authority to withhold permission to such Government servant to retire under this rule:*

*Provided further that the provisions of clause (a) of this sub-rule shall not apply to a Government servant, including scientist or technical expert who is –*

*(i) on assignments under the Indian Technical and Economic Cooperation (ITEC) Programme of the Ministry of*

*External Affairs and other aid programmes,*

*(ii) posted abroad in foreign based offices of the Ministries/Departments,*

*(iii) on a specific contract assignment to a foreign Government,*

*Unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year.*

*(1-A)(a) A Government servant referred to in clause (a) of the first proviso to sub-rule (1) may make a request in writing to the appointing authority to accept notice of less than three months giving reasons therefor.*

*(b) On receipt of a request under clause (a) the appointing authority may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, appointing authority may relax the requirement of notice of three months on the condition that the Government servant shall not apply for commutation of a part of his pension before the expiry of the period of notice of three months.*

*(2) A Government servant, who has elected to retire under this rule and has given the necessary intimation to the effect to the appointing authority, shall be precluded from withdrawing his election subsequently except with the specific approval of such authority:*

*Provided that the request for withdrawal shall be within the intended date of his retirement.*

*(3) For the purpose of this rule the expression "appointing authority" shall mean the authority which is competent to make appointments to the service or post from which the Government servant retire.*

***48-A. Retirement on completion of 20 years' qualifying service***

*(1) At any time after a Government servant has completed twenty years' qualifying service, he may, by giving notice of not less than three months in writing to the appointing authority, retire from service.*

*Provided that this sub-rule shall not apply to a Government servant, including scientist or technical expert who is –*

*(i) on assignments under the Indian Technical and Economic Cooperation (ITEC) Programme of the Ministry of External Affairs and other aid programmes,*

*(ii) posted abroad in foreign based offices of the Ministries/Departments, (iii) on a specific contract assignment to a foreign Government,*

*Unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year.*

*(2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority:*

*Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.*

*3-A(a) Government servant referred to in sub-rule (1) may make a request in writing to the appointing authority to accept notice of voluntary retirement of less than three months giving reasons therefor;*

*(b) On receipt of a request under Clause (a), the appointing authority subject to the provisions sub-rule (2), may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority may relax the requirement of notice of three months on the condition that the Government shall not apply for commutation of a part of his pension before the expiry of the period of notice of three months.]*

*(4) A Government servant, who has elected to retire under this rule and has given the necessary notice to that effect to the appointing authority, shall be precluded from withdrawing his notice except with the specific approval of such authority:*

*Provided that the request for withdrawal shall be made before the intended date of his retirement.*

*(5) The pension and [retirement gratuity] of the Government servant retiring under this rule shall be based on the emoluments as defined under Rules 33 and 34 and the increase not exceeding five years in his qualifying service shall not entitle him to any notional fixation of pay for purposes of calculating pension and gratuity.*

*(6) This rule shall not apply to a Government servant who,-*

*(a) retires under Rule 29, or*

*(b) retires from Government service for being absorbed permanently in an autonomous body or a public sector undertaking to which he is on deputation at the time of seeking voluntary retirement.*

**Fundamental Rules**

*"56(c) Any government servant may, by giving notice of not less than three months in writing to the appropriate authority, retire from service after he has attained the age of fifty years or has completed 25 years of service, whichever is earlier."*

**Indian Railway Establishment Code**

***"1802. Premature Retirement- Retirement On Attaining Age:-***

*(a)…………………..*

***(b) Premature Retirement On Voluntary Retirement:***

*(1) Any railway servant may by giving notice of not less than three months in writing to the appropriate authority, retire from service after he has attained the age of fifty years if he is in Group-A or Group-B service or post (and had entered Government service before attaining the age of 35 years) and in all other cases after he has attained the age of 55 years:*

*Provided that it shall be open to the appropriate authority to withhold permission to a railway servant under suspension who seeks to retire under this clause.*

*(2) A railway servant, referred to in sub-rule (1) may make a request in writing to the appointing authority to accept a notice of less than three months, giving reasons therefore. On receipt of a request under this sub-rule, the appointing authority may consider such request for curtailment of the period of notice of three months on merits and, if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority may relax the requirement of notice of three months, on the condition that the railway servant shall not apply for commutation of a part of his pension before the expiry of the period of notice of three months."*

22. It is not disputed that the original applicant was posted as Superintendent of Post Office, at Basti. It is also not in dispute that on 26.6.2013, the original applicant preferred an application seeking voluntarily retirement w.e.f. 30.9.2013 before the competent

authority. Parties are in agreement that a communication was issued by the A.D.P.S. for Post Master General, Gorakhpur Region, Gorakhpur addressed to Assistant Post Master General (Staff) in the office of Chief Post Master General, Lucknow on 19.7.2023 mentioning therein that the original applicant was neither placed under suspension nor any disciplinary/criminal case was pending against him or any punishment/penalty is in currency against the original applicant.

23. The dispute arose when a transfer order came to be passed by the writ petitioners transferring the original applicant from Basti to Gorakhpur. The original applicant proceeded on medical leave and did not join the transferred post. Record reveals that the original applicant submitted an informal charge report on 30.9.2023 treating the said date to be the date of voluntarily retirement. Since the original applicant was not extended the post retiral benefits so he instituted O.A. No. 330/00161/2014, Dr. Shiv Poojan R. Singh vs. UOI & others which was disposed of on 6.2.2014 requiring the writ petitioners to address the claim of the original applicant while passing orders on the representation. Thereafter two orders are stated to have been passed, firstly on 31.3.2014 and secondly on 6.5.2014 by the writ petitioners reciting therein that the request of the original applicant for voluntarily retirement has been turned down, he is not entitled to be paid .post retiral benefits and further on account of misconduct a decision has been taken to hold departmental enquiry against the original applicant. The said orders came to be challenged in O.A. No.762 of 2014 which came to be allowed on 4.8.2015 setting aside the said orders.

24. The bone of contention between the parties is whether the statutory Rules give a legal and absolute right to the government servant to seek voluntarily retirement post completion of the satisfactory qualifying period or not. There are two provisions with respect to voluntarily retirement under Chapter VII under the headings of "Regulations of Amounts of Pension".

25. Rule 48 of the Rules, 1972 talks about retirement on completion of 30 years of qualifying service, whereas Rule 48A of the Rules, 1972 provides for retirement on completion of 20 years qualifying service. Though, in the order impugned before the Tribunal, the writ petitioners had invoked Rule 48A of the Rules, 1972 but in para 28 of the counter affidavit filed by the writ petitioners before the Tribunal the following stand was taken.

*"The Rule 48-A has inadvertently (been) mentioned in Director General (Posts) New Delhi letter dated 19.9.2015 instead of correct rule 48 of the CCS (Pension Rules)".*

26. Rule 48 of the Rules, 1972 stipulates that it is open for the government servant post completion of 30 years of qualifying service to retire from service. Even otherwise the appointing authority is also empowered to retire in public interest a government servant after completion of 30 years of qualifying service. The Rule further provides that the government servant shall be entitled to a retiring pension. A three months notice in writing is required for exercising the said right for voluntarily retirement. However, there is a caveat also that the right of a Government Servant for voluntarily retirement can be stalled in case the Government

Servant is under suspension. As per the said Rule the period of three months notice can be curtailed by the appointing authority.

27. In contrast rule 48A of the Rules, 1972 deals with retirement on completion of 20 years of qualifying service. Sub-Rule (2) of the Rule 48A of the Rules, 1972 further provides that the notice of voluntarily retirement shall require acceptance by the appointing authority.

28. A conjoint reading of the Rules 48 and 48A of the Rules, 1972 would reveal that Rule 48 of the Rules, 1972 first of all deals with completion of 30 years of qualifying service whereas Rule 48A of the Rules, 1972 deals with retirement on completion of 20 years of qualifying service. There is a conspicuous marked difference between both the provisions in the context that though the provision contained in Rule 48A(2) of the Rules, 1972 postulates requirement of acceptance of voluntarily retirement by appointing authority, however, the same is lacking in Rule 48. The said broad difference clinches the issue.

29. Notably, to put it otherwise Rule 48 of the Rules, 1972 gives a right to the retiring employee to claim voluntarily retirement subject to two conditions firstly, satisfactory completion of 30 years of qualifying service, secondly, the retiring employee is not under suspension. Evidently, the Rule making authority was conscious about the different categories of retiring employees and that is why two separate provisions have been engrafted.

30. Fundamental Rules 56 is also on the same line wherein post completion of the qualifying period, the Government Servant has a right to claim voluntarily appointment and there is no provision of acceptance of the request for the voluntarily retirement.

31. The three Judges Bench of the Hon'ble Apex Court in the case of **Dinesh Chandra Sangma vs. State of Assam and others (1977) 4 SCC 441** had the occasion to consider the said issue and held as under:-

*"8. As is well known Government servants hold office during the pleasure of the President or the Governor, as the case may be, under Article 310 of the Constitution. However, the pleasure doctrine under Article 310 is limited by Article 311 (2). It is clear that the services of a permanent Government servant cannot be terminated except in accordance with the rules made under Article 309 subject to Article 311 (2) of the Constitution and the Fundamental Rights. It is also well-settled that even a temporary Government servant or a probationer cannot be dismissed or removed or reduced in rank except in accordance with Article 311 (2). The above doctrine of pleasure is invoked by the government in the public interest after a government servant attains the age of 50 years or has completed 25 years of service. This is constitutionally permissible as compulsory termination of service under Fundamental Right 56(b) does not amount to removal or dismissal by way of punishment. While the Government reserves its right to compulsorily retire a Government servant, even against his wish, there is a corresponding right of the Government servant under Fundament Right 56(c) to voluntarily retire from service by giving the Government three months' notice in writing. There is no question of acceptance of the request for voluntary retirement by the*

*Government when the Government servant exercises his right under Fundament Right 56(c). Mr. Niren De is therefore right in conceding this position.*

*13. F.R 56 is one of the statutory rules which binds the Government as well as the Government servant. The condition of service which is envisaged in Rule 56(c) giving an option in absolute terms to a Government servant to voluntarily retire with three months' previous notice, after he reaches 50 years of age or has completed 25 years of service, cannot therefore be equated with a contract of employment as envisaged in Explanation 2 to Rule 119."*

32. The aforesaid decision was followed in the case of **State of Haryana and others vs. S.K. Singhal (1999) 4 SCC 293** while observing:-

*9. The employment of government servants is governed by rules. These rules provide a particular age as the age of superannuation. Nonetheless, the rules confer a right on the Government to compulsorily retire an employee before the age of superannuation provided the employee has reached a particular age or has completed a particular number of years of qualifying service in case it is found that his service has not been found to be satisfactory. The rules also provide that an employee who has completed the said number of years in his age or who has completed the prescribed number of years of qualifying service could give notice of, say, three months that he would voluntarily retire on the expiry of the said period of three months. Some rules are couched in language which results in an automatic retirement of the employee upon the expiry of the period specified in the employee's notice. On the other hand, certain rules in some other departments are couched in language which makes it clear that even upon expiry of the period specified in the notice, the retirement is not automatic and an express order granting permission is required and has to be communicated. The relationship of master and servant in the latter type of rules continues after the period specified in the notice till such acceptance is communicated; refusal of permission could also be communicated after 3 months and the employee continues to be in service. Cases like Dinesh Chandra Sangma v. State of Assam, B.J. Shelat v. State of Gujarat and Union of India v. Sayed Muzaffar Mir belong to the former category where it is held that upon the expiry of the period, the voluntary retirement takes effect automatically as no order of refusal is passed within the notice period. On the other hand H.P. Horticultural Produce Marketing & Processing Corpn. Ltd. v. Suman Behari Sharma belongs to the second category where the bye-laws were interpreted as not giving an option "to retire" but only provided a limited right to "seek" retirement thereby implying the need for a consent of the employer even if the period of the notice has elapsed. We shall refer to these two categories in some detail.*

*13. Thus, from the aforesaid three decisions it is clear that if the right to voluntarily retire is conferred in absolute terms as in Dinesh Chandra Sangma case by the relevant rules and there is no provision in the rules to withhold permission in certain contingencies the voluntary retirement comes into effect automatically on the expiry of the period specified in the notice......*

33. Reiterating the said legal position the Hon'ble Apex Court in the case of **Tek Chand vs. Dile Ram (2001) 3 SCC 290** held as under:-

*"35. In our view, this judgment fully supports the contention urged on behalf of the appellant in this regard. In this judgment, it is observed that there are three categories of rules relating to seeking of voluntary retirement after notice. In the first category, voluntary retirement automatically comes into force on expiry of notice period. In the second category also, retirement comes into force unless an order is passed during notice period withholding permission to retire and in the third category voluntary retirement does not come into force unless permission to this effect is granted by the competent authority. In such a case, refusal of permission can be communicated even after the expiry of the notice period. It all depends upon the relevant rules. In the case decided, the relevant Rule required acceptance of notice by appointing authority and the proviso to the Rule further laid down that retirement shall come into force automatically if the appointing authority did not refuse permission during the notice period. Refusal was not communicated to the respondent during the notice period and the Court held that voluntary retirement came into force on expiry of the notice period and subsequent order conveyed to him that he could not be deemed to have voluntary retired had no effect. The present case is almost identical to the one decided by this Court in the aforesaid decision."*

34. The pari materia provisions akin to Rule 48 of the Rules,1972 being Rule 1802 (b) of Indian Railway Establishment Code came up for interpretation before the Hon'ble Apex Court in the case of **Union of India and others vs. Sayed Muzaffar Mir 1995 Supp (1) SCC 76** wherein the following was observed:-

*"5. The second aspect of the matter is that it has been held by a three-Judge Bench of this Court in Dinesh Chandra Sangma v. State of Assam, which has dealt with a pari materia provision finding place in Rule 56(c) of the Fundamental Rules, that where the government servant seeks premature retirement the same does not require any acceptance and comes into effect on the completion of the notice period. This decision was followed by another three-Judge Bench in B.J. Shelat v. State of Gujarat."*

35. Applying the proposition of law as culled out in the above noted judgements in the facts of the case, we find that neither on the date when the original applicant applied for voluntarily retirement i.e. 26.6.2013 nor the effective date of voluntarily retirement i.e. 30.9.2013, there was any order of appointing authority either placing the original applicant under suspension or any departmental enquiry initiated or pending. It has come on record that the departmental charge sheet has been issued on 10.10.2013 i.e. much after the effective date of voluntarily retirement.

36. As regards the contention of the writ petitioners that the original applicant became unauthorisedly absent w.e.f. 1.8.2013 subjecting to a conduct unbecoming of a Government Servant, the same would not be of much relevance inasmuch as Rule 48 of the Rules, 1972 stipulates that it is the right of the government servant to claim voluntarily retirement, however, subject to completion of 30 years of qualifying service and not placed under suspension.

37. On a pointed query being raised, the learned counsel for the writ petitioners could not dispute the fact that the original applicant has to his

credit 30 years of qualifying service and he was not placed under suspension. The theory propounded by the writ petitioners that since a decision had been taken on 19.9.2013 for holding departmental proceedings against the original applicant also stands eroded particularly when the charge sheet is dated 10.10.2013 much after the effective date of voluntarily retirement.

38. In so far as the submission of learned counsel for the writ petitioners that once an Original Application No.330/00944/2014 has been instituted by the original applicant before the tribunal challenging the charge sheet dated 10.10.2013 and in the wake of the pendency of the said original application, it was not appropriate to decide the original application in isolation order whereof has been impugned in the writ petition is concerned, the same at the first blush may appear to be attractive but the same would not hold water particularly when the cause of action and subject matter in both the original applications are distinct and different in that regard.

39. Despite repeated query being made to the learned counsel for the writ petitioners to place the provisions which gave handle to the writ petitioners/employers to withhold the retiral benefits in the wake of the explicit provision contained under Rule 48 of the Rules, 1972, nothing is forthcoming. Even otherwise, the Tribunal in the impugned judgement has considered each and every aspect of the matter and has also relied and followed the decisions of the coordinate bench of the Tribunal on the same issues.

40. Viewing the case from all angles, we do not find any manifest illegality or infirmity committed by the Tribunal so as to warrant interference in the present proceedings.

41. Resultantly, the writ petition is liable to be dismissed and is dismissed.

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**(2024) 7 ILRA 1456**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 16.07.2024**

**BEFORE**

**THE HON'BLE MANISH KUMAR, J.**

Writ A No. 1000071 of 2013
along with
Writ A No. 1000077 of 2014

**Mohd. Talaha ...Petitioner**
**Versus**
**Special Judge Ayodhya Prakaran/Addl. D.J. Lko. & Ors. ...Respondents**

**Counsel for the Petitioner:**
G.S. Nigam, Abhisht Saran, Manish Jauhari

**Counsel for the Respondents:**
A.S.G., Ankit Srivastava, Pankaj Khare

**A. Tenancy Law – Bonafide requirement - Uttar Pradesh Urban Building (Regulation of Letting, Rent and Eviction), 1972 - Sectiosn 21(1)(a) & 22 - It is unnecessary to make an endeavour as to how else the landlord could have adjusted himself. In the matter of choice of accommodation some discretion and latitude has to be given to the landlord and tenant cannot dictate that landlord shall satisfy his need in the manner suggested by him. Courts cannot impose their own wisdom in advising the landlord the manner in which he can satisfy his need without disturbing the possession of the tenant.** (Para 10)

Neither the tenant or the Court could direct the landlord. It is the choice of the landlord to choose the place for business which is more suitable for him. (Para 12)

The need of the petitioner was ultimately found bonafide by the Appellate Court. The Appellate Court should have ordered for the release of the whole accommodation to meet the bonafide need of the landlord instead of only a part of it to the extent of 700 square feet and secondly, it is also clear that the petitioner had moved the application for release on not getting the desired amount of rent will not be relevant factor though for the question of bonafide need is concerned and on that ground it could not be said that the need of the petitioner was artificial in nature. (Para 15)

**B. The finding recorded that the tenant carries on functions of public convenience therefore, the accommodation may not be released in favour of the landlord since it will cause the inconvenience to the public has no relevance** and it will not undo the bonafide requirement of the landlord on the basis of which he is entitled to get the tenanted accommodation release in his favour. (Para 16)

**WRIT - A No. - 1000071 of 2013, filed by the landlord, allowed.**
**WRIT - A No. - 1000077 of 2014, filed by the tenant, dismissed**. (E-4)

**Precedent followed:**

1. Surendra Singh Dhillon & ors.Vs Vimal Jindal, 2022 (4) ICC 842 (Para 8)

2. Mangalserry Vs Sukumar, judgment dated 26.07.2023, Bombay High Court, WP No. 715 of 2018 (Para 8)

3. Shiv Prasad Jaiswal Vs Ist A.D.J. Azamgarh, 2006 (1) ARC 602 (Para 10)

4. Rishi Kumar Govil Vs Maqsoodan & ors., 2007 (4) SCC 465 (Para 12)

**Present two writ petitions are the same and inter-connected, therefore, both the writ petitions are decided together. The WRIT - A No. - 1000071 of 2013 has been filed by the landlord for quashing the judgment and order dated 20.02.2013. The WRIT - A No. - 1000077 of 2014 has been filed by the tenant for setting aside the impugned judgment and order dated 20.02.2013, passed by the Special Judge, Ayodhya Prakran Additional District Judge Lucknow partly allowing the Rent Appeal No. 30 of 2010 and judgment and order dated 05.04.2010, passed by Prescribed Authority / First Additional District Judge, Small Causes.**

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

1. As the questions involved in the present two writ petitions are the same and inter-connected, therefore, both the writ petitions are decided together.

2. The WRIT - A No. - 1000071 of 2013 has been filed by the landlord with the following prayer:-

a) A writ direction or order in the nature of Certiorari quashing the judgment and order dated 20/02/2013 passed by opposite party no. 1 contained in Annexure No. 1 of the writ petition.

3. The WRIT - A No. - 1000077 of 2014 has been filed by the tenant with the following prayer:-

(i) Issue a writ, order or direction in the nature of certiorari thereby setting aside the impugned judgment and order dated 20.02.2013, passed by the Special Judge, Ayodhya Prakran Additional District Judge Lucknow partly allowing the Rent Appeal No. 30 of 2010 and judgment and order dated 05.04.2010, passed by Prescribed Authority / First Additional District Judge, Small Causes, Court No. 18, Lucknow relating to P.A. Case No. 19 of 2008, as contained in Annexure Nos. 1 and 2 respectively to the writ petition.

4. Learned counsel for the petitioner in WRIT - A No. - 1000071 of 2013 i.e. the landlord has submitted that the respondent

no. 3 is in the tenancy of the ground floor of the building of the petitioner situated at Aminabad, Lucknow since 1941 on the rent of Rs. 425 per month. The petitioner has two sons and to establish them independently in the business, the shop rented to the respondent no. 3 was required hence an application under Section 21 (1) (a) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction), 1972 (in short " U.P. Act No. 13 of 1972")was moved before the Prescribed Authority and the Prescribed Authority accepted the bonafide need of the petitioner and granted an order in favour of the petitioner i.e. landlord, directing the respondent no. 3 to vacate the premises.

5. It is further submitted that against the order of the Prescribed Authority, the respondent no. 3 preferred an appeal under Section 22 of the U.P. Act No. 13 of 1972 which was decided in favour of the tenant/respondent no. 3 by placing reliance that earlier petitioner had issued a notice on 02.06.2003 for enhancement of rent which was not accepted by the respondent no. 3. Again a request was made in 2006 to enhance the rent @ Rs. 25 per square feet and total area of tenancy is 2150/- square feet. The said request of the petitioner was turned down by the respondent no. 2 on 7.12.2007 and again reiterated for the enhancement of rent from Rs. 425/- to Rs. 20,000/- per month, which was not accepted by the petitioner on 10.12.2007. After three months an application under Section 21 (1) (a) of the U.P. Act No. 13 of 1972 was moved by the petitioner on 10.3.2008 showing the bonafide need i.e. area is required for establishing his sons for running their business independently.

6. Learned counsel for the petitioner further submitted that the Appellate Court had come to the conclusion that the said application for release moved after three months from the date of rejection of offer of enhancement of rent by the tenant i.e. respondent no. 3 would show that the need was not bonafide, it was artificial but at the same time in the last part of its judgment had accepted the need of the petitioner rejecting the submissions made by the tenant i.e. respondent no. 3 that suggestion made by the tenant that the applicant i.e. a petitioner is man of sound financial condition and is capable of finding out appropriate commercial buildings/space for his sons to run their business and in the ground floor apart from the area under the tenancy of the respondent no. 3 the other shops are also available which was not accepted by the Appellate Court by giving a finding that the applicant is residing at the first floor of the building along with his family. The said building is situated in commercial area hence ground floor is more proper and convenient for running a business for his sons and as per settled proposition of law the appellant i.e. tenant would not suggest the landlord to look for the alternative commercial accommodation nor the tenant can suggest for evicting the another shop in the same building under the tenancy of some other persons and thereafter had come to conclusion for running the business of his sons the area of 700 square feet is sufficient from the total area of 2150 square feet, which is under the tenancy of the respondent no. 3 and passed an order of release in favour of the petitioner, meaning-thereby the bonafide need was accepted by the Appellate Authority. Once it has been accepted then there was no occasion to take a decision to release only some part of the property under the tenancy of the respondent no. 3 and interference in the order passed by the Prescribed Authority is not at all required,

hence the order passed is bad in the eyes of law and liable to be quashed.

7. On the other hand Sri Ankit Srivastava, learned counsel for the respondent no. 3/counsel for the petitioner in WRIT - A No. - 1000077 of 2014/tenant has submitted that when the petitioner failed to get the rent enhanced as per their desire within three months, he preferred the application under Section 21 (1) (a) of the U.P. Act No. 13 of 1972 meaning-thereby an application preferred by the petitioner is not bonafide it was in vengeance for not enhancing the rent at the rate of Rs. 25/- per square feet. When they have not achieved the enhanced rent as per their desire and the finding given by the Appellate Court in this regard does not require for any interference. It is further submitted that once the finding was given by the Appellate Authority that the need was not bonafide and thereafter passing of the order of release of the 700 square feet of the property from the area of the tenancy of the respondent no. 3/petitioner/tenant is bad in the eyes of law and liable to be quashed as far as part of release of 700 square feet of the land from the tenancy of the tenant out of total area of 2150 square feet.

8. In reply learned counsel for the petitioner has submitted that it is an undisputed fact that after moving the application of release under Section 21 (1) (a) of the U.P. Act No. 13 of 1972 by the petitioner the tenant/respondent/petitioner had not made any effort to look out for an alternative accommodation. He also submitted that demand of increase of rent is wholly irrelevant to determine the bonafide requirement of the premises by the appellant and in support of his submission learned counsel for the petitioner has placed reliance upon the judmgent of Hon'ble Supreme Court in the case of ***Surendra Singh Dhillon and others Vs. Vimal Jindal reported in 2022(4) ICC 842*** and judgment dated 26.7.2023 of the ***Bombay High Court in the case of Mangalserry Vs. Sukumar decided in Writ Petition No. 715 of 2018.***

9. After hearing learned counsel for the parties, going through the record of the case and the judgments relied by the learned counsel for the petitioner, the position emerges out in the present case is the case of the tenant/respondent/petitioner in WRIT - A No. - 1000077 of 2014 for denying the need of the petitioner/landlord are:-

(i) Firstly, that when they failed to receive the rent as per their desire, an application was moved showing the bonafide need which is in-fact artificial in nature,

(ii) Secondly, the petitioner is a financially sound person and he could make arrangement for alternative commercial accommodation of his sons for running their business,

(iii) Thirdly, the petitioner has other shops in the same premises which is also rented and can be opted for eviction.

(iv) Fourthly, the respondent no. 3/tenant is a post office, which is a public utility service and shifting of the same is inconvenient to the public at large.

10. As far as learned counsel for the tenant/respondent no. 3/petitioner in WRIT - A No. - 1000077 of 2014 regarding the status and capability for looking for alternative accommodation etc. there is a specific finding in the impugned Appellate Order rejecting the said submission on the settled proposition of law that the tenant

cannot dictate the landlord to act in what manner, as held by the Hon'ble Supreme Court in the case of ***Shiv Prasad Jaiswal Vs. Ist ADJ Azamgarh; 2006 (1) ARC 602*** and the relevant para 10 of the said judgment is quoted herein-below:-

*"10. The Supreme Court in Sarla Ahuja v. United India Insurance Company Ltd... AIR 1999 SC 100., and S.N Kapoor v. B.L. Khatri. 2002 46 ALR 209 SC., has held that it is unnecessary to make an endeavour as to how else the landlord could have adjusted himself. It has also been held that in the matter of choice of accommodation some discretion and latitude has to be given to the landlord and tenant cannot dictate that landlord shall satisfy his need in the manner suggested by him. In the latter authority it has also been held that Courts cannot impose their own wisdom in advising the landlord the manner in which he can satisfy his need without disturbing the possession of the tenant."*

11. By passing an order for release of 700 square feet from the tenancy of the tenant means that the bonafide need was accepted by the Appellate Court otherwise release of the part of the tenanted accommodation could not have been passed.

12. The law is settled that neither the tenant or the Court could direct the landlord. It is the choice of the landlord to choose the place for business which is more suitable for him as per the law settled by the Hon'ble Suprme Court in the the case of Rishi Kumar Govil vs Maqsoodan And Ors;2007 (4) SCC 465. The relevant para 19 is quoted herein-below:-

*"In **Raghavendra Kumar v. Firm Prem Machiner & Co. AIR (2000) SC 534** it was held that it is the choice of the landlord to choose the place for the business which is most suitable for him. He has complete freedom in the matter. In **Gaya Prasad v. Pradeep Srivastava, AIR (2001) SC 803** it was held that the need of the landlord is to be seen on the date of application for release. In **Prativa Devi (Smt.) v. T.V. Krishnan, [1996] 5 SCC 353** it was held that the landlord is the best Judge of his requirement and Courts have no concern to dictate the landlord as to how and in what manner he should live. The bona fide personal need is a question of fact and should not be normally interfered with. The High Court noted that when the Prescribed Authority passed the order son of the respondent-landlady was 20 years old and the shop was sought to be released for the purpose of settling him in business. More than 20 years have elapsed and the son has become more than 40 years of age and she has not been able to establish him as she has still to get the possession of the shop and the litigation of the dispute is still subsisting. The licence for repairing fire arms can only be obtained when there is a vacant shop available and in the absence of any vacant shop, licence cannot be obtained by him. Therefore, the High Court came to the conclusion concurring with that of the Prescribed Authority and Appellate Authority that the need of the landlady is bona fide and genuine. Considering the factual findings recorded by the Prescribed Authority, Appellate Authority and analysed by the High Court, there is no scope for any interference in this appeal which is accordingly dismissed. However, considering the period for which the premises in question are in the occupation of the appellant time is granted till 31st December, 2007 to vacate the premises subject to filing of an undertaking before*

*the Prescribed Authority within a period of 2 weeks to deliver the vacant possession on or before the stipulated date. There will be no order as to costs.*

13. As far as the submission that when the petitioner has failed to get the rent as per his desire, the release application was moved thereafter deprived the petitioner to move such application as the said application is not bonafide but the need is artificial, the said submission is also against the law settled in the case of ***Surendra Singh Dhillon and others (Supra) Vs. Vimal Jindal*** relied by the learned counsel for the petitioner and the relevant para nos. 3 is quoted herein-below:-

*"3. The The learned Counsel appearing for the Appellants argued that the Rent Controller and the Appellate Authority have passed an order of eviction finding bonafice requirement of the landlord. The demand of increase of rent is wholly irrelevant to determine the bonafide requirement of the premises by the Appellant.*

14. In another Judgment of Hon'ble Bombay High Court relied by the learned counsel for the petitioner in the case of ***Mangalserry Vs. Sukumar (Supra)*** and the relevant para no. 13 is quoted herein-below:-

*"13. As far as settlement is concerned, it has come on record that the petitioners have failed to act upon the terms and conditions of the settlement. Even this Court repeatedly granted opportunity to the petitioners in that regard, however, the petitioners failed to avail such opportunity. In the said backdrop, subsequently change of decision by the landlords not to sell the property does not amount to cessation of a need of the landlords."*

15. From the record the position is clear that the need of the petitioner was ultimately found bonafide by the Appellate Court. The Appellate Court should have ordered for the release of the whole accommodation to meet the bonafide need of the landlord instead of only a part of it to the extent of 700 square feet and secondly, it is also clear that the petitioner had moved the application for release on not getting the desired amount of rent will not be relevant factor though for the question of bonafide need is concerned and on that ground it could not be said that the need of the petitioner was artificial in nature.

16. As far as the finding recorded that the tenant carries on functions of public convenience therefore, the accommodation may not be released in favour of the landlord since it will cause the inconvenience to the public has no relevance and it will not undo the bonafide requirement of the landlord on the basis of which he is entitled to get the tenanted accommodation release in his favour.

17. In view of discussion made above the challenge of judgment/order passed by the Prescribed Authority by the tenant does not require any interference.

18. **In view of the facts discussion made hereinabove the WRIT - A No. - 1000071 of 2013 preferred by the landlord is hereby allowed and the impugned order dated 20.02.2013 is hereby quashed and the WRIT - A No. - 1000077of 2014 filed by the tenant is dismissed.**

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**(2024) 7 ILRA 1462**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 11.07.2024**
**BEFORE**

**THE HON'BLE MANISH KUMAR, J.**

Writ A No. 1000097 of 2008

**Shyam Chandra & Ors. ...Petitioners**
**Versus**
**District Judge Sultanpur & Ors. ...Respondents**

**Counsel for the Petitioners:**
Satya Prakash, Ashish Verma, Kumar Jaikrit, M.P. Yadav, Rajeiu Kr. Tripathi, Ram Kushal Tiwari, Sanjiv Srivastava, Shrikant Mishra

**Counsel for the Respondents:**
C.S.C., Dinesh Kumar, Mohammad Aslam Khan, Shrikant Mishra

**A. Tenancy Law – Bonafide requirement - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 21(1)(a) - Neither the tenant nor the court could direct the landlord. It is the choice of the landlord to choose the place for business which is more suitable for him.** (Para 16)

Using the premises purchased during the pendency of the case as a godown will not give any right to the tenants to dictate the landlord on which property they should use as a godown. The godown is required where the shop is running. The petitioners just to avoid an adverse effect on their business as under compelling circumstances i.e. long pendency of the case, made an alternative arrangement. (Para 16)

**B. In order to prove bona-fide need, a landlord does not require to establish dire or compelling need for a premises in order to establish his business and it is the choice of the landlord which would be paramount in such circumstances.** (Para 19)

Subsequent event/developments are not affecting the ground taken in the release application preferred by the petitioners as in the release application for personal bonafide need, the ground taken was that now the petitioner no. 2 has become major and got married and requires shop as through the same shop there is ingress and outgress of the house and the petitioners are short of space for keeping the stock of the goods. During this long period of litigation, such requirement has not changed. The business is running in the same shop, the entry of the house is from the same shop and with the passage of time, the business would have been increased and there is more requirement of godown for keeping the stock. The petitioner no. 1 is married having children thus, the family has expanded, so none of the circumstances have changed by subsequent developments as discussed above hence, in the present case, the rights of the parties stand crystallized on the date of the institution of the suit. (Para 21)

The appellate court has erred in deciding the appeal by taking a new ground/plea i.e. the petitioners had not disclosed the nature of the business which they are running in the shop in how much space and which type of goods they are storing for which the godown is required. Such questions were never raised nor were in dispute. In the facts & circumstances as on the record, the appellate court mislead itself in entering into such questions foreign to the merits of the case. (Para 23)

**Writ petition allowed.** (E-4)

**Precedent followed:**

1. Nidhi Vs Ram Kripal Sharma (dad through Legal Representatives), (2017) Supreme Court Cases 640 (Para 7)

2. Smt. Bibi Begum Vs Dr. Awadhesh Narain & ors., 2008 SCC Online All 1069; (2009) 75 ALR 277 (Para 8)

3. Dharmendra Singh Sonkar Vs Additional District and Sessions Judge, 2016 SCC Online All

3003; (2016) 115 ALR 739; (2016) 3 All LJ 23 (Para 8)

4. Rishi Kumar Govil Vs Maqsoodan & ors., (2007) 4 SCC 465 (Para 9)

5. Raghunath G. Panhale (Dead) by LRs Vs Chaganlal Sundarji and Co., (1999) 8 SCC 1 (Para 12)

**The present writ petition assails judgment and order dated 30.04.2008, passed in Rent Appeal No. 01 of 2007 and also the judgment and order dated 13.02.2007 passed in P.A. Case No. 249 of 1997 by the Court of Prescribed Authority/Additional Chief Judicial Magistrate, Sultanpur; with a further prayer to direct respondent no. 3/private respondent to vacate and handover the peaceful possession of tenanted portion.**

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

1. The present writ petition has been preferred for setting aside the impugned judgment and order dated 30.04.2008 passed in Rent Appeal No. 01 of 2007 in re Shyam Chandra and another versus Ram Gopal and also the judgment and order dated 13.02.2007 passed in P.A. Case No. 249 of 1997 by the Court of Prescribed Authority/Additional Chief Judicial Magistrate, Court no. 17, Sultanpur; with a further prayer to direct respondent no. 3/private respondent to vacate and handover the peaceful possession of tenanted portion.

2. During the pendency of the present writ petition, the petitioner no. 2 has died and her legal heirs/representatives have been substituted as petitioner no. 2/1 and 2/2 as per the order dated 24.02.2011.

3. Learned counsel for petitioner has submitted that the respondent no. 3/private respondent is the tenant in the shop of which the petitioner is the landlord. The respondent no. 3 is a tenant since the time of father of petitioner no. 1.

4. It is further submitted that an application was preferred by the petitioners/landlords, under Section 21(1)(a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as U.P. Act No. 13 of 1972) for evicting the tenants i.e. respondent no. 3 from the disputed shop and to release the same in favour of the petitioners as the petitioner no. 1, who is married and having children and the ingress and outgress of the house of the petitioner is also through the same shop. There is also no space for storing the stock which was lying in the same.

5. It is further submitted that the respondent no. 3 had filed a written statement mentioning therein that need shown by the petitioners in their application of release under Section 21 (1) (a) is not bona-fide and genuine as the petitioners have purchased two houses separately during the pendency of the release application and using one premises of the house as a godown. It is further stated in the written statement that another tenant Dhulai Ram had vacated the shop during the pendency of the case and the same has been joined by the petitioners in his shop so, there is no requirement for shop.

6. It is further submitted that the Prescribed Authority/Additional C.J.M. had rejected the application of the petitioners on the ground that the petitioners have a basement which can be used as a godown ignoring completely that the respondent no. 3 in its written statement had not come with a case that the petitioners are in possession

of the basement which can be used as a godown and in absence of any evidence, the finding has been given.

7. It is further submitted that the subsequent development would not affect the right of the petitioners regarding bona-fide personal need as mentioned in the application preferred for release of the property in their favour and in support of his submissions learned counsel for the petitioner has relied upon the judgment of Hon'ble Supreme Court in the case of ***Nidhi versus Ram Kripal Sharma (dead through Legal Representatives) reported in (2017) 5 Supreme Court Cases 640***, wherein it has been held that the subsequent development will not affect the petitioners as the rights of the parties has been crystalized.

8. It is further submitted that the respondent had never ever made any effort for searching for any alternative accommodation after filing of the release application by the petitioners so the comparative hardship is in favour of the petitioners. In support of his submission, learned counsel for the petitioners has relied upon the judgment in the case of ***Smt. Bibi Begum versus Dr. Awadhesh Narain and others reported in 2008 SCC Online All 1069: (2009) 75 ALR 277 and Dharmendra Singh Sonkar versus Additional District and Sessions Judge, reported in 2016 SCC Online All 3003; (2016) 115 ALR 739: (2016) 3 All LJ 23.***

9. It is further submitted that the landlord is the best judge of his requirement and the court and the tenant has no concern to dictate the landlord as to how and in what manner he should live. In support of his submissions, learned counsel for the petitioners have relied upon the judgment of Hon'ble Supreme Court in the case of ***Rishi Kumar Govil versus Maqsoodan and others, reported in (2007) 4 SCC 465.***

10. It is further submitted that the prescribed authority, on the basis of presumption that the petitioners are having basement in their possession which they can use as a godown, has rejected the release application, ignoring completely that it was not the case pleaded by the tenant/respondent in their written statement, nor any evidence to that effect was adduced. The appellate court though on page-5 in its judgment had noted the said submission but, the said question was neither discussed nor any finding has been recorded on the same.

11. It is further submitted that the supplementary affidavit has been filed enclosing therein that the respondent is digging the soil form the basement and transporting the same by a tractor due to which there is an imminent threat to the house of the petitioners.

12. It is further submitted that the landlord is to prove the bona-fide need but does not require to establish dire or compelling need for the premises and in support of his submissions, learned counsel for the petitioners relied upon the judgment in the case of ***Raghunath G. Panhale (Dead) by LRs v. Chaganlal Sundarji and Co., reported in(1999) 8 SCC 1.***

13. On the other hand, Shri Mohd. Aslam Khan, learned Advocate appearing for the respondent no. 3 has submitted that the petitioners have a basement available with them in which they can store their goods/material for which the release application has been preferred by the petitioners. He further submitted that the

said fact is also mentioned in the impugned order and has said that the impugned order has been passed on the basis of the fact that the petitioners are having residential and commercial accommodation which they are using as a godown and apart from that in the said two storey house in which the respondent no. 3 is the tenant, the basement is also available which could be used as a godown to fullfil their personal need of storage as alleged in the release application. It is further submitted that another tenant Dhulai Ram, during the pendency of the case, had vacated the shop which has been joined by the petitioner in his shop.

14. After hearing learned counsel for the parties and going through the record of the case, the issue which is to be adjudicated in the present case is that the subsequent developments as mentioned above would affect the rights of the petitioners for eviction of the tenant i.e. respondent no. 3 and the plea which was neither taken nor evidence was lead by the private respondent/respondent no. 3 before the Prescribed Authority regarding the possession of the basement by the petitioners could be a ground for rejecting the application of release preferred by the petitioners.

15. The application preferred by the petitioners under Section 21(1)(a) was mainly on the ground that now petitioner no. 2 is married and having children and needed the shop in the occupation of the respondent no. 3 for his personal need and the petitioners are facing problems of storage of goods as from the shop in possession of petitioners, there is an ingress and outgress of the house. The prescribed authority in absence of any pleadings or evidence led by respondent no. 3 that the petitioner is having basement in his possession which he could use as a godown merely on the basis of presumption decided the matter, rejecting the release application. On the contrary the only averment made in the written statement is that there is a basement which is in possession of the tenants i.e. respondent no. 3.

16. Using the premises purchased during the pendency of the case as a godown will not give any right to the tenants to dictate the landlord on which property they should use as a godown. The godown is required where the shop is running. The petitioners just to avoid an adverse effect on their business as under compelling circumstances i.e. long pendency of the case, made an alternative arrangement. The law is settled that neither the tenant nor the court could direct the landlord. It is the choice of the landlord to choose the place for business which is more suitable for him as per the law settled by Hon'ble Supreme Court in the case of ***Rishi Kumar Govil (supra)***. The relevant paragraph no. 19 of the judgement of ***Rishi Kumar Govil (supra)*** is quoted hereinbelow:-

*"19. In Ragavendra Kumar v. Firm Prem Machinery & Co. [(2000) 1 SCC 679 : AIR 2000 SC 534] it was held that it is the choice of the landlord to choose the place for the business which is most suitable for him. He has complete freedom in the matter, In Gaya Prasad v. Pradeep Srivastava [(2001) 2 SCC 604: AIR 2001 SC 803] it was held that the need of the landlord is to be seen on the date of application for release. In Prativa Devi v. T.V. Krishnan [(1996) 5 SCC 353] it was held that the landlord is the best judge of his requirement and courts have no concern to dictate the landlord as to how and in what manner he should live. The*

*bona fide personal need is a question of fact and should not be normally interfered with. The High Court noted that when the prescribed authority passed the order, son of the respondent landlady was 20 years old and the shop was sought to be released for the purpose of settling him in business. More than 20 years have elapsed and the son has become more than 40 years of age and she has not been able to establish him as she has still to get the possession of the shop and the litigation of the dispute is still subsisting. The licence for repairing firearms can only be obtained when there is a vacant shop available and in the absence of any vacant shop, licence cannot be obtained by him. Therefore, the High Court came to the conclusion concurring with that of the prescribed authority and the Appellate Authority that the need of the landlady is bona fide and genuine. Considering the factual findings recorded by the prescribed authority, the Appellate Authority and analysed by the High Court, there is no scope for any interference in this appeal which is accordingly dismissed. However, considering the period for which the premises in question was in the occupation of the appellant, time is granted till 31-12-2007 to vacate the premises subject to filing of an undertaking before the prescribed authority within a period of 2 weeks to deliver the vacant possession on or before the stipulated date. There will be no order as to costs."*

17. The prescribed authority has failed to consider the submission regarding comparative hardship on the point that the tenants, on learning about the submission of release application should look for an alternative accommodation. In the present case, no efforts were made by the tenants i.e. respondent no. 3 to look for an alternative accommodation. The prescribed authority has erred in giving the finding that the respondent no. 3 had approached the owners of the Lohia Market and Munna Market, who had informed respondent no. 3 that no shop is available, ignoring the fact completely that these two addresses or locations were told by the petitioners and the respondent no. 3 had approached these two places only and had not made any effort of his own to look for an alternative accommodation or move an application for allotment. There is nothing to show that any real efforts were made by the respondents to find out another accommodation as per the law settled by co-ordinate Bench of this Court in the case of ***Smt. Bibi Begum (supra).*** Hence, the only one reasonable conclusion to be arrived at is that the respondent did not prove the case of greater hardship, the question of comparative hardship is to be decided against the tenants. The relevant extract of judgment of ***Smt. Bibi Begum (supra)*** is quoted hereinbelow:-

*"4. I have gone through the judgment rendered by the prescribed authority as well as appellate authority. The appellate authority has failed to see the relevant provisions of U.P. Act XIII of 1972 and the Rules made thereunder. Right from Apex Court to this Court, the law is settled that on submission of a release application, the tenant must look for alternative accommodation/residential premises. Even as per the latest rent laws, the goodwill of a shop keeper or businessman would not play any dominant role because the good-will is like fragrance, which can travel any where, like flower's scent and the customers will go to the new location. This Court has dealt with this issue in Writ Petition No. 21 of 1999 (R/C).Bata Shoe Company v.VIIth*

*Additional District Judge, Faizabad, which, as per learned Counsel for the petitioner, has been decided by the Apex Court."*

*"8. In these days, several shopping areas, malls, new markets are coming up and even in small cities, new market construction are being raised by the development authorities, which are working hard to provide residential and commercial accommodation to the urban population. The tenants on learning about the submission of release application can look for an alternative accommodation. In fact, the process of law is abused and the tenants take advantage of the delay which takes place in adjudication of rent matters."*

18. On the said same issue, the relevant extract of the co-ordinate bench of this court in the case of ***Dharmendra Singh Sonkar (supra)*** is quoted hereinbelow-:

*"29. In the above authority it has also been held in para 13, that tenant must show as to what efforts he made to purchase or take on rent other accom modation after filing of the release application which is quoted below:*

*In Piper v.Harvey, the issue as to comparative hardship arose for the consideration of Court of appeals under the Rent Act, 1975. Lord Denning opined; when I look at all the evidence in his case and see the strong case of hardship which the landlord put forward, and when I see that the tenant did not give any evidence of any attempts made by him to find other accommodation, to look for another house, either to buy or to rent, it seems to me that there is only one reasonable conclusion to be arrived at, and that is that the tenant did not prove (and the burden is on him to prove) the case of greater hardship. Hudson, L.J., opined: the tenant has not been able to say anything more than the minimum which every tenant can say, namely, that he was in fact been in occupation of the bungalow, and that he has not at the moment any other place to go to. He has not, however, sought to prove anything additional to that by way of hardship such as unsuccessful attempts to find other accommodation, or, indeed, to raise the question of his relative financial incompetence as compared with the landlord. On such state of the case, the Court answered the issue as to comparative hardship against the tenant and ordered his eviction.*

*"30. In the case of Salim Khan v. IVth Additional District Judge, Jhansi3 has held that in respect of comparative hardship, tenant did not show what efforts they made to search alternative accommodation after filing of release application. This case sufficient to tilt the balance of hardship against them Vide Bhutada v.G.R. Mundada4. Moreover, rent of Rs. 6/- per month which the tenants are paying is virtually as well as actually no rent. By paying such insignificant rent they must have saved a lot of money. Money saved is money earned. They must, therefore, be in a position to take another house on good rent. Further, they did not file any allotment application for allotment of another house. Under Rule 10(3) of the Rules framed under the Act, a tenant, against whom release application has been filed, is entitled to apply for allotment of another house immediately. Naturally such person is to be given preference in the matter of allotment. Respondents did not file any such allotment application. Thus, the question of comparative hardship has also to be decided against the tenants. (See also Raj Kumar v. Lai Khan and Ashis Sonar v. Prescribed Authority)."*

*"33. In the instant case as stated above, the Appellate Court had held that the tenant has not made any effort for search of alternative accommodation and it*

*is settled proposition of law that the equity follows law and so does sympathy. If the factors mentioned in Rule 16 are considered, taking into consideration the facts of this case, no doubt it is an old tenancy but there is nothing to show that any real efforts were made by the tenant to find another accommodation, since the date of moving of release application. (See also Govind Narain v. 7th Additional District Judge, Allahabad2 and Rani Devi Jain v. Badloo3). So the argument as raised by learned Counsel for petitioner that Courts below have failed to compare the need between the parties has got no force, rejected."*

19. As per the judgment of Hon'ble the Supreme Court in the case of ***Raghunath G. Panhale (Dead) by LRs v. Chaganlal Sundarji and Co., reported in (1999) 8 SCC 1***, where the Hon'ble Supreme Court has held that in order to prove bona-fide need, a landlord does not require to establish dire or compelling need for a premises in order to establish his business and it is the choice of the landlord which would be paramount in such circumstances.

20. The submission of learned counsel for petitioner that the rights of the parties stand crystallized by institution of the suit and the subsequent development could not be seen by placing reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Nidhi versus Ram Kripal (supra).*** The relevant extract of the said judgment is quoted herein below:-

*'16. Ordinarily, the rights of the parties stand crystallised on the date of institution of the suit. However, the court has power to take note of the subsequent events and mould the relief accordingly. Power of the court to take note of subsequent events came up for consideration in a number of decisions. In Om Prakash Gupta v. Ranbir B. Goyal, this Court held as under:*

*"11. The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that b the opposite party is not taken by surprise. In Pasupuleti Venkateswarlu v. Motor & General Traders this Court held that a fact arising after the lis, coming to the notice of the court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the court cannot be blinked at. The court may in such cases bend the rules of procedure if no specific provision of law or rule of fair play is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The Court speaking through Krishna Iyer, J. affirmed the proposition that the court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the Court cautioned: (i) the event should be one as would stultify or render*

*inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fair play is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautious, and (iv) the rules of fairness to both sides should be scrupulously obeyed."*

21. From the perusal of the judgments as mentioned above, it is undisputed that subsequent event/developments are not affecting the ground taken in the release application preferred by the petitioners as in the release application for personal bonafide need, the ground taken was that now the petitioner no. 2 has become major and got married and requires shop as through the same shop there is ingress and outgress of the house and the petitioners are short of space for keeping the stock of the goods. During this long period of litigation, such requirement has not changed. The business is running in the same shop, the entry of the house is from the same shop and with the passage of time, the business would have been increased and there is more requirement of godown for keeping the stock. The petitioner no. 1 is married having children thus, the family has expanded, so none of the circumstances have changed by subsequent developments as discussed above hence, in the present case, the rights of the parties stand crystallized on the date of the institution of the suit.

22. The prescribed authority, in absence of any pleading in the written statement filed by the tenant/respondent or adducing any evidence that the petitioners are having basement in their possession which can be used as a godown, merely on the basis of presumption rejected the release application of the petitioners, which has not been the case of the tenant. On the contrary, in the written statement in para-26 and 27 of the written statement filed before the prescribed authority, the respondent/tenant took up the case that they are in possession of the basement in their tenancy and the owner of the same is the petitioner. Before the appellate authority, the said plea was taken and argued and the same has been mentioned at page-5 of the appellate order/judgment but neither there was any discussion nor any finding has been recorded on the said plea.

23. The appellate court has erred in deciding the appeal by taking a new ground/plea i.e. the petitioners had not disclosed the nature of the business which they are running in the shop in how much space and which type of goods they are storing for which the godown is required. The said objection was never ever raised by the respondent no. 3 either by the Prescribed Authority or before the Appellate Court, rather the respondent no. 3, throughout admitted in the proceedings before the court below that the petitioner is running the shop and doing his business, meaning thereby there is no denial of the running of the shop and doing the business by the petitioners. So, on this frivolous new ground, the appellate court has decided the matter against the petitioners. As a matter of fact, the appellate court has gone into the irrelevant question as to in what item the petitioner was carrying on his business, such questions were never raised nor were in dispute, more so, for the purpose whether a godown is required or not. In the facts & circumstances as on the record, the appellate court mislead itself in entering into such questions foreign to the merits of the case.

24. In view of the facts, circumstances and discussion made hereinabove, the writ petition is ***allowed.***

25. The impugned orders dated 30.04.2008 and 13.02.2007 are hereby quashed.

26. The respondents pray for eighteeen months' time for vacating the premises, which is opposed by the learned counsel for petitioners and thereafter, an undertaking was given on behalf of the respondents that the premises in question will be vacated within a period of 9 months.

27. As such, the respondents are directed to vacate the premises in question within a period of 9 months and handover the same to the petitioners.

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**(2024) 7 ILRA 1470**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ-A No. 1064 of 2021
Alonwith
Writ-A No. 6500 of 2022
&
Writ-A No. 7672 of 2024

**Ashok Kumar Singh ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Rahul Jain

**Counsel for the Respondents:**
C.S.C.

**A. Service Law – Regularisation - U.P. Intermediate Education Act, 1921- Section 16 E (10) - U.P. Government Servant (Discipline and Appeal) Rules, 1999 - Rule 3 – Essential/Preferential qualification -** In the letter dated 04.03.1993 issued by the District Inspector of Schools granting approval to the petitioner's appointment, his qualification is written as "B.Sc. Agriculture, B.Ed." and the same qualification is mentioned in the petitioner's service book. In case the petitioner had not claimed possessing a B.Ed. degree, there was no occasion for the authorities to include the aforesaid qualification in his service record. Further, **had the authorities had erroneously mentioned this qualification on their own, it was open for the petitioner to point out the error and to get it rectified, but the petitioner did not do so**. Even if the petitioner's contention that B.Ed. is not an essential qualification, is accepted, he admits that it was a preferential qualification and, therefore, even as per the petitioner, B.Ed. was not an irrelevant qualification which would have no effect on the selections, as the candidates having preferential qualification are given a preference over other candidates who possess the essential qualification but do not possess the preferential qualification. (Para 41)

**B. A person who secures an appointment by submitting a forged educational certificate, is not entitled to claim any opportunity of hearing.** (Para 49)

Where the appointment of the petitioners is ab initio void, they cannot be said to be the civil servants of the State. Therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution or under any other disciplinary rules shall not arise. (Para 50)

In the present case, although the petitioner claims that he was not given an opportunity of hearing, he was repeatedly sent show cause notices. The petitioner did not provide any documents and on 09.10.2020, the DISs wrote another letter with contents similar to his earlier letter dated 18.09.2020 (On 18.09.2020, the District Inspector of Schools Kushinagar sent a letter to the Committee of Management of the college stating that by means of a GO dated 08.07.2020, a direction has been issued for verification of the educational certificates of the teachers working in government secondary schools, non-government aided schools and to send a report to the Government for taking the final action in the matter) and a copy of the verification report sent by Deen Dayal Upadhyay

Gorakhpur University, Gorakhpur and a copy of petitioner's marks sheet of B.Ed. were also enclosed with this letter. **A notice was issued to the petitioner on 17.12.2020 directing him to show cause within a period of 15 days as to why the appointment obtained by him on the basis of a forged marks-sheet be not cancelled and the amount paid to him as salary be recovered from him.** It was also mentioned in the notice that if the petitioners fails to show cause, it shall be deemed that he admits the charges and an appropriate decision will be taken in the matter. After multiple reminders, the petitioner submitted his reply on 22.06.2021 stating that he does not hold B.Ed. degree and he had no concern with the forged B.Ed. Marks-sheet. He further stated that B.Ed. was not an essential qualification for the post of Assistant Teacher and it was merely a preferential qualification. Thereafter the petitioner was given opportunity of personal hearing on 17.09.2021, 12.10.2021 and 12.11.2021. (Para 45)

**C. The right to salary or pension after retirement flows from a valid and legal appointment. Such benefits cannot be given in a case where the appointment was found to have been obtained fraudulently.**

The petitioner has been found to have secured a public employment by submitting a forged marks-sheet, which makes his initial appointment as null and void and there is no illegality in the impugned orders. The petitioner having committed a fraud by submitting a forged marks-sheet at the time of applying for his initial appointment, is not entitled to get any retiral dues. However, as this Court had passed interim orders in favour of the petitioner allowing him to continue in service, this Court does not deem it proper that the salary already paid to the petitioner be recovered from him. (Para 52)

**All the writ petitions are dismissed.** (E-5)

**Precedent followed:**

1. Reena Devi Vs St. of U.P. & ors., 2019 6 AWC 6355 All (Para 29)

2. Ramanand Bharti Vs St. of U.P. & ors., 2023 AHC 11 1702 (Para 29)

3. Jaswant Singh Vs District Inspector of Schools, 1980 SCC OnLine All 44 (Para 30)

4. State of Bihar Vs Kirti Narayan Prasad, (2019) 13 SCC 250 (Para 50)

5. R. Vishwanatha Pillai Vs St. of Kerala, (2004) 2 SCC 105 (Para 51)

**Precedent distinguished:**

1. Jaswant Singh & anr.Vs District Inspector of Schools & anr., 1980 All. L.J. 174 (Para 28, 31)

2. Gauri Shanker Rai & ors. Vs Dr. Ram Lakhan Pandey & ors., 1984 All. L.J. 291 (Para 28, 32)

3. Asha Saxena (Dr.) Vs S.K. Chaudhary, 1990 SCC OnLine All 602; (1991) 1 UPBLEC 250 (Para 28, 33)

4. Rajeev Kumar Singh Vs St. of U.P., 2000 SCC OnLine All 973; 2001 All LJ 485 (Para 28, 34)

5. Amrendra Pratap Singh Vs Tej Bahadur Prajapati, (2004) 10 SCC 65 (Para 35)

6. State of Orissa Vs Mohd. Illiyas, (2006) 1 SCC 275 (Para 36)

7. P.S. Sathappan Vs Andhra Bank Ltd., (2004) 11 SCC 672 (Para 37)

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

1. Heard Sri. Rahul Jain, the learned Counsel for the petitioner, Sri. Shailendra Singh, the learned Standing Counsel for the State of U. P. appearing for the respondent nos. 1 to 3 and Sri. Ramesh Chandra Dwivedi, the learned Counsel for the respondent no. 4 – Committee of Management, Janta Inter College, Ramkola, Kushi Nagar.

2. All the three Writ Petitions have been filed by the same petitioner relating to

the same set of disputes, as would appear from the narration made in the following paragraphs and, therefore, the three Writ Petitions are being decided by a common judgment.

3. Briefly stated, the facts pleaded in the Writ Petitions are that on 30.01.1993 the Committee of Management, Janta Inter College, Ramkola, Deoria (Now Kushi Nagar) passed a resolution for appointment of the petitioner as an L.T. Grade Teacher on ad-hoc basis against a short term vacancy till return of one Rakesh Govind Ram to his original post. The District Inspector of Schools, Deoria granted approval and financial sanction to the petitioner's appointment by means of an order dated 04.03.1993, in which the description of the petitioner is "Ashok Kumar Singh, B.Sc. Agriculture, B.Ed." The Manager of the College issued a letter to the petitioner on 06.03.1993 appointing him on ad-hoc basis till a regularly selected candidate joins the post. The petitioner took charge of the post on 10.03.1993.

4. The petitioner has pleaded that he possesses B.Sc. Agriculture and M.A. Political Science qualifications and he does not possess a B.Ed. degree and that B.Ed. was not an essential qualification for the post on which he was appointed and he had been appointed on the basis of the qualification which he actually possessed.

5. On 15.09.2008, the Regional Level Selection Committee recommended regularization of the petitioner's service and it was specifically mentioned in the resolution that if any fact regarding the ad hoc appointment of the petitioner has been concealed, the regularization of the petitioner's service shall automatically stand cancelled upon such fact coming to light and being affirmed in an enquiry.

6. The District Inspector of Schools, Kushinagar passed an order dated 09.11.2015 sanctioning payment of selection grade pay to the petitioner with effect from the date of regularization of his services and this order also specifically mentions that in case any fact has been cancelled in the matter, the order shall be cancelled automatically and the amount paid to the petitioner shall be recovered.

7. On 18.09.2020, the District Inspector of Schools Kushinagar sent a letter to the Committee of Management of the college stating that by means of a Government Order dated 08.07.2020, a direction has been issued for verification of the educational certificates of the teachers working in government secondary schools, non-government aided schools and to send a report to the Government for taking the final action in the matter. A District Level Committee constituted under the chairmanship of the District Magistrate has to take action in the matter. Upon verification of the B.Ed. Marks-sheet of the petitioner from Deen Dayal Upadhyay Gorakhpur University, it was found that the particulars mentioned in the self-attested marks-sheet provided by the petitioner did not tally with the verification report provided by the University and the roll number 6969 mentioned in the self attested marks-sheet provided by the petitioner belonged to one Ashok Kumar Upadhyay, from which it transpired that the B.Ed. marks-sheet provided by the

petitioner was forged and he has obtained employment on the basis of a forged certificate of an essential qualification. The letter directed the respondent no. 4 to lodge a First Information Report against the petitioner and to pass a resolution for termination of the petitioner's service under Section 16 E (10) of the U. P. Intermediate Education Act. All the original documents relating to the appointment of the petitioner be sent to the District Inspector of Schools. The payment of salary to the petitioner was stopped and it was directed that no work be taken from him.

8. On 21.09.2020, the Manager of the college sent a letter to the petitioner stating that the District Inspector of Schools had informed through his letter dated 18.09.2020 that the petitioner's marks sheet of B.Ed. is forged and an enquiry had been scheduled to be held in the office of the Additional District Magistrate (Finance and Revenue) on 22.09.2020 and the District Inspector of Schools had demanded the original educational certificates of the petitioner. The letter directed the petitioner to provide his original educational certificates alongwith a set of self attested copies of the same.

9. The petitioner claims that on 21.09.2020, he had sent a letter to the District Inspector of Schools stating that he was not keeping well and he needs two weeks' time to submit his version. He further stated that he had already sent information of his illness to the school on 19.09.2020, but he has not brought on record a copy of any such information. The petitioner has annexed a copy of a prescription dated 18.09.2020 issued by the District Hospital, Deoria, in which complaints of fever, pain in abdomen and viral hepatitis have been recorded, the petitioner was advised bed rest for 15 days and the following medicines have been prescribed to him: -

Tab. Ciplox 500 twice a day
Tab. Cefexime twice a day
Tab. PCM (Paracetamol) thrice a day
Tab. Becosules once a day
Tab. Liv 52 once a day
For 15 days

10. The petitioner has annexed another prescription dated 03.10.2020, which also records complaints of fever, nausea and viral hepatitis have been recorded and the following medicines have been prescribed: -

Tab. Cefexime twice a day
Tab. PCM (Paracetamol) twice a day
Tab. Liv 52 once a day
For 15 days

11. The petitioner did not provide any documents and on 09.10.2020, the District Inspector of Schools wrote another letter with contents similar to his earlier letter dated 18.09.2020 and a copy of the verification report sent by Deen Dayal Upadhyay Gorakhpur University, Gorakhpur and a copy of petitioner's marks sheet of B.Ed. were also enclosed with this letter.

12. The petitioner did not provide any documents and his salary was stopped by means of an order dated 09.10.2020 passed by the District Inspector of Schools.

13. The petitioner filed Writ A No. 1064 of 2021 challenging the order dated 09.10.2020 passed by the District Inspector

of Schools and this Court passed an interim order dated 01.02.2021 staying the operation of the order dated 09.10.2020, on the ground that the order had been passed without following the principles of natural justice.

14. The State through the District Inspector of Schools has filed a stay vacation application alongwith a counter affidavit in Writ A No 1064 of 2021 inter alia stating in paragraph 6 thereof that at the time of applying for appointment, the petitioner had shown his qualification as B.Sc. (Agriculture) and B.Ed., which is clear from the approval letter dated 04.03.1993 annexed by the petitioner as Annexure No. 3 to the Writ Petition.

15. In the rejoinder affidavit filed in Writ A No 1064 of 2021, the petitioner has denied that he had shown B.Ed. as his qualification and he has stated that the approval order dated 04.03.1993 wrongly mentions B.Ed. as his qualification. He has further stated that B.Ed. is only a desirable qualification for the post in question and it is not an essential qualification.

16. A notice was issued to the petitioner on 17.12.2020 directing him to show cause within a period of 15 days as to why the appointment obtained by him on the basis of a forged marks-sheet be not cancelled and the amount paid to him as salary be recovered from him. It was also mentioned in the notice that if the petitioner fails to show cause, it shall be deemed that he admits the charges and an appropriate decision will be taken in the matter. When the petitioner did not respond to the notice, reminders were sent to him on 25.01.2021 and 04.03.2021. The petitioner personally received the notice from the office of the Director Education on 16.03.2021 and he asked for 15 days' time to submit his reply. When he did not submit any reply within the stipulated period, again reminders were sent to him on 15.04.2021 and 31.05.2021 through registered post. Ultimately, the petitioner submitted his reply on 22.06.2021 stating that he does not hold B.Ed. degree and he had no concern with the forged B.Ed. Marks-sheet. He further stated that B.Ed. was not an essential qualification for the post of Assistant Teacher and it was merely a preferential qualification.

17. Thereafter the petitioner was given opportunity of personal hearing on 17.09.2021, 12.10.2021 and 12.11.2021.

18. On 11.03.2022, the Director Education (Secondary) U.P. passed an order holding that the petitioner had obtained appointment on the basis of a forged marks-sheet of B.Ed. and he got the same regularized by concealment of fact. The regularization order categorically states that in case any concealed fact comes to light, the regularization order will be cancelled automatically. The Director declared the appointment of the petitioner to be without qualification and void and he has been removed from the service.

19. The petitioner challenged the validity of the aforesaid order dated 11.03.2022 by filing Writ A No. 6500 of 2022 and this Court passed the following interim order on 04.05.2022: -

> *"The State Government is directed to initiate inquiry against all the public servants who were involved in the regularization and grant of selection grade to the petitioner since the year 2008 till date and fix the responsibility on*

*the erring public servant / servants as to how the person having a forged mark sheet was permitted to be given regular public employment at the cost of public exchequer by them.*

*The state government will initiate inquiry against all the public servants involved in this dispute and submit its report before this court in three months after conducting the inquiry in accordance with law, granting opportunity of hearing to each and every public servant involved in this case.*

*Put up this case as a fresh case on 10.08.2022.*

*Issue notice to respondent no. 4.*

*Steps be taken within a week.*

*The impugned orders dated 11.03.2022/21.03.2022 passed by Director of Education shall remain stayed till the next date and the working of the petitioner shall not be disturbed."*

20. The Principal Secretary, Secondary Education, Government of U.P. has filed his personal affidavit stating that an enquiry was conducted in compliance of the order dated 04.05.2022 passed by this Court and five officers named in the affidavit were found guilty for approval of ad-hoc appointment of the petitioner, regularization of his service and grant of selection grade to him without verification of his certificates / marks sheets, but all those officers had retired from service and disciplinary proceedings could not be initiated against them under Rule 3 of the U. P. Government Servants (Discipline and Appeal) Rules, 1999.

21. The Deputy Director of Education (Secondary) has filed a counter affidavit in Writ A No. 6500 of 2022 inter alia stating that the minimum educational qualification for appointment to a post of Assistant Teacher in subject Civics is a Bachelor's degree in any two subjects – History, Geography, Civics or Economics and B.Ed. training. The minimum educational qualification for the post of Assistant Teacher L.T. Grade in Agriculture subject is B.Sc. Agriculture and L.T. training. The petitioner was appointed on ad hoc basis against a substantive vacancy of Assistant Teacher L.T. Grade in subject Civics and that too, on the basis of a forged B.Ed. degree and, therefore, his initial appointment is null and void. It is further mentioned in the counter affidavit that an F.I.R. No. 0292 under Sections 419, 420, 467, 468, 471 I.P.C. has been lodged against the petitioner on 17.10.2022 in Police Station Ramkola District Kushinagar.

22. The Committee of Management of the college has also filed a counter affidavit in Writ A No. 6500 of 2022 inter alia stating that the manager of the college had sent a show cause notice dated 19.10.2020 to the petitioner through registered post and he had been called to appear on 26.10.2020 but he did not submit any explanation and he did not appear also. Thereafter a three member inquiry committee was constituted on 19.11.2020 and a notice dated 29.10.2020 was sent to the petitioner giving him another opportunity to show cause. The Enquiry Committee held its meetings on 08.11.2020, but the petitioner did not appear. The enquiry committee sent another notice dated 09.11.2020 to the petitioner fixing 13.11.2020 as the next date, but the petitioner did not appear again. The enquiry

was adjourned to 19.11.2020, but he did not appear again and he was not attending the college also. The three member enquiry committee submitted its recommendation dated 19.11.2020 stating that as per the information provided by Deen Dayal Upadhyay Gorakhpur University, the B.Ed. marks-sheet of the petitioner is forged and the petitioner has no explanation to offer. Accordingly, the committee recommended termination of services of the petitioner.

23. On 23.11.2020, the Committee of Management has passed a resolution stating that the conduct of the petitioner in not giving any explanation or evidence in spite of being granted numerous opportunities shows that he has nothing to say and he has no evidence in his favour. Therefore, the committee recommended termination of service of the petitioner and his suspension till termination.

24. A copy of the petitioner's service book has been annexed with the counter affidavit filed by the committee of management, wherein the petitioner's qualification is mentioned as "B.Sc. Agriculture, B.Ed."

25. The Committee of Management, Janta Inter College filed Special Appeal No. 39 of 2023 against the interim order dated 04.05.2022 passed in Writ A No. 6500 of 2022, which was dismissed by means of an order dated 28.02.2023 leaving it open to the appellant to file a counter affidavit in the Writ Petition and seek vacation of the stay order.

26. The petitioner filed a petition for contempt due to non-compliance with the interim order dated 04.05.2022 passed in Writ A No. 6500 of 2022 and the Contempt Court had passed an order dated 18.01.2023 whereby the salary of the district Inspector of Schools was withheld. Thereafter the District Inspector of Schools filed Special Appeal No. 80 of 2023 against the order dated 18.01.2023 passed contempt case, which was allowed by means of an order dated 16.03.2023 and the order dated 18.01.2023 was modified.

27. Thereafter the petitioner submitted representations for registering his name on the Human Resources Portal and for preparation of his pension papers and meanwhile he retired on 31.03.2024. After retirement, the petitioner submitted representations for payment of pension and he has filed Writ A No. 7682 of 2024 for issuance of a Writ of Mandamus commanding the respondent no. 4 to prepare the papers regarding payment of pension to the petitioner and forward the same to the District Inspector of Schools, Kushinagar, and to direct the respondents to pay pension and other retiral dues for the post of L.T. Grade Teacher to the petitioner.

28. The learned Counsel for the petitioner has submitted that the petitioner did not ever claim that he possesses B.Ed. degree and that B.Ed. was merely a desired qualification for the post in question and it was not an essential qualification. He has further submitted that the impugned orders have been passed in violation of the principles of natural justice. In support of his submissions, the learned Counsel for the petitioner has relied upon the judgments in the cases of **Jaswant Singh and another versus District Inspector of Schools and another**: 1980 All.L.J. 174, **Gauri Shanker Rai and others versus Dr. Ram Lakhan Pandey and others**: 1984 All. L. J. 291, **Smt. S. K. Chaudhari versus Manager, Committee of Management, Vidyawati Darbari Girls Inter College,**

**Lookerganj, Allahanbad & others**: (1991) 1 UPLBEC 250 (FB) and **Rajeev Kumar Singh versus State of U.P. and others**: 2001 All.L.J. 485.

29. Per Contra, the learned Standing Counsel and the learned Counsel for the Committee of Management of the college have submitted that the petitioner had secured appointment on the basis of a forged marks sheet of B.Ed. and he deliberately failed to avail the opportunity of hearing provided to him. They have relied upon the judgments in the cases of **Reena Devi versus State of U.P. and 4 others**: 2019 6 AWC 6355 All and **Ramanand Bharti versus State of U.P. and 2 others**: 2023:AHC:111702.

30. In **Jaswant Singh v. District Inspector of Schools**, 1980 SCC OnLine All 44, a coordinate bench of this Court was dealing with the matter of passing of successive orders by the District Inspectors of Schools regarding grant of recognition to a duly elected committee of management. This Court referred to various precedents on the point and formulated the following principles: -

> *"In view of the aforesaid decisions and in view of* ***the nature of the jurisdiction which the District Inspector of Schools exercises in the matter of recognition of a committee of management and further in view of the consequences of the orders which he passes we are of opinion that the following principles emerge in this behalf:—***
>
> *(1) The District Inspector of Schools does not have the jurisdiction to adjudicate upon a claim made by rival committees of management, each one of them asserting to have been duly elected and to give a final decision thereon. No such power has been conferred on him either by the U.P. Intermdiate Education Act or by the High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971. The jurisdiction to decide such a dispute rests with the Civil Court.*
>
> *(2) Since the District Inspector of Schools under the aforesaid two Acts has to perform various administrative functions of statutory character in collaboration with the management of High Schools and Intermediate Colleges and since these duties cannot be discharged by him unless he is in a position to find out on an administrative level as to who are the real office-bearers of the college, he for this limited purpose must of necessity satisfy himself as to who, according to him, are the validly elected office-bearers of the institution. This satisfaction has to be reached by the District Inspector of Schools by making a summary enquiry on an administrative level.*
>
> *(3) The order so passed by the District Inspector of Schools does not have the effect of finally adjudicating upon the dispute between the parties. The remedy of the aggrieved party is to institute a suit in the Civil Court for appropriate relief and the decision given in the suit will alone have the effect of making a final and binding adjudication in the matter and the said decision will have to be given effect to by the District Inspector of*

*Schools in supersession of the order that may have been passed by him earlier.*

*(4) The inquiry which the District Inspector of Schools has to make for his satisfaction as aforesaid is to be confined to the question as to whether a fresh election has taken place and if so who are the persons who have been elected to constitute the committee of management. This inquiry is to be made by first ascertaining as to whether the meeting to hold the election had been convened in accordance with the requirements of the scheme of administration and any other relevant provision in this behalf applicable to the affairs of the society which runs the institution. If the meeting had been so convened reference should be made to the minutes of the meeting in order to find out as to who were the persons who were duly elected to constitute the committee of management. Such disputes which the parties may raise before him which are contrary to the minutes of the meeting held and which involve decision of disputed questions of fact after taking evidence should be left open to be decided by the Civil Court in a suit which may be filed by the person aggrieved by the order of the District Inspector of Schools.*

*(5) The District Inspector of Schools is not expected to write a detailed order as if it were a judgment of a Court of law. His order must, however, indicate that he has applied his mind to the controversy involved before him for if the order does not disclose application of mind it is likely to be termed arbitrary.*

*(6) The District Inspector of Schools having once passed an order in the manner stated above does not have jurisdiction to review his order unless it is established that the said order had been obtained by misrepresentation or fraud or was the result of mistake in the sense that it was passed on incorrect facts and would not have at all been passed if the correct facts had been brought to his notice. These facts should, however, be such which go to the very root of the matter. The District Inspector of Schools has no power to review his earlier order on a fresh assessment of facts or law.*

*(7) Even in those cases where it is established that the earlier order had been obtained by misrepresentation or fraud or had been given under mistake as aforesaid the District Inspector of Schools must not recall or revoke the said order without giving an opportunity of hearing to the person in whose favour the said order had been passed.*

*(8) The opportunity of hearing which the District Inspector of Schools has to give either at the stage of passing the initial order or recalling or revoking it in the circumstances stated above is to be confined to giving the persons concerned an opportunity to put forward their case. It is not to be converted into a regular hearing as is done by a Civil Court. The District Inspector of Schools has to keep in mind that the inquiry to be made by him is of*

*a summary nature and on an administrative level meant to satisfy himself as to who, according to him, are the validly elected office-bearers of the committee of management. In other words the District Inspector of Schools should not arrogate to himself the jurisdiction of a Civil Court and thereby assume the power to decide the fate of the parties before him.*

31. **Jaswant Singh** (Supra) specifically deals with the scope of powers of the District Inspector of Schools in passing successive orders in the matter of grant of recognition to a duly constituted Committee of Management of a college and the question of obtaining appointment on the basis of forged educational certificate was not involved in this case. Therefore, it is not relevant for adjudication of the present case.

32. In **Gauri Shanker Rai v. Dr. Ram Lakhan Pandey**: 1983 SCC OnLine All 794 : 1984 All LJ 291, there was a dispute of management of the college. The District Inspector of Schools passed an order holding that the Committee of management elected on 13.02.1979 was entitled to continue to manage the affairs of the Institution. After change of the person holding the post of D.I.O.S., the subsequent incumbent passed another order reviewing the earlier order passed by his predecessor. Two contentions were raised before this Court: -

*1. The District Inspector of Schools had no jurisdiction to review the order passed by his predecessor on 13-6-1980.*

*2. No opportunity whatsoever was given to the petitioners before the District Inspector of Schools passed the impugned order dated 1-8-1980.*

*This Court held that both these contentions are right. The aforesaid case also related to recognition of rival committees of management and the question of scope of interference in the matter of appointment obtained on the basis of forged education certificates was not involved in this case.*

33. In **Asha Saxena (Dr.) v. S.K. Chaudhari**: 1990 SCC OnLine All 602 = (1991) 1 UPLBEC 250, the first question involved was about the inter se seniority of the three Lecturers. The next question was as to whether the provisions of clause 3(1)(bb) of Chapter II of the U. P. Intermediate Education Act are retrospective in its operation or not, on which the Full Bench held that the provisions of clause 3(1)(bb) of Chapter II are not retrospective in operation. In light of the aforesaid answer, the Full Bench held that the controversy regarding seniority of the three lecturers was determined by the Managing Committee on 29.04.1976 and the seniority list had remained in existence since then. The Full Bench further held that the law is well settled that the court will not interfere with a seniority list which had remained in existence for a long time and which had become final. The Management had determined the seniority on 29.04.1976 after affording opportunity to Dr. Asha Saxena. She did not file any appeal against the decision of the Committee of Management even though an appeal may have been preferred. Objections by Dr. Asha Saxena had been filed after a lapse of nearly 15 years. She did not raise an

objection that seniority list was not prepared every year. The only objection raised was that she did not know about the insertion of provisions of Section 3(1)(bb) in Chapter II and she filed the objections after coming to know of the aforesaid provision. In the aforesaid factual background, the Full Bench held that as the seniority list had been existing since the year 1975-1976, this Court was not prepared to quash the seniority list after a lapse of nearly 15 years. The Full Bench decision given in the aforesaid background is not applicable for adjudication fo the dispute involved in the present case.

34. In **Rajeev Kumar Singh v. State of U.P.,** 2000 SCC OnLine All 973 = 2001 All LJ 485, the question was whether the petitioner was qualified to be appointed as Assistant Teacher (Art). The DIOS had rejected the claim of the petitioner as he was not 'Trained' as provided in Appendix 'A' to Chapter II of the Regulations. This Court held that 'Trained' was not an essential qualification for appointment to the post of Assistant Teacher (Art) for teaching classes IX and X. 'Trained' was a desirable qualification for the post. There is a difference in desirable or preferential qualification and essential qualification. If a candidate does not possess essential qualification, then he is ineligible for the post. Since 'Trained' was only a preferential qualification the petitioner could not be held ineligible, on this ground. The question commission of fraud by submission of a forged marks-sheet was not involved in this case and, therefore, this judgment is not relevant for adjudication of the controversy involved in the present case.

35. In **Amrendra Pratap Singh v. Tej Bahadur Prajapati**, (2004) 10 SCC 65, the Hon'ble Supreme Court held 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.*

36. In **State of Orissa v. Mohd. Illiyas**, (2006) 1 SCC 275 it was reiterated that:—

> *"12.... 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 (1968) 2 SCR 154 and Union of India v. Dhanwanti Devi (1996) 6 SCC 44.) 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 [1901] A.C. 495 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."*

37. In **P.S. Sathappan v. Andhra Bank Ltd.,** (2004) 11 SCC 672, a Constitution Bench consisting of five Hon'ble Judges held that:—

*"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 : (SCC p. 172, para 19)*

*"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."*

38. Therefore, the aforesaid judgments relied upon by the learned Counsel for the petitioner would not apply to the facts of and the points involved in the present case, which was not involved in any of those cases.

39. In **Reena Devi versus State of U.P. and 4 others**: 2019 6 AWC 6355 All, a coordinate Bench of this Court referred to various precedents and concluded that: -

> *"14. Thus, where a person secures appointment on the basis of a forged mark-sheet or certificate or appointment letter and on that basis he or she has been inducted in Government service then he becomes beneficiary of illegal and fraudulent appointment. Such an appointment is illegal and void ab initio. Therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution of India or under any disciplinary rules including the Uttar Pradesh Basic Education Staff Rules, 1973 or the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, shall not arise."*

40. In **Ramanand Bharti versus State of U.P. and 2 others**: 2023:AHC:111702, another coordinate bench of this Court held that: -

> *"Where a person secures appointment on the basis of a forged marksheet or certificate or appointment letter and on that basis he or she has been inducted in Government service then he becomes beneficiary of illegal and fraudulent appointment. Such an appointment is void ab initio. Therefore, holding disciplinary proceedings envisages by Article 311 of the Constitution of India or under any disciplinary rules including the Uttar Pradesh Basic Education Staff Rules, 1973 or the Uttar Pradesh Government Servant (Discipline and Appeal) Rules 1999, shall not arise."*

41. When we examine the facts of the present case in light of the law laid down by this Court in the above mentioned cases, it appears that the respondents claim that the petitioner was appointed on ad hoc basis against a substantive vacancy of Assistant Teacher L.T. Grade in subject Civics and the minimum educational qualification for appointment to a post of Assistant Teacher in subject Civics includes a B.Ed. degree. Upon verification from the University, the petitioner's B.Ed. degree has been found to be forged the respondents contend that it makes the petitioner's appointment null and void. The petitioner claims that he had not claimed that he possessed a B.Ed. degree and B.Ed. was not an essential qualification and it was merely a preferential qualification. In the letter dated 04.03.1993 issued by the District Inspector of Schools granting approval to the petitioner's appointment, his qualification is written as "B.Sc. Agriculture, B.Ed." and the same qualification is mentioned in the petitioner's service book. In case the petitioner had not claimed possessing a B.Ed. degree, there was no occasion for the authorities to include the aforesaid qualification in his service record. Further, had the authorities had erroneously mentioned this qualification on their own, it was open for the petitioner to point out the error and to get it rectified, but the petitioner did not do so. Even if the

petitioner's contention that B.Ed. is not an essential qualification, is accepted, he admits that it was a preferential qualification and, therefore, even as per the petitioner, B.Ed. was not an irrelevant qualification which would have no effect on the selections, as the candidates having preferential qualification are given a preference over other candidates who possess the essential qualification but do not possess the preferential qualification.

42. Although the petitioner claims that he was not given an opportunity of hearing, the manager of the college had sent a show cause notice dated 19.10.2020 to the petitioner through registered post and he had been called to appear on 26.10.2020 but he did not submit any explanation and he did not appear also. The three member inquiry committee had sent a notice dated 29.10.2020 to the petitioner giving him another opportunity to show cause. The Enquiry Committee had sent another notice dated 09.11.2020 to the petitioner, but the petitioner did not appear. The three member enquiry committee submitted its recommendation dated 19.11.2020 stating that as per the information provided by Deen Dayal Upadhyay Gorakhpur University, the B.Ed. marks-sheet of the petitioner is forged and the petitioner has no explanation to offer. Accordingly, the enquiry committee recommended termination of services of the petitioner.

43. On 23.11.2020, the Committee of Management has passed a resolution stating that the conduct of the petitioner in not giving any explanation or evidence in spite of being granted numerous opportunities shows that he has nothing to say and he has no evidence in his favour. Therefore, the committee recommended termination of service of the petitioner and his suspension till termination.

44. The petitioner claims that on 21.09.2020, he had sent a letter to the District Inspector of Schools stating that he was not keeping well and he needs two weeks' time to submit his version. The petitioner has annexed a copy of a prescription dated 18.09.2020 issued by the District Hospital, Deoria, in which complaints of fever, pain in abdomen and viral hepatitis have been recorded and some medicines were prescribed to him, including a particular antibiotic. Another prescription dated 03.10.2020 also records complaints of fever, nausea and viral hepatitis and the same antibiotic was again prescribed for a further period of 15 days. There is nothing on record that a copy of any of the medical prescriptions was ever provided to the respondents. There is no other medical certificate or fitness certificate on record. It is also strange that the petitioner was diagnosed with viral hepatitis without conducting any pathological examination. Although he was suffering from a viral disease, he was prescribed anti biotic medicines and further, the same antibiotic medicine was prescribed continuously for one month. All these things give rise to a strong suspicion against the genuineness of the petitioner's claim of illness.

45. The petitioner did not provide any documents and on 09.10.2020, the District Inspector of Schools wrote another letter with contents similar to his earlier letter dated 18.09.2020 and a copy of the verification report sent by Deen Dayal Upadhyay Gorakhpur University, Gorakhpur and a copy of petitioner's marks sheet of B.Ed. were also enclosed with this letter. A notice was issued to the petitioner

on 17.12.2020 directing him to show cause within a period of 15 days as to why the appointment obtained by him on the basis of a forged marks-sheet be not cancelled and the amount paid to him as salary be recovered from him. It was also mentioned in the notice that if the petitioners fails to show cause, it shall be deemed that he admits the charges and an appropriate decision will be taken in the matter. When the petitioner did not respond to the notice, reminders were sent to him on 25.01.2021 and 04.03.2021. The petitioner personally received the notice from the office of the Director Education on 16.03.2021 and he asked for 15 days' time to submit his reply. When he did not submit any reply within the stipulated period, again reminders were sent to him on 15.04.2021 and 31.05.2021 through registered post. Ultimately, the petitioner submitted his reply on 22.06.2021 stating that he does not hold B.Ed. degree and he had no concern with the forged B.Ed. Marks-sheet. He further stated that B.Ed. was not an essential qualification for the post of Assistant Teacher and it was merely a preferential qualification. Thereafter the petitioner was given opportunity of personal hearing on 17.09.2021, 12.10.2021 and 12.11.2021.

46. On 11.03.2022, the Director Education (Secondary) U.P. passed an order holding that the petitioner had obtained appointment on the basis of a forged marks-sheet of B.Ed. and he got the same regularized by concealment of fact. The regularization order categorically states that in case any concealed fact comes to light, the regularization order will be cancelled automatically. The Director declared the appointment of the petitioner to be without qualification and void and he has been removed from the service.

47. The Principal Secretary, Secondary Education, Government of U.P. has filed his personal affidavit stating that an enquiry was conducted in compliance of the order dated 04.05.2022 passed by this Court and five officers named in the affidavit were found guilty for approval of ad-hoc appointment of the petitioner, regularization of his service and grant of selection grade to him without verification of his certificates / marks sheets, but all those officers had retired from service and disciplinary proceedings could not be initiated against them under Rule 3 of the U. P. Government Servants (Discipline and Appeal) Rules, 1999.

48. In these circumstances, the petitioner's contention that the impugned orders have been passed without giving him an opportunity of hearing, has no force and it is rejected.

49. Even otherwise, a person who secures an appointment by submitting a forged educational certificate, is not entitled to claim any opportunity of hearing, as has been held by the Hon'ble Supreme court in a number of judgments.

50. In **State of Bihar versus Kirti Narayan Prasad**: (2019) 13 SCC 250, the Hon'ble Supreme Court held that where the finding of the State Committee was that many writ petitioners had secured appointment by producing fake or forged appointment letter or had been inducted in government service surreptitiously by the Civil Surgeon-cum-Chief Medical Officer concerned by issuing a posting order, they are the beneficiaries of illegal orders made by the Civil Surgeon-cum-Chief Medical Officer, the appointment of the petitioners is ab initio void, they cannot be said to be the civil servants of the State. Therefore,

holding disciplinary proceedings envisaged by Article 311 of the Constitution or under any other disciplinary rules shall not arise.

51. In **R. Vishwanatha Pillai v. State of Kerala:** (2004) 2 SCC 105, the Hon'ble Supreme Court held that: -

> *"19. ... The rights to salary, pension and other service benefits are entirely statutory in nature in public service. The appellant obtained the appointment against a post meant for a reserved candidate by producing a false caste certificate and by playing a fraud. His appointment to the post was void and non est in the eye of the law. The right to salary or pension after retirement flows from a valid and legal appointment. The consequential right of pension and monetary benefits can be given only if the appointment was valid and legal. Such benefits cannot be given in a case where the appointment was found to have been obtained fraudulently and rested on a false caste certificate. A person who entered the service by producing a false caste certificate and obtained appointment for the post meant for a Scheduled Caste, thus depriving a genuine Scheduled Caste candidate of appointment to that post, does not deserve any sympathy or indulgence of this Court. A person who seeks equity must come with clean hands. He, who comes to the court with false claims, cannot plead equity nor would the court be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. Equity jurisdiction cannot be exercised in the case of a person who got the appointment on the basis of a false caste certificate by playing a fraud. No sympathy and equitable consideration can come to his rescue. We are of the view that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquired a status by practising fraud."*

52. The petitioner has been found to have secured a public employment by submitting a forged marks-sheet, which makes his initial appointment as null and void and there is no illegality in the impugned orders. The petitioner having committed a fraud by submitting a forged marks-sheet at the time of applying for his initial appointment, is not entitled to get any retiral dues. However, as this Court had passed interim orders in favour of the petitioner allowing him to continue in service, this Court does not deem it proper that the salary already paid to the petitioner be recovered from him.

53. In view of the aforesaid discussion, this Court finds no merit in any of the three Writ Petitions filed by the petitioner. All the Writ Petitions are **dismissed**.

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**(2024) 7 ILRA 1485**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 30.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ-A No. 6738 of 2024
Alongwith
Writ-A No. 7788 of 2024

**Kamal Nayan Singh & Ors.** **...Petitioners**
**Versus**
**State of U.P. & Ors.** **...Opp. Parties**

**Counsel for the Petitioners:**
Siddharth Khare, Sr. Advocate

**Counsel for the Opp. Parties:**
C.S.C., Siddharth Singhal

**अ) सेवा कानून - पुराने नियमों के तहत नियुक्ति की मांग - भारतीय संविधान - अनुच्छेद 309,310,311 - सरकारी नौकरियों और अधिकारियों की नियुक्ति से संबंधित , अनुच्छेद 14 - समानता का अधिकार - सरकार को यह अधिकार है कि वह संशोधन के पूर्व उत्पन्न हुई रिक्तियों को नहीं भरने का नीतिगत निर्णय ले सकती है - इस निर्णय के बाद, किसी भी अभ्यर्थी को पुराने नियमों के अनुसार भर्ती माँगने का अधिकार नहीं होगा - सरकार का नीतिगत निर्णय उचित तथा सकारण होना चाहिए और संविधान के अनुच्छेद 14 की कसौटी पर खरा उतरना चाहिए - विशेष योग्यता वाले पदों, यथा पुस्तकालयाध्यक्ष, के स्तर का उन्नयन (Upgradation) किसी भी प्रकार से एक जनहित विरोधी निर्णय नहीं कहा जा सकता - लोक पदों की योग्यता के स्तर का उन्नयन लोकहित के विपरीत न होकर लोकहित को बढ़ावा देने वाला प्रभाव रखेगा - लोक सेवा में नियुक्ति हेतु चयन प्रक्रिया का उद्देश्य सर्वश्रेष्ठ और कार्य के लिए सर्वाधिक उपयुक्त व्यक्ति का चयन करना है। (पैरा - 26,27, 34-37)**

उत्तर प्रदेश अधीनस्थ सेवा चयन आयोग ने पुस्तकालयाध्यक्ष के पदों पर 2016 में चयन प्रक्रिया प्रारंभ की -तत्पश्चात अखिल भारतीय तकनीकी शिक्षा परिषद और राज्य सरकार ने योग्यता और वेतनमान में उन्नयन (Upgradation) करते हुए नए नियम लागू किए - चयन प्रक्रिया पुराने नियमों पर आधारित थी - जबकि नई चयन प्रक्रिया संशोधित नियमों के अनुसार शुरू की गई -याचिकाकर्ताओं का तर्क - चयन प्रक्रिया को 2016 के नियमों के अनुसार पूरा किया जाना चाहिए, न कि नए संशोधित नियमों के तहत । **(पैरा 3-4,12,36-37)**

**निर्णय :** यदि कोई चयन प्रक्रिया पुराने नियमों के आधार पर शुरू की गई थी, जिसमें कम शैक्षिक योग्यता वाले अभ्यर्थियों को कम वेतनमान के पद पर चयन के लिए प्रारम्भ किया गया था, तो ऐसे चयन के आधार पर नियुक्ति पाने का कोई निहित अधिकार नहीं है। यह इसलिए है क्योंकि अखिल भारतीय तकनीकी शिक्षा परिषद् और राज्य सरकार ने पुस्तकालयाध्यक्ष के पद का स्तर उन्नयन कर दिया है, और उच्चीकृत स्तर के लिए उ०प्र० लोक सेवा आयोग ने एक विज्ञापन प्रकाशित करके चयन प्रक्रिया प्रारम्भ कर दी है। मात्र चयन प्रक्रिया में भाग लेने से अभ्यर्थियों को नियुक्ति का अधिकार नहीं होता है। पुराने नियमों के आधार पर चयन प्रक्रिया को पूरा करना आवश्यक नहीं है। **( पैरा 41-42 )**

**रिट याचिकाएँ निरस्त कर दी गई।** (E-7)

**उद्धृत मामलों की सूची :**

1. हिमाचल प्रदेश राज्य तथा अन्य बनाम राजकुमार तथा अन्य, (2023) 3 एस०सी०सी० 773
2. वाई०वी० रंगैया बनाम जे० श्रीनिवास राव, (1983) 3 सुप्रीम कोर्ट केसेस 284
3. आसाम लोक सेवा आयोग बनाम प्रांजल कुमार सर्मा, (2020) 20 एस०सी०सी० 680
4. रामजीत सिंह कर्दम बनाम संजीव कुमार तथा अन्य, (2020) 20 एस०सी०सी० 209
5. लीलाधर बनाम राजस्थान राज्य, (1981) 4 सुप्रीम कोर्ट केसेस 159
6. अशोक कुमार यादव बनाम हरियाणा राज्य, (1985) 4 सुप्रीम कोर्ट केसेस 417
7. तेज प्रकाश पाठक बनाम राजस्थान उच्च न्यायालय, (2013) 4 सुप्रीम कोर्ट केसेस 540
8. रामजीत सिंह कर्दम बनाम संजीव कुमार, (2020) 20 सुप्रीम कोर्ट केसेस 209
9. तमिलनाडु कम्प्यूटर साइंस बी.एड. गवर्नमेंट वेलफेयर सोसायटी (1) बनाम हायर सेकेंडरी स्कूल कम्प्यूटर टीचर्स एसोसिएशन, (2009) 14 एस०सी०सी 517
10. तेज प्रकाश पाठक बनाम राजस्थान राज्य, (2013) 4 एस०सी०सी 540

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

1. रिट-ए संख्या-6738 वर्ष 2024 के याचिकाकर्तागण की तरफ से विद्वान वरिष्ठ अधिवक्ता श्री अशोक खरे एवं अधिवक्ता श्री सिद्धार्थ खरे, रिट-ए संख्या-7788 वर्ष 2024 के याचिकाकर्तागण के विद्वान अधिवक्ता श्री अखिलेश त्रिपाठी, विपक्षी संख्या-1 एवं 2 की तरफ से उपस्थित विद्वान अपर महाधिवक्ता श्री अशोक मेहता तथा विद्वान अपर मुख्य स्थायी अधिवक्ता श्री प्रदीप्त कुमार शाही, उ०प्र० अधीनस्थ सेवा चयन आयोग की तरफ से विद्वान अधिवक्ता श्री सिद्धार्थ सिंघल की तरफ से उपस्थित विद्वान अधिवक्ता श्री अखिलेश कुमार को सुना तथा पत्रावली का अवलोकन किया।

2. भारतीय संविधान के अनुच्छेद 226 के अंतर्गत प्रस्तुत उपरोक्त दोनों रिट याचिकाओं द्वारा याचिकाकर्ताओं ने प्रमुख सचिव, प्राविधिक शिक्षा अनुभाग-2, उ०प्र० शासन द्वारा निर्गत कार्यालय ज्ञाप संख्या 23.03.2024 की वैधता को चुनौती दी है तथा विपक्षीगण को यह परमादेश देने का अनुरोध किया है कि विज्ञापन संख्या-22-परीक्षा/2016 के क्रम में निर्गत चयन सूची दिनांक 12.12.2021 के आधार पर वे याचिकाकर्तागण को निदेशक, तकनीकी शिक्षा, उ०प्र०, कानपुर के अधीन पुस्तकालाध्यक्ष के पदों पर नियुक्ति प्रदान करें।

3. संक्षेप में प्रकरण के तथ्य इस प्रकार हैं कि उ०प्र० अधीनस्थ सेवा चयन आयोग ने विज्ञापन संख्या-22-परीक्षा/2016 द्वारा 14 विभिन्न विभागों में अनेक श्रेणियों में नियुक्तियाँ करने हेतु चयन करने के लिए विज्ञापन निकाला, जिसमें निदेशक तकनीकी शिक्षा, उ०प्र०, कानपुर के अधीन पुस्तकालाध्यक्ष के 69 पद रु० 2,800/-ग्रेड वेतन, रु० 5,200-20,200/- वेतन क्रम के थे। याचिकाकर्तागण ने उपरोक्त विज्ञापन के संदर्भ में प्रार्थनापत्र दिये तथा चयन प्रक्रिया में प्रतिभाग किया। लिखित परीक्षा तथा साक्षात्कार के उपरान्त उ०प्र० अधीनस्थ सेवा चयन आयोग ने दिनांक 12.12.2021 को उपरोक्त विज्ञापन संख्या-22 के क्रम में चयन परिणाम घोषित किया, जिसमें याचिकाकर्तागण सहित 23 अभ्यर्थी चयनित घोषित किये गये।

4. अंतिम चयन सूची प्रकाशित होने के बाद भी चयनित अभ्यर्थियों को नियुक्ति-पत्र निर्गत नहीं किये गये। याचिकाकर्तागण की जानकारी के अनुसार नियुक्ति पत्र निर्गत न होने का कारण यह है कि दिनांक 01.03.2019 को भारतीय तकनीकी शिक्षा परिषद ने तकनीकी संस्थानों में कार्यरत कर्मियों के वेतनमान, सेवा शर्तें तथा शिक्षकों एवं अन्य शिक्षण कर्मियों यथा पुस्तकालय एवं शारीरिक शिक्षा कर्मियों के वेतनमान, सेवा शर्तों तथा न्यूनतम योग्यता तथा संस्थानों में स्तर बनाए रखने के उपायों के संबंध में नियमावली प्रकाशित की। उक्त नियमावली के प्रस्तर 5.1 के अनुसार सहायक पुस्तकालयाध्यक्ष (वेतन स्तर, 9ए, प्रारम्भिक वेतन रु० 56,100/-) के लिए न्यूनतम योग्यता निम्न प्रकार निर्धारित की गयीः-

> *"1-पुस्तकालय विज्ञान, सूचना विज्ञान, अभिलेखन विज्ञान में परास्नातक डिग्री अथवा समकक्ष व्यावसायिक डिग्री कम से कम प्रथम श्रेणी में उत्तीर्ण अथवा समकक्ष योग्यता तथा लगातार उत्कर्ष शैक्षणिक प्रदर्शन के साथ ही पुस्तकालय के कम्प्यूटरीकरण का ज्ञान;*
>
> *2- विश्वविद्यालय अनुदान आयोग द्वारा संचालित राष्ट्रीय स्तर परीक्षा में उत्तीर्ण होना अथवा विश्वविद्यालय अनुदान आयोग द्वारा अनुमोदित अन्य समकक्ष परीक्षा।"*

5. दिनांक 09.06.2021 को श्री राज्यपाल महोदय, उ०प्र० ने भारतीय संविधान के अनुच्छेद 309 द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए उ०प्र० तकनीकी शिक्षा (अध्यापन) सेवा में भर्तियों तथा कार्यरत कर्मियों की सेवा शर्तों के संबंध में उ०प्र० तकनीकी शिक्षा (अध्यापन) सेवा नियमावली 2021 प्रख्यापित की, जो तुरंत प्रभावी हो गयी। राजकीय पॉलीटेक्निक में पुस्तकालयाध्यक्ष का पद नियमावली के नियम-5 की श्रेणी-6 में अंकित है, जिसका भर्ती का स्रोत शत-प्रतिशत उ०प्र० लोक सेवा आयोग द्वारा की गयी सीधी भर्ती से है। इस पद के लिए अर्हता तथा शैक्षिक योग्यता भारतीय तकनीकी शिक्षा परिषद द्वारा पुस्तकालयाध्यक्ष के पद के लिए निर्धारित शर्तों के अनुसार होगी। पुस्तकालयाध्यक्ष का प्रारम्भिक वेतनमान रु० 56,100/-, वेतनमान स्तर 9ए निर्धारित किया गया तथा अगला वेतन स्तर शासनादेश दिनांक 16.03.2020 के प्राविधानों के अनुसार होगा। पुस्तकालयाध्यक्ष के लिए न्यूनतम शैक्षिक योग्यता पुस्तकालय विज्ञान में प्रथम श्रेणी के साथ परास्नातक उपाधि तथा कम्प्यूटर के ज्ञान सहित लगातार उत्कर्ष शैक्षणिक प्रदर्शन तथा विश्वविद्यालय अनुदान आयोग द्वारा संचालित राष्ट्रीय स्तर परीक्षा उत्तीर्ण होना अथवा विश्वविद्यालय अनुदान आयोग द्वारा अनुमोदित कोई अन्य समकक्ष परीक्षा उत्तीर्ण होना है।

6. उक्त नियमावली में यह प्राविधान है कि जो पुस्तकालयाध्यक्ष दिनांक 01.01.1996 तथा 15.03.2000 के बीच डिप्लोमा स्तर के संस्थान में उस समय प्रभावी भर्ती

नियमावली के अनुसार नियुक्त हुआ था, यदि वह भारतीय तकनीकी शिक्षा परिषद द्वारा निर्धारित न्यूनतम शैक्षिक योग्यता धारण कर लेता है, तो उसे सी०ए०एस० (कैरियर एडवांसमेंट स्कीम) के अंतर्गत अगले उच्च स्तर पर भर्ती करने के लिए विचार किया जाएगा।

7. इसके उपरान्त उ०प्र० लोक सेवा आयोग ने विज्ञापन संख्या-A-7/E1/2021, दिनांक 15.09.2021 उ०प्र० प्राविधिक शिक्षा (अध्यापन) सेवा परीक्षा 2021 हेतु प्रकाशित किया, जिसमें अन्य कई पदों के साथ पुस्तकालयाध्यक्ष के 87 पद सम्मिलित थे। पुस्तकालयाध्यक्ष के लिए योग्यता पुस्तकालय विज्ञान में कम से कम प्रथम श्रेणी के साथ स्नातकोत्तर उपाधि या उसके समकक्ष और कम्प्यूटर ज्ञान के साथ निरंतर उत्कृष्ट शैक्षणिक प्रदर्शन, विश्वविद्यालय अनुदान आयोग द्वारा संचालित राष्ट्रीय स्तर की परीक्षा अथवा विश्वविद्यालय अनुदान आयोग द्वारा अनुमोदित अन्य समकक्ष परीक्षा उत्तीर्ण होना आवश्यक था। साथ ही साथ यह भी कथन था कि डिप्लोमा स्तरीय संस्थानों के लिए ऐसे पुस्तकालयाध्यक्ष, जिनकी भर्ती डिप्लोमा स्तरीय संस्थानों में विद्यमान भर्ती नियमावली के साथ दिनांक 01.01.1996 और दिनांक 15.03.2000 के मध्य हुई है, ज्येष्ठ वेतनमान के मात्र अगले उच्चतर ग्रेड में सी०ए०एस० (कैरियर एडवांसमेंट स्कीम) के अधीन उच्चीकरण हेतु विचार किया जाएगा, यदि वे न्यूनतम शैक्षिक योग्यता धारण करते हों।

8. जब चयनित अभ्यर्थियों को नियुक्ति प्राप्त नहीं हुई तो, कुछ चयनित अभ्यर्थियों ने इस न्यायालय में रिट-ए संख्या-5390 वर्ष 2020 योजित करके निदेशक तकनीकी शिक्षा, उ०प्र० को 13 याचिकाकर्ताओं को चयन सूची दिनांक 10.12.2021 के आधार पर नियुक्ति देने का अनुरोध किया। साथ ही उन याचिकाकर्ताओं ने उ०प्र० लोक सेवा आयोग द्वारा जारी विज्ञापन दिनांक 15.09.2021 को भी चुनौती दी। यह रिट याचिका दिनांक 05.12.2022 के निर्णय से स्वीकार करते हुए विपक्षीगण को यह निर्देश दिया गया कि उ०प्र० अधीनस्थ सेवा चयन आयोग द्वारा प्रकाशित परिणाम दिनांक 10.12.2021 के क्रम में एक माह के अंदर नियुक्तियाँ प्रदान करें (यदि इसके विरुद्ध कोई अन्य विधिक बाधा न हो)। आदेश में यह भी कथित है कि यदि राज्य के कोई प्राधिकारी इससे भिन्न मत के हों, तो वह इसी अवधि में निर्णय में की गयी टिप्पणियों को दृष्टिगत रखते हुए उपरोक्त अवधि में ही अपना निर्णय लें तथा ऐसी परिस्थिति में पक्षकारों के अधिकार विपक्षी संख्या-1, राज्य सरकार के निर्णय के अधीन होंगे।

9. उक्त आदेश का अनुपालन न होने पर याचिकाकर्तागण ने कंटेम्प्ट प्रार्थनापत्र संख्या-419 वर्ष 2019 प्रस्तुत किया, जिसके उपरान्त विपक्षी संख्या-1 ने आलोच्य आदेश दिनांक 23.03.2024 पारित करके याचिकाकर्तागण का दावा निरस्त कर दिया है। उक्त आदेश दिनांक 23.03.2024 में यह अंकित है कि रिट ए संख्या-5390 वर्ष 2022 में पारित आदेश दिनांक 05.12.2022 के विरुद्ध इस न्यायालय के समक्ष दिनांक 18.01.2023 को विशेष अपील संख्या-65 वर्ष 2023 प्रस्तुत की गयी है, किन्तु न्यायालय की व्यस्तता के कारण विशेष अपील पर सुनवाई संभव नहीं हो पा रही है। इस बीच अवमानना वाद संख्या-419 वर्ष 2024 में दिनांक 05.03.2024 को आदेश पारित करते हुए एक माह से अनधिक समय रिट याचिका में पारित आदेश दिनांक 05.12.2022 के अनुपालन के लिए दिया गया तथा कंटेम्प्ट याचिका दिनांक 15.04.2024 के लिए नियत कर दी गयी।

10. आदेश दिनांक 23.03.2024 में यह भी कथित है कि विभाग के कतिपय कार्मिकों द्वारा उ०प्र० राज्य के डिप्लोमा स्तरीय संस्थानों में अखिल भारतीय तकनीकी शिक्षा परिषद की संस्तुतिओं के अनुरूप स्टाफ स्ट्रक्चर, शिक्षकों एवं अन्य शैक्षणिक स्टाफ जैसे पुस्तकालयाध्यक्ष पद की शैक्षिक अर्हता तथा वेतनमान आदि के मापदंड लागू किये जाने हेतु इस न्यायालय के समक्ष रिट याचिका संख्या-13727 वर्ष 1991, फेडरेशन ऑफ इण्डियन पालीटेक्निक टीचर्स आर्गनाइजेशन बनाम उ०प्र० राज्य योजित की गयी थी, जो दिनांक 11.04.2001 को निर्णीत हुई। आदेश दिनांक 11.04.2001 का अनुपालन न होने के कारण अवमानना याचिका संख्या-41 वर्ष 2013 योजित हुई, जिसमें पारित आदेश दिनांक 07.10.2017 व 24.11.2017 के अनुपालन में शासनादेश संख्या-709/16-2-22018-138(डब्लू)/99, दिनांक 03.05.2018 निर्गत करके उ०प्र० राज्य की डिप्लोमा स्तरीय संस्थाओं में अखिल भारतीय तकनीकी शिक्षा परिषद द्वारा संस्तुत शैक्षिक अर्हता, पदनाम, वेतनमान एवं अन्य सेवा शर्तो को लागू किये जाने हेतु निर्गत विनियम 2010 प्रभावी किये गये।

11. तकनीकी शिक्षा में शिक्षकों एवं अन्य शैक्षणिक स्टाफ जैसे पुस्तकालय तथा शारीरिक शिक्षा कार्मिकों की नियुक्ति के लिए वेतनमान, सेवा शर्तें और न्यूनतम अर्हताएं तथा तकनीकी शिक्षा में मानकों के अनुरक्षण के लिए उपायों पर अभातशिप (डिप्लोमा) विनियम, की अधिसूचना दिनांक 01.03.2019 को

प्रकाशित हुई, जो दिनांक 01.01.2016 से प्रभावी की गयी, जिसके प्रस्तर 1.4(क), (ख), एवं (च) में निम्नवत् प्राविधान हैं:-

*"1.4 सेवा शर्तों के प्रभावी होने की तारीख*

*(क) अन्य सभी सेवा शर्तें जिनमें योग्यता, अनुभव, भर्ती, प्रोन्नतियां आदि शामिल हैं, इस राजपत्र अधिसूचना की तारीख से प्रभावी होंगी।*

*(ख) 01.01.2016 से इस राजपत्र अधिसूचना के जारी होने तक योग्यताएं, अनुभव, भर्ती, प्रोन्नतियाँ आदि अखिल भारतीय तकनीकी शिक्षा परिषद् तकनीकी संस्थाओं (डिप्लोमा) में शिक्षकों तथा अन्य शैक्षणिक स्टॉफ के लिए वेतनमान, सेवा शर्तें और अर्हताएं विनियम, 2010 दिनांक 05 मार्च 2010 तथा समय-समय पर जारी पश्चातवर्ती अधिसूचनाओं द्वारा प्रशासित की जाएगी।*

*(च) ऐसे मामलों में, जहां विज्ञापन प्रकाशित किया गया था, आवेदन आमंत्रित किए गए थे, परन्तु साक्षात्कार इस अधिसूचना के प्रकाशन तक संचालित नहीं किए गए, संस्थानों/नियोजकों से अपेक्षित है कि वे शुद्धिपत्र प्रकाशित करें और आवेदनों का प्रक्रमण इस अधिसूचना में दिए गए उपबंधों के अनुसार किया जाए।"*

12. विनियम 2019 को शासनादेश दिनांक 16.03.2020 द्वारा लागू किये जाने का निर्णय लिया गया है। तत्पश्चात् संविधान के अनुच्छेद 309 के परन्तुक द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए इस विषय पर समस्त विद्यमान नियमों एवं आदेशों का अतिक्रमण करके शासन की अधिसूचना दिनांक 09.06.2021 द्वारा उ०प्र० प्राविधिक शिक्षा (अध्यापन) सेवा नियमावली 2021 द्वारा सेवा में व्यक्तियों की नियुक्ति, शैक्षिक अर्हता, वेतनमान और सेवा शर्तों को विनियमित करने के लिए नियम प्रख्यापित किये गये, जिसके अनुसार पुस्तकालयाध्यक्ष पद हेतु शैक्षिक अर्हता, वेतनमान, भर्ती का स्रोत आदि निम्नवत् है:-

| पूर्व विद्यमान नियमों के अनुसार पुस्तकालयाध्यक्ष पद की निर्धारित अर्हता | वेतनमान व भर्ती का स्रोत | उत्तर प्रदेश प्राविधिक शिक्षा (अध्यापन) सेवा नियमावली-2021 के अनुसार शैक्षिक अर्हता | वेतनमान व भर्ती का स्रोत |
|---|---|---|---|
| स्नातक उपाधि के साथ लाइब्रेरी साइंस में डिप्लोमा। (एक) प्रादेशिक सेना में न्यूनतम 02 वर्ष की अवधि तक की सेवा की हो, या (दो) राष्ट्रीय कैडेट कोर का "बी" प्रमाण-पत्र प्राप्त किया हो। | वेतनमान-5200-20200 एवं ग्रेड वेतन रु०-2800/-भर्ती का स्रोत-उत्तर प्रदेश अधीनस्थ सेवा चयन आयोग, लखनऊ। | 1- पुस्तकालय विज्ञान में कम से कम प्रथम श्रेणी के साथ स्नातकोत्तर उपाधि या उसके समकक्ष और कम्प्यूटर ज्ञान के साथ निरन्तर उत्कृष्ट शैक्षणिक अभिलेख। 2- यू०जी०सी० द्वारा उक्त प्रयोजनार्थ संचालित राष्ट्रीय की परीक्षा अथवा यू०जी०सी द्वारा यथा अनुमोदित अन्य समकक्ष परीक्षा में अर्हता हो। | वेतनमान-प्रविष्टि वेतन 56,100 लेवलः 9क अगला वेतन लेवल शासनादेश संख्या-474/सोलह-2-2020-138(डब्लू)/99, दिनांक-16.03.20 में दिये गये उपबंध के अनुसार अनुज्ञेय है। भर्ती का स्रोत-उत्तर प्रदेश लोक सेवा आयोग, प्रयागराज। |
| | | (क) डिप्लोमा स्तरीय संस्थाओं के लिये ऐसे पुस्तकालयाध्यक्ष, जिनकी भर्ती डिप्लोमा स्तरीय संस्थाओं में विद्यमान भर्ती नियमावली के साथ दिनांक 01.01.1996 और 15.03.2000के मध्य हुई हो, ज्येष्ठ वेतनमान के मात्र अगले उच्चतर ग्रेड में सी०ए०एस० के अधीन उच्चीकरण हेतु विचारगत किये | |

| | | जायेंगे। तथापि सी०ए०एस० के अधीन अग्रेतर उच्च संचलन हेतु उनसे उसी रीति से न्यूनतम् शैक्षिक अर्हता अर्जित किया जाना अपेक्षित होगा, जैसाकि ए०आई०सी०टी०ई० अधिसूचना-2000 (उपाधि) और अनुवर्ती स्पष्टीकरणों/अधिसूचनाओं में निर्धारित है। | |
|---|---|---|---|
| | | (ख) स्नातक स्तरीय संस्थाओं के लिये यथोक्त। | |

13. अवमानना याचिका संख्या-41 वर्ष 2013 में पारित आदेश दिनांक 07.10.2017 एवं 24.11.2017 में विधिक कठिनाईयों को दृष्टिगत रखते हुए लोकसेवा आयोग द्वारा प्रकाशित विज्ञापन दिनांक 30.12.2017 में विभिन्न पदों पर चयन/भर्ती की कार्यवाही को स्थगित रखे जाने हेतु शासन के पत्र दिनांक 18.01.2018 द्वारा लोक सेवा आयोग से अनुरोध किया गया था। तत्पश्चात् निर्गत उ०प्र० प्राविधिक शिक्षा (अध्यापन) सेवा नियमावली, 2021 के प्राविधानों के अनुसार उपरोक्त पदों को सम्मिलित करते हुए शासन के पत्र दिनांक 25.06.2021 द्वारा प्रधानाचार्य/व्याख्याता (विभिन्न विषय), कर्मशाला अधीक्षक व पुस्तकालयाध्यक्ष के कुल 1357 रिक्त पदों का संशोधित अधियाचन लोक सेवा आयोग को प्रेषित किया गया, जिसमें पुस्तकालयाध्यक्ष के कुल 87 पद भी सम्मिलित थे। उक्त के आधार पर उ०प्र० लोक सेवा आयोग, प्रयागराज के विज्ञापन दिनांक 15.09.2021 द्वारा भर्ती हेतु संशोधित विज्ञप्ति प्रकाशित करते हुए चयन की प्रक्रिया संपन्न करायी जा रही है। उक्त के क्रम में ही निदेशालय के पत्र दिनांक 14.09.2016 द्वारा उ०प्र० अधीनस्थ सेवा चयन आयोग को विभिन्न पदों के साथ पुस्तकालयाध्यक्ष के 69 पद वेतनमान रु०-5,200-20200/- एवं ग्रेड वेतन रु०-2,800/- हेतु प्रेषित अधियाचन में से पुस्तकालयाध्यक्ष के पद के विज्ञापन/चयन/भर्ती की कार्यवाही को स्थगित रखे जाने हेतु निदेशालय के पत्र दिनांक 12.02.2018 एवं 16.02.2018 द्वारा अनुरोध किया गया था। उक्त के पश्चात् भी निदेशालय के विभिन्न पत्रों दिनांक 28.07.2018, 11.12.2018, 16.12.2018, 30.05.2019, 04.09.2019, 19.02.2021 तथा 23.10.2021 द्वारा उ०प्र० अधीनस्थ सेवा चयन आयोग को उपरोक्त वर्णित स्थिति से अवगत कराते हुए पुस्तकालयाध्यक्ष बैण्ड वेतनमान रु०-5,200-20,200/- एवं ग्रेड वेतन रु०-2,800/- के रिक्त 69 पदों पर विज्ञापन/चयन/भर्ती की कार्यवाही को स्थगित किये जाने हेतु कार्यालय सचिव, उ०प्र० अधीनस्थ सेवा चयन आयोग, लखनऊ से निरंतर पत्राचार किया गया, किन्तु उ०प्र० अधीनस्थ सेवा चयन आयोग, लखनऊ द्वारा निदेशालय के संदर्भित पत्रों को संज्ञान में नहीं लिया गया एवं पुस्तकालयाध्यक्ष के पदों पर चयन हेतु लिखित परीक्षा दिनांक 28.07.2019 को करायी गयी तथा दिनांक 13.10.2020 को साक्षात्कार हेतु परिणाम निर्गत किया गया। दिनांक 01.12.2020 से दिनांक 24.12.2020 तक साक्षात्कार किये गये तथा उ०प्र० अधीनस्थ सेवा चयन आयोग ने दिनांक 12.12.2021 को चयन परिणाम घोषित कर दिया, परन्तु अधीनस्थ सेवा चयन आयोग ने चयनित अभ्यर्थियों को नियुक्त करने हेतु विभाग को कोई संस्तुति उपलब्ध नहीं करायी है।

14. आदेश दिनांक 23.03.2024 में अंकित है कि उपरोक्त स्थिति से स्पष्ट है कि पूर्व में उ०प्र० प्राविधिक शिक्षा राजपत्रित अधिकारी सेवा नियमावली 1990, यथा संशोधित 1998 के अनुसार पुस्तकालयाध्यक्ष के लिए निर्धारित अर्हतानुसार उ०प्र० अधीनस्थ सेवा चयन आयोग को चयन कराये जाने की संस्तुति प्रेषित की गयी थी, परन्तु प्राविधिक शिक्षा विभाग (डिप्लोमा सेक्टर) के अंतर्गत अखिल भारतीय तकनीकी शिक्षा परिषद् के विनियम लागू होने के उपरान्त पुस्तकालयाध्यक्ष पद की अर्हता एवं वेतनमान परिवर्तित तथा उच्चीकृत हो जाने के कारण उक्त पद लोक सेवा आयोग की परिधि में आने के कारण पूर्व में उ०प्र० अधीनस्थ सेवा चयन आयोग को प्रेषित पुस्तकालयाध्यक्ष के पदों को सम्मिलित करते हुए अधियाचन उ०प्र० लोक सेवा आयोग को प्रेषित किया गया, जिसके संबंध में आयोग द्वारा लिखित परीक्षा का आयोजन कर चयन की कार्यवाही संपादित की जा रही है। इस परिस्थिति में याचीगण के प्रत्यावेदन में उठाए गये बिन्दु निरस्त कर दिये गये।

15. उक्त आदेश की वैधता को चुनौती देते हुए याचिकाकर्तागण के विद्वान वरिष्ठ अधिवक्ता श्री अशोक खरे ने तर्क दिया कि विपक्षी संख्या-1 द्वारा पारित आलोच्य आदेश दिनांक

23.03.2024 इस न्यायालय द्वारा पारित रिट याचिका-ए संख्या-5390 वर्ष 2022 में पारित निर्णय तथा आदेश दिनांक 05.12.2022 में की गयी टिप्पणियों के विपरीत हैं, जबकि इस न्यायालय ने यह आदेशित किया था कि आदेश दिनांक 05.12.2022 में की गयी टिप्पणियों को ध्यान में रखते हुए आदेश पारित किया जाएगा। इस न्यायालय द्वारा निर्णीत किये गये बिन्दु विपक्षी संख्या-1 पर बाध्यकारी हैं और इस न्यायालय द्वारा निर्णीत बिन्दुओं के विरुद्ध पारित किया गया आदेश अवैधानिक है तथा निरस्त किये जाने योग्य है।

16. रिट-ए याचिका संख्या-7788 वर्ष 2024 के याचिकाकर्तागण के विद्वान अधिवक्ता श्री अखिलेश त्रिपाठी ने संक्षिप्त लिखित कथन प्रस्तुत किये हैं, जिसमें उन्होंने कहा है कि उ०प्र० अधीनस्थ सेवा चयन आयोग द्वारा प्रारम्भ की गयी चयन प्रक्रिया चयन हेतु विज्ञापन प्रकाशन होने की तिथि को लागू नियमों के अनुसार ही पूर्ण की जानी चाहिए। यदि जिन पदों के लिए पूर्व में विज्ञापन प्रकाशित हुआ था, उन्हें एक मृत संवर्ग घोषित कर दिया गया था तो भी पहले से प्रारम्भ हो चुकी चयन प्रक्रिया को पूर्ण किया जाना आवश्यक है। राज्य सरकार ने 2016 में प्रारम्भ हुई चयन प्रक्रिया के लिए भेजे गये अधियाचन को अथवा चयन प्रक्रिया को निरस्त नहीं किया है तथा ऐसी परिस्थिति में चयन प्रक्रिया के परिणामस्वरूप चयनित अभ्यर्थियों को नियुक्ति दी जानी चाहिए।

17. इसके विपरीत राज्य-सरकार की तरफ से विद्वान अपर महाधिवक्ता श्री अशोक मेहता ने तर्क दिया कि यद्यपि इस न्यायालय ने रिट-ए संख्या- 5390 वर्ष 2022 में पारित आदेश दिनांक 05.12.2022 द्वारा याचिकाकर्तागण को उ०प्र० अधीनस्थ सेवा चयन आयोग द्वारा घोषित परिणाम दिनांक 10.12.2021 के क्रम में नियुक्ति देने का निर्देश दिया था, किन्तु इसके साथ ही इस न्यायालय ने यह भी कहा था कि यदि राज्य के प्राधिकारी किसी भिन्न मत के हों, तो वह न्यायालय द्वारा की गयी टिप्पणियों को ध्यान में रखते हुए अपना निर्णय देने के लिए स्वतंत्र होंगे तथा पक्षकार राज्य-सरकार के प्राधिकारी द्वारा लिये गये निर्णय से बाध्य होंगे।

18. विद्वान अपर महाधिवक्ता का तर्क है कि आदेश दिनांक 05.12.2022 में इस न्यायालय ने विपक्षीगण इस न्यायालय के मत से भिन्न मत रखते हुए आदेश पारित करने की छूट दी थी तथा ऐसी परिस्थिति में आलोच्य आदेश दिनांक 23.03.2024 मात्र इस आधार पर अवैध नहीं हो जाता है कि उसमें इस न्यायालय द्वारा दिनांक 05.12.2022 में दिये जा रहे मत से भिन्न मत लिया गया है।

19. विद्वान अपर महाधिवक्ता ने यह भी तर्क दिया कि अखिल भारतीय तकनीकी शिक्षा परिषद् के विनियम लागू होने के पश्चात् पुस्तकालयाध्यक्ष पद की अर्हता एवं वेतनमान परिवर्तित हो जाने के कारण उक्त पद लोक सेवा आयोग की परिधि में आ जाने के कारण पूर्व में पुस्तकालयाध्यक्ष के जिन पदों के संबंध में उ०प्र० अधीनस्थ सेवा चयन आयोग को अधियाचन प्रेषित किया जा चुका था, उनको सम्मिलित करते हुए उ०प्र० लोक सेवा आयोग द्वारा चयन की कार्यवाही संपादित की जा रही है। जिन पदों के संबंध में उ०प्र० लोक सेवा आयोग द्वारा चयन प्रक्रिया चलायी जा रही है, उनके संबंध में देय वेतनमान तथा निर्धारित योग्यता एवं अर्हता उन पदों के लिए योग्यता तथा अर्हता भिन्न हैं, जिनके संबंध में याचिकाकर्तागण ने उ०प्र० अधीनस्थ सेवा चयन आयोग को प्रार्थनापत्र दिया था।

20. विद्वान अपर महाधिवक्ता ने यह भी तर्क दिया कि रिट याचिका संख्या-6738 वर्ष 2024 में याचिकाकर्ता संख्या-3 जयवीर सिंह, याचिकाकर्ता संख्या-6 राहुल यादव तथा याचिकाकर्ता संख्या-8 संगीता देवी ने उ०प्र० लोक सेवा आयोग द्वारा किये जा रहे चयन में प्रतिभाग किया है तथा उनकी तरफ से प्रस्तुत रिट याचिका पोषणीय नहीं है।

21. संलग्न रिट याचिका संख्या-7788 वर्ष 2024 के संबंध में विद्वान अपर महाधिवक्ता का तर्क है कि इस रिट याचिका के याचीगण रिट-ए संख्या-5390 वर्ष 2022 में पक्षकार नहीं थे तथा उक्त रिट याचिका में पारित निर्णय दिनांक 05.12.2022 का वे याचीगण कोई लाभ नहीं ले सकते हैं क्योंकि निर्णय दिनांक 05.12.2022मात्र रिट-ए संख्या-5390 वर्ष 2022 के पक्षकारों के संबंध में पारित किया गया था।

22. जहाँ तक याचिकाकर्ता संख्या-3, 6 तथा 8 द्वारा प्रस्तुत रिट याचिका की पोषणीयता का प्रश्न है, मात्र इस आधार पर, कि उन याचिकाकर्तागण ने उ०प्र० लोक सेवा आयोग द्वारा प्रकाशित पदों के संबंध में आवेदन किया है, उनका आदेश दिनांक 23.03.2024 की वैधता को चुनौती देने का अधिकार समाप्त नहीं हो जाता है तथा न्यायालय विद्वान अपर महाधिवक्ता के इस तर्क से सहमत नहीं है।

23. इस न्यायालय को आदेश दिनांक 23.03.2024 की वैधता प्रकरण के समस्त तथ्यों एवं परिस्थितियों तथा संगत विधि-व्यवस्था को दृष्टिगत रखते हुए तय करनी होगी।

24. रिट-ए संख्या-5390 वर्ष 2022 में पारित निर्णय दिनांक 05.12.2022 में इस न्यायालय ने **हिमाचल प्रदेश राज्य तथा अन्य बनाम राजकुमार तथा अन्य** (2023) 3 एस०सी०सी० 773 के निर्णय का आश्रय लिया है, जिसमें माननीय उच्चतम न्यायालय ने इस प्रश्न को निर्णीत किया कि क्या नियमों में संशोधन होने के पूर्व रिक्त हुए पदों पर नियुक्ति असंशोधित नियमों के अनुसार होनी चाहिए या नए संशोधित नियमों के साथ होनी चाहिए। इस संबंध में **वाई०वी० रंगैया बनाम जे० श्रीनिवास राव** (1983) 3 सुप्रीम कोर्ट केसेस 284 में माननीय उच्चतम न्यायालय ने यह निर्णीत किया था कि जो रिक्तियाँ नियमों में संशोधन के पूर्व की हैं, उन्हें पुराने असंशोधित नियमों के अनुसार ही भरा जाना चाहिए। इसके पश्चात उच्चतम न्यायालय ने कई निर्णय रंगैया निर्णय प्रकरण के अनुसार दिये। राजकुमार के उपरोक्त निर्णय में माननीय उच्चतम न्यायालय ने लोक पदों के संबंध में निम्नलिखित सिद्धांत स्पष्ट किये हैः-

> *1- जब तक संविधान में कोई विशेष प्राविधान न हो, संघ अथवा राज्य के अधीन किसी लोक सेवा में कार्यरत व्यक्ति राष्ट्रपति अथवा राज्यपाल की इच्छानुसार पद धारित करता है (अनुच्छेद 310)। इच्छा तक पद धारित करना राज्याधीन सेवाओं के संबंध में लोकहित की संवैधानिक नीति है, जो जनहित के उद्देश्य से बनायी गयी है।*
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> *2- भारत संघ तथा इसके राज्य सेवा में भर्ती, सेवा शर्तों, सेवा अवधि तथा सेवा समाप्ति के संबंध में भारतीय संविधान के अनुच्छेद 309, 310 तथा 311 के अनुसार विधियाँ तथा नियमावली बनाने में सक्षम हैं। पक्षों के अधिकार तथा कर्तव्य उनकी सहमति पर निर्भर करते हैं, अपितु विधि द्वारा प्रदत्त अधिकारों तथा कर्तव्यों द्वारा उनका विधिक संबंध निर्धारित होता है। इस प्रकार लोक सेवा एक विधिक स्तर प्रदान करती है, जो कि पक्षकारों को एक अनुबंध से मिलने वाले अधिकारों से भिन्न है।*
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> *3- विधिक स्तर की विशेषता विधि द्वारा स्थापित अधिकार एवं कर्तव्य हैं, जो कि सरकार द्वारा एक तरफा रूप से, बिना कर्मचारी की सहमति लिये हुए, बदले अथवा संशोधित किये जा सकते हैं।*
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> *4- सरकार तथा इसके कर्मचारियों के बीच के रिश्ते नियमों से ही शासित होते हैं तथा नियमों के प्राविधानों से परे कोई अधिकार नहीं होते हैं।*
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> *5- सरकार द्वारा की जा रही किसी भर्ती प्रक्रिया में किसी को नियुक्ति प्राप्त करने का कोई अधिकार नहीं होता है तथा मात्र उचित रूप से भर्ती हेतु विचार किये जाने का अधिकार होता है। भर्ती प्रक्रिया भी इस संबंध में बनाये गये नियमों के अनुसार होती है।*
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> *6- किसी भी लोक सेवक की सेवा की शर्तें, जिनमें पदोन्नति तथा ज्येष्ठता आदि सम्मिलित हैं, संगत नियमों से शासित होती हैं। नियमों से इतर सेवा शर्तों के संबंध में कोई भी अधिकार निहित नहीं होते हैं।*
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> *7- सेवा शर्तों के संबंध में विधियाँ बनाने के साथ ही सरकार भी उन नियमों के प्राविधानों से समान रूप से बाध्य होती हैं। सेवा शर्तों के संबंध में बनाये गये नियमों से परे सरकार को भी कोई विवेकाधिकार नहीं होता है तथा सरकार के कृत्यों की न्यायिक समीक्षा की जा सकती है।*

25. राजकुमार के उपरोक्त निर्णय में माननीय उच्चतम न्यायालय ने यह कहा कि वाई०वी० रंगैया का निर्णय सही विधि निर्धारित नहीं करता है तथा उसमें प्रतिपादित विधिक सिद्धांत को निरस्त कर दिया गया।

26. राजकुमार के निर्णय में 15 ऐसे निर्णयों की समीक्षा की गयी, जिनमें रंगैया प्रकरण के निर्णय से भिन्न मत लिया गया था तथा माननीय उच्चतम न्यायालय ने निम्नलिखित सिद्धांत प्रतिपादित किये;

> "1- ऐसा कोई सार्वभौमिक नियम नहीं है कि रिक्तियाँ उसी नियमों के आधार पर भरी जाए, जो रिक्ति उत्पन्न होने की तिथि को प्रभावी थे तथा रंगैया निर्णय को उस प्रकरण में संगत नियमों के आलोक में ही पढ़ा जाना चाहिए।
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> 2- यह विधि का सुस्थापित सिद्धांत है कि एक अभ्यर्थी को वर्तमान नियमों के आलोक में नियुक्ति हेतु विचार किये जाने का अधिकार है। वर्तमान नियमों से तात्पर्य उन नियमों से है जो विचार किये जाने के समय प्रभावी हों। पदोन्नति के लिए विचार में रखे जाने का अधिकार उस दिनांक को उत्पन्न होता है, जिस दिनांक को अन्य अर्ह अभ्यर्थियों के संबंध में विचार किया जा रहा हो।
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> 3- सरकार को यह अधिकार है कि वह सोच-समझकर यह नीतिगत निर्णय ले कि संशोधन के पूर्व उत्पन्न हुई रिक्तियों को नहीं भरा जाएगा। ऐसा नीतिगत निर्णय लिये जाने की स्थिति में किसी भी

अभ्यर्थी को यह अधिकार नहीं होगा कि वह नए नीतिगत निर्णय के बाद भी पुराने नियमों के अनुसार भर्ती माँगे। किसी इकाई में अधिक प्रभावी ढंग से कार्य करवाने के उद्देश्य से उत्पन्न स्थिति में सरकार का यह दायित्व नहीं है कि वह पुराने नियमों के अंतर्गत कोई भी नियुक्ति करे। मात्र इतना अनिवार्य है कि सरकार का नीतिगत निर्णय उचित तथा सकारण हो एवं संविधान के अनुच्छेद 14 की कसौटी पर खरा उतरे।

4- रंगैया प्रकरण का निर्णय मात्र इस कारण से लागू नहीं किया जा सकता कि पदों का गठन हो चुका था, क्योंकि पदों पर नियुक्ति करना नियोजक अधिकारी के लिए अनिवार्य नहीं होता है।

5- राज्य का ऐसा कोई वैधानिक दायित्व नहीं है कि नियमों में संशोधन के पूर्व उत्पन्न हुई रिक्तियों पर नियुक्ति के लिए विचार किया जाए तथा राज्य को ऐसा करने के लिए कोई निर्देश नहीं दिया जा सकता है।"

27. **आसाम लोक सेवा आयोग बनाम प्रांजल कुमार सर्मा**, (2020) 20 एस०सी०सी० 680 के निर्णय में माननीय उच्चतम न्यायालय ने यह निर्णीत किया कि कोई भी चयन प्रक्रिया चयन प्रक्रिया प्रारम्भ होने के दिन प्रभावी नियमों के अनुसार पूरी की जानी चाहिए तथा किसी अभ्यर्थी को चयन प्रक्रिया के दौरान नियमों में संशोधन द्वारा उसके चयन हेतु विचार किये जाने के अधिकार से वंचित नहीं किया जा सकता, जब तक कि संशोधन पूर्व समय से प्रभावी होने का कोई प्राविधान न हो।

28. **रामजीत सिंह कर्दम बनाम संजीव कुमार तथा अन्य**, (2020) 20 एस०सी०सी० 209 में माननीय उच्चतम न्यायालय ने यह कहा कि लोक सेवा हेतु अभ्यर्थियों का चयन करते समय राज्य का उद्देश्य हमेशा यह होता है कि सबसे अच्छे तथा उपयोगी व्यक्ति को नियुक्ति किया जाए। माननीय उच्चतम न्यायालय ने **लीलाधर बनाम राजस्थान राज्य**, (1981) 4 सुप्रीम कोर्ट केसेस 159 का हवाला दिया, जिसमें यह कहा गया था कि लोक सेवा में नियुक्ति हेतु चयन प्रक्रिया का उद्देश्य यह निश्चित करना है कि सर्वश्रेष्ठ तथा कार्य के लिए सर्वाधिक उपयुक्त व्यक्ति का चयन किया जाए। लोक सेवा में नियुक्ति हेतु चयन योग्यता के आधार पर ही किया जाना चाहिए।

29. लीलाधर प्रकरण के उपरोक्त निर्णय को **अशोक कुमार यादव बनाम हरियाणा राज्य**, (1985) 4 सुप्रीम कोर्ट केसेस 417 में भी पुष्ट किया गया।

30. माननीय उच्चतम न्यायालय ने **तेज प्रकाश पाठक बनाम राजस्थान उच्च न्यायालय**, (2013) 4 सुप्रीम कोर्ट केसेस 540 का भी वर्णन किया, जिसके द्वारा माननीय सर्वोच्च न्यायालय के तीन माननीय न्यायाधीशों की पीठ ने दिनांक 20.03.2013 के आदेश से इस प्रश्न को वृहद् पीठ को संदर्भित किया गया कि यद्यपि चयन प्रक्रिया प्रारम्भ होने के पश्चात् चयन के संबंध में नियम परिवर्तित करके चयन प्रक्रिया में हेर-फेर नहीं किया जा सकता है, किन्तु क्या यह सिद्धांत ऐसी परिस्थिति में भी लागू होगा जब नियमों में बदलाव द्वारा चयन को और कठिन बनाया जा रहा हो। माननीय उच्चतम न्यायालय के पाँच माननीय न्यायाधीशों ने उक्त प्रकरण में दिनांक 18.07.2023 को अंतिम सुनवाई करके निर्णय सुरक्षित रख लिया था, किन्तु वृहद् पीठ का निर्णय अभी तक प्रतीक्षित है।

31. रिट-ए संख्या-5390 वर्ष 2022 के निर्णय दिनांक 05.12.2022 में अंकित है कि राज्य की तरफ से यह नहीं दर्शाया जा सका कि अधियाचन किसी भी स्तर पर वापस लिया गया। उक्त निर्णय में कहा गया कि यद्यपि यह सही है कि मात्र चयन से किसी चयनित अभ्यर्थी को नियुक्ति प्राप्त करने का कोई अधिकार निहित नहीं हो जाता है, तथापि चयन प्रक्रिया को मात्र प्रशासनिक अकर्मण्यता अथवा प्रशासनिक कृत्यों के अधूरेपन के कारण व्यर्थ नहीं जाने देना चाहिए।

32. रिट-ए संख्या-5390 वर्ष 2022 के निर्णय में इस न्यायालय ने यह कहा कि उ०प्र० अधीनस्थ सेवा चयन आयोग द्वारा चयन प्रक्रिया प्रारम्भ कर दिये जाने के बाद अखिल भारतीय तकनीकी शिक्षा परिषद द्वारा प्रख्यापित नियमों तथा उसके आधार पर उ०प्र० शासन द्वारा प्रख्यापित नियमावली, 2021 में यह कथित नहीं था कि उपरोक्त नियम भूतलक्षी प्रभाव के होंगे। अतः उक्त नियमों के पहले से चल रही चयन प्रक्रिया की वैधता पर कोई प्रभाव नहीं पड़ेगा। इस न्यायालय ने यह भी कहा कि नए नियम लागू होने के पश्चात भी राज्य के अधिकारियों ने कोई शुद्धिपत्र प्रकाशित नहीं किया। उ०प्र० अधीनस्थ सेवा चयन आयोग को स्वतः ही अधियाचन निरस्त अथवा संशोधित करने का कोई अधिकार प्राप्त नहीं था तथा उ०प्र० अधीनस्थ सेवा चयन आयोग द्वारा चयन प्रक्रिया जारी रखे जाने में कोई अवैधानिकता नहीं थी। जब उ०प्र० अधीनस्थ सेवा चयन आयोग चयन प्रक्रिया प्रारम्भ कर चुका था, राज्य के अधिकारियों को उस चयन प्रक्रिया में हस्तक्षेप करने अथवा उ०प्र० अधीनस्थ सेवा चयन आयोग को चयन प्रक्रिया को लंबित रखने का निर्देश देने का कोई विधिक अधिकार प्राप्त नहीं था। अखिल भारतीय तकनीकी शिक्षा परिषद की विज्ञप्ति दिनांक 01.03.2019 में यह प्राविधान है कि जहाँ विज्ञापन का प्रकाशन

हो चुका है, आवेदन माँगे जा चुके हैं, किन्तु विज्ञप्ति के प्रकाशन तक साक्षात्कार नहीं हुए हैं, संस्थान/सेवायोजक एक शुद्धिपत्र प्रकाशित करके विज्ञप्ति दिनांक 01.03.2019 के अनुसार प्रार्थनापत्रों पर कार्यवाई कर सकते हैं, किन्तु प्रस्तुत प्रकरण में ऐसा नहीं किया गया। इस न्यायालय ने यह भी पाया कि उ०प्र० तकनीकी शिक्षा (अध्यापन) सेवा नियमावली, 2021 के लागू होने का पहले से चल रही चयन प्रक्रिया पर कोई विपरीत प्रभाव नहीं पड़ा।

33. इस न्यायालय ने यह भी कहा कि राज्य सरकार की तरफ से प्रस्तुत प्रति शपथपत्र में यह कहा गया है कि राज्य सरकार के सचिव तकनीकी शिक्षा ने दिनांक 18.01.2018 को उ०प्र० लोक सेवा आयोग के सचिव को नए नियमों के लागू होने तक कोई परीक्षा न कराने को कहा, किन्तु यह पत्र उ०प्र० अधीनस्थ सेवा चयन आयोग को नहीं भेजा गया था।

34. **रामजीत सिंह कर्दम बनाम संजीव कुमार**, (2020) 20 सुप्रीम कोर्ट केसेस 209 में माननीय उच्चतम न्यायालय ने अवधारित किया कि चयन के आधारों को चयन आयोग मनमाने तरीके से बदल नहीं सकता है। माननीय उच्चतम न्यायालय ने **तमिलनाडु कम्प्यूटर साइंस बी.एड. गवर्नमेंट वेलफेयर सोसायटी (1) बनाम हायर सेकेंडरी स्कूल कम्प्यूटर टीचर्स एसोसिएशन**, (2009) 14 एस०सी०सी 517 के निर्णय का आश्रय लिया, जिसमें यह कहा गया था कि चयन प्रक्रिया के दौरान न्यूनतम अर्हता अंकों को पचास प्रतिशत से घटा कर पैंतीस प्रतिशत किया जाना न्यायोचित नहीं था। माननीय उच्चतम न्यायालय ने **तेज प्रकाश पाठक बनाम राजस्थान राज्य**, (2013) 4 एस०सी०सी 540 के आदेश का भी हवाला दिया, जिसके द्वारा प्रकरण वृहद् पीठ को संदर्भित किया गया तथा जिसमें वृहद् पीठ का निर्णय अभी भी प्रतीक्षित है। माननीय उच्चतम न्यायालय ने कहा कि वर्तमान में विधिक व्यवस्था यह है कि चयन करने वाली संस्था समय-समय पर मनमाने तरीके से चयन की शर्तें बदल नहीं सकती। रामजीत सिंह कर्दम के प्रकरण में चयन की शर्तें इस प्रकार मनमाने ढंग से बदली गयी थी कि चयन का स्तर नीचे गिर गया था, न कि ऊपर उठा था। ऐसी परिस्थिति में माननीय उच्चतम न्यायालय ने उच्च न्यायालय के निर्णय, जिसके द्वारा चयन प्रक्रिया प्रारम्भ होने के पश्चात चयन की शर्तों में बदलाव करके उनका स्तर नीचे गिराया गया, को अनुचित ठहराया था, में हस्तक्षेप करने से अस्वीकार कर दिया।

35. लीलाधर बनाम राजस्थान, रामजीत सिंह कर्दम बनाम संजीव कुमार तथा हिमाचल प्रदेश राज्य बनाम राजकुमार के निर्णयों में प्रतिपादित सिद्धातों का सार यह है कि ऐसा कोई सार्वभौमिक नियम नहीं है कि रिक्तियाँ उसी नियमों के आधार पर भरी जाए, जो रिक्ति उत्पन्न होने की तिथि को प्रभावी थे। सरकार को यह अधिकार है कि वह सोच-समझकर यह नीतिगत निर्णय ले कि संशोधन के पूर्व उत्पन्न हुई रिक्तियों को नहीं भरा जाएगा। ऐसा नीतिगत निर्णय लिये जाने की स्थिति में किसी भी अभ्यर्थी को यह अधिकार नहीं होगा कि वह नए नीतिगत निर्णय के बाद भी पुराने नियमों के अनुसार भर्ती माँगे। किसी इकाई में अधिक प्रभावी ढंग से कार्य करवाने के उद्देश्य से उत्पन्न स्थिति में सरकार का यह दायित्व नहीं है कि वह पुराने नियमों के अंतर्गत कोई भी नियुक्ति करे। मात्र इतना अनिवार्य है कि सरकार का नीतिगत निर्णय उचित तथा सकारण हो एवं संविधान के अनुच्छेद 14 की कसौटी पर खरा उतरे। राज्य का ऐसा कोई वैधानिक दायित्व नहीं है कि नियमों में संशोधन के पूर्व उत्पन्न हुई रिक्तियों पर नियुक्ति के लिए विचार किया जाए तथा राज्य को ऐसा करने के लिए कोई निर्देश नहीं दिया जा सकता है। लोक सेवा में नियुक्ति हेतु चयन प्रक्रिया का उद्देश्य यह निश्चित करना है कि सर्वश्रेष्ठ तथा कार्य के लिए सर्वाधिक उपयुक्त व्यक्ति का चयन किया जाए।

36. प्रस्तुत प्रकरण में वर्ष 2016 में चयन प्रक्रिया प्रारम्भ होने के पश्चात अखिल भारतीय तकनीकी शिक्षा परिषद ने दिनांक 01.03.2019 की विज्ञप्ति द्वारा पुस्तकालयाध्यक्ष के पद का स्तर, वेतनमान तथा न्यूनतम योग्यता उच्चीकृत कर दी, न कि योग्यता का स्तर घटाया गया। उ०प्र० तकनीकी शिक्षा परिषद की विज्ञप्ति के अनुसार ही राज्य सरकार ने भी उ०प्र० तकनीकी शिक्षा (अध्यापन) सेवा नियमावली 2021 प्रख्यापित करके पुस्तकालयाध्यक्ष के स्तर का उन्नयन कर दिया, जिससे वह पद समूह 'ग' से उठ कर समूह 'ख' में आ गया तथा उक्त पद के लिए देय वेतन बढ़ गया। साथ ही पुस्तकालयाध्यक्ष पद के लिए न्यूनतम योग्यता भी उच्चीकृत होकर पुस्तकालय विज्ञान में कम से कम प्रथम श्रेणी के साथ स्नातकोत्तर उपाधि कर दी गयी, जबकि पहले यह मात्र स्नातक उपाधि के साथ पुस्तकालय विज्ञान में डिप्लोमा थी। पुस्तकालयाध्यक्ष पद की न्यूनतम योग्यता का उन्नयन तथा इसके साथ ही पद के लिए देय वेतन आदि का उन्नयन, जो कि भारतीय संविधान के अनुच्छेद 309 के अंतर्गत प्रदत्त शक्तियों का प्रयोग करते हुए तथा अखिल भारतीय तकनीकी शिक्षा परिषद द्वारा उच्चीकृत स्तर को ध्यान में रखते हुए राज्य सरकार द्वारा किया गया, किसी भी प्रकार से मनमाना या अकारण संशोधन नहीं कहा जा सकता। उक्त संशोधन के कारण यदि राज्य सरकार ने यह निर्णय लिया कि अब पूर्व के निम्न स्तर की योग्यताओं के आधार पर प्रारम्भ की गयी चयन प्रक्रिया के क्रम में कोई नियुक्ति नहीं की जाएगी तथा संशोधित एवं उच्चीकृत योग्यताओं के आधार पर

नियुक्तियाँ की जाएंगी, तो ऐसा निर्णय भी मनमाना या अकारण निर्णय नहीं कहा जा सकता।

37. विशेष योग्यता वाले पदों, यथा पुस्तकालयाध्यक्ष, के स्तर का उन्नयन किसी भी प्रकार से एक जनहित विरोधी निर्णय नहीं कहा जा सकता। लोक पदों की योग्यता के स्तर का उन्नयन लोकहित के विपरीत न होकर लोकहित को बढ़ावा देने वाला प्रभाव रखेगा।

38. जहाँ तक आलोच्य आदेश को इस आधार पर चुनौती दी गयी है कि यह रिट-ए संख्या-5390 वर्ष 2022 के आदेश के प्रतिकूल है, रिट-ए याचिका संख्या-5390 वर्ष 2022 के निर्णय दिनांक 05.12.2022 द्वारा इस न्यायालय ने ही यह छूट दी थी कि यदि राज्य के प्राधिकारी अन्यथा मत के हों, तो वह अपना निर्णय लेने के लिए स्वतंत्र होंगे, किन्तु निर्णय लेते समय उन्हें न्यायालय के निर्णय दिनांक 05.12.2022 में की गयी टिप्पणियों को ध्यान में रखना होगा।

39. जबकि इस न्यायालय ने अपने निर्णय दिनांक 05.12.2022 में स्वयं ही राज्य के प्राधिकारियों को इस न्यायालय के निर्णय से भिन्न निर्णय लेने की छूट प्रदान की थी, तो ऐसी परिस्थिति में आलोच्य आदेश दिनांक 23.03.2024 की वैधता इस न्यायालय के निर्णय दिनांक 05.12.2022 में की गयी टिप्पणियों के साथ ही सम्पूर्ण संगत विधि-व्यवस्था के आलोक में ही किया जाना चाहिए तथा आलोच्य आदेश मात्र इस आधार पर निरस्त होने योग्य नहीं है कि राज्य के किसी प्राधिकारियों ने इस न्यायालय के आदेश दिनांक 05.12.2022 में उ०प्र० अधीनस्थ सेवा चयन आयोग द्वारा प्रकाशित परिणाम के क्रम में नियुक्ति देने के स्थान पर याचिकाकर्तागण का प्रत्यावेदन निरस्त कर दिया।

40. आलोच्य आदेश में यह कथित है कि पुस्तकालयाध्यक्ष के पद का स्तर उन्नयन होने के पश्चात् पुस्तकालयाध्यक्ष के पद के विज्ञापन/चयन/भर्ती की कार्यवाही को स्थगित रखे जाने हेतु निदेशालय ने दिनांक 12.02.2018 तथा दिनांक 16.02.2018 को उ०प्र० अधीनस्थ सेवा चयन आयोग से अनुरोध किया था तथा इसके पश्चात् भी निदेशालय ने विभिन्न पत्र दिनांक 28.07.2018, 11.12.2018, 16.12.2018, 30.05.2019, 04.09.2019, 19.02.2021 एवं 23.10.2021 को उ०प्र० अधीनस्थ सेवा चयन आयोग को उपरोक्त वर्णित स्थिति से अवगत कराते हुए पुस्तकालयाध्यक्ष बैण्ड वेतनमान रु० 5,200/- से 20,200/- एवं ग्रेड वेतन रु० 2,800/- के 69 पदों पर विज्ञापन/चयन/भर्ती की कार्यवाही को स्थगित किये जाने हेतु निरंतर पत्राचार किया गया, किन्तु उ०प्र० अधीनस्थ सेवा चयन आयोग ने निदेशालय के पत्रों को संज्ञान में नहीं लिया और न ही इस संदर्भ में कोई पृच्छा की एवं लिखित परीक्षा तथा साक्षात्कार करके चयन परिणाम घोषित कर दिया। ऐसी परिस्थिति में यह नहीं कहा जा सकता कि नियोक्ता-निदेशक तकनीकी शिक्षा प्रशासनिक अकर्मण्यता के दोषी हैं। यदि उ०प्र० अधीनस्थ सेवा चयन आयोग सेवायोजक के बार-बार पत्र लिखने के पश्चात् भी चयन प्रक्रिया को आगे चलाता रहा, तो मात्र इस कारण से सेवायोजक ऐसी चयन प्रक्रिया के आधार पर नियुक्ति देने के लिए बाध्य नहीं होंगे, जिसको इस कारण रोकने का निर्देश दिया गया था कि प्रश्नगत पदों के स्तर का उन्नयन हो गया है।

41. उपरोक्त समीक्षा के आलोक में इस न्यायालय का यह निश्चित मत है कि मात्र एक ऐसी चयन प्रक्रिया, जो वर्ष 2016 तत्समय विद्यमान नियमों के आधार पर कम शैक्षिक योग्यता धारण करने वाले अभ्यर्थियों को कम वेतनमान के समूह 'ग' के पुस्तकालयाध्यक्ष के पद पर चयन के लिए प्रारम्भ किया गया था, में चयन के आधार पर नियुक्ति पाने का कोई निहित अधिकार नहीं है, जबकि चयन प्रक्रिया इस आधार पर रोके जाने का निर्णय लिया गया कि अखिल भारतीय तकनीकी शिक्षा परिषद् तथा राज्य सरकार ने पुस्तकालयाध्यक्ष के पद का स्तर उन्नयन कर दिया है और उच्चीकृत स्तर के लिए उ०प्र० लोक सेवा आयोग ने एक विज्ञापन प्रकाशित करके चयन प्रक्रिया प्रारम्भ कर दी।

42. रिट याचिका संख्या-6738 वर्ष 2024 तथा 7788 वर्ष 2024 बलहीन है एवं तदनुसार **निरस्त** की जाती है।

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**(2024) 7 ILRA 1495**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 23.07.2024**

**BEFORE**

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

Writ-A No. 7162 of 2023

**Siraj Hussain ...Petitioner**

**Versus**

**State of U.P. & Anr. ...Respondents**

**Counsel for the Petitioner:**
Mr. Alok Mishra

**Counsel for the Respondents:**
C.S.C.

**A. Service Law – Dismissal - Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules 1991- Rule 14(1) – Condonation of delay - Jurisdiction -** The Deputy Inspector General of Police, Lucknow Range, Lucknow had no business to speak or opine contrary to the orders of the Division Bench dated 21.09.2016. The order dated 21.09.2016 passed by the DB became final inter partes as it was never challenged by the respondents before the Supreme Court. May be the proviso to sub- Rule (6) of Rule 20 was not brought to their Lordships' notice but whatever be the position of the statute **once the judgment has become final inter partes, it was the Appellate Authority's duty to have considered the explanation for the delay on merits, while deciding the delay condonation application in the appeal afresh, pursuant to the command of this Court.**

Appellate Authority could not have relied on Rule 20(6) of the Rules and hold the appeal again to be barred by an uncondonable period of limitation. The reason is that the State Government have not exercised their powers u/Rule 25 of the Rules with some remarks on merits upholding the impugned order of the Disciplinary Authority. If the Appellate Authority is directed to decide the delay condonation matter in the appeal afresh with a possibility where the appeal may be held competent after condonation of delay, Appellate Authority would be required to sit in judgment over the correctness of the remarks of the State Government carried in the impugned order dated 01.02.2022, or at least would be licensed to opine contrary to the State Government. This would not only be anomalous but illegal. It is for this reason, the validity of the order passed by the Appellate Authority dated 14.02.2017 has not been looked into. (Para 11, 12)

**B. Jurisdiction - There is absolutely no power or jurisdiction with the Additional Chief Secretary to comment on the record or proceedings of this Court in the slightest measure.** Even if there was an error apparent in the orders passed by this Court, it is both beyond ken and jurisdiction of the Additional Chief Secretary to say that this Court has committed an error apparent and Counsel for the petitioner misguided this Court into passing the order dated 06.09.2018. The proper course for the Additional Chief Secretary was to have understood the order in the best way possible within the limits of his jurisdiction and decide the matter without commenting on the worth or validity of this Court's order. The remarks about the order incorrectly mentioning that the petitioner had been punished with a censure instead of dismissal and virtually castigating our order for an error apparent, is to say the least, the most undesirable transgression of hierarchy in jurisdiction by the Additional Chief Secretary. (Para 14)

**C. Maintainability of representation u/Rule 25 of the Rules, 1991 -** The second part of reasoning carried in the impugned order dated 01.02.2022, is flawed for the reason that in the Additional Chief Secretary's opinion, the petitioner's remedy u/Rule 25 of the Rules was barred because he had appealed the order of punishment, which excluded the State Government's power u/Rule 25 whereas in this case, **there was really no appeal ever carried by the petitioner. The petitioner did attempt to lodge an appeal with the Appellate Authority praying for condonation of delay, which was twice denied.** All that was dealt with by the Appellate Authority was a delay condonation application, which he rejected, in consequence whereof no appeal can be said to have ever been instituted by the petitioner against the Disciplinary Authority's order u/Rule 20 of the Rules. If there was no appeal ever competently instituted against the order of the Authority of first instance, the clause in Rule 25 excluding the State Government's jurisdiction to exercise power u/Rule 25 does not come into play at all. (Para 16)

**D. The remedy u/Rule 25 is of wide import casting a duty on the State Government to see that no injustice is done. The State Government must satisfy themselves if the Establishment has discharged its burden of bringing home the charge by evidence, both documentary and oral,**

**after fixing a date, time and place for holding an inquiry. These are the procedural aspects, which must be gone into by the State Government while deciding the petitioner's statutory representation u/Rule 25 of the Rules. The quantum of punishment, and if it is disproportionate, would always be open to the State Government to consider while making their orders afresh u/Rule 25.**

The petitioner has been denied his right of appeal and revision on the technical ground of delay u/Rules 20 and 23 of the Rules. In this case, virtually the State Government while exercising powers u/Rule 25 would be doing a review of the order of punishment passed by the Disciplinary Authority. It has, therefore, to consider the matter almost as carefully as would be expected of the Appellate Authority, if not precisely by the same procedure. On the basis of contentions raised, the procedural fairness, the evidence appearing against the petitioner, the tenability of his defence based on documents that the petitioner has offered to justify his absence, must all be carefully scrutinized to affirm, modify or pass any other order u/Rule 25 of the Rules. It cannot be done by the State Government at least in this case by cryptic remarks that the petitioner has shown nothing that may demonstrate his innocence as to the charge. (Para 17)

Writ petition succeeds and is allowed in part. The impugned order dated 01.02.2022 passed by the State Government is hereby quashed. The petitioner's statutory representation u/Rule 25 of the Rules is restored to the State Government's file to be decided afresh within 6 weeks of receipt of a copy of this order.

**Present petition assails order dated 01.02.2022, passed by State Government**.(E-4)

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

1. The petitioner is a dismissed Constable of the Uttar Pradesh Police. If there is anything to his cause, it is that he has never been heard on the merits of his challenge by any of the departmental fora of appeal and revision with all of them throwing out his case either on limitation or some other ground of maintainability.

2. The facts giving rise to this petition are these:

> The petitioner was a Constable in the Civil Police. He was appointed on 01.02.1982 and worked up to the year 2010, when he was dismissed from service. The petitioner was placed under suspension pending inquiry vide order dated 17.02.2005 on the charge of unauthorized absence from duty. A charge-sheet was served upon the petitioner on 10.05.2008 under Rule 14(1) of The Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (for short, 'the Rules'). The Inquiry Officer, appointed to inquire into the charges, submitted his report on 21.11.2008. The petitioner, on the basis of findings of the Inquiry Officer, was dismissed by the Superintendent of Police, Lakhimpur Kheri vide order dated 28.05.2010.

3. The petitioner carried a departmental appeal impugning the order of his dismissal from service passed by the Superintendent of Police last mentioned under Rule 20 of the Rules. The Deputy Inspector General of Police, Lucknow Range, Lucknow, before whom the appeal came up, dismissed the same vide order dated 30.11.2012 on ground that it was barred by an uncondonable period of limitation. The petitioner challenged the appellate order by instituting a claim

petition before the Uttar Pradesh Public Service Tribunal, bearing No.426 of 2012. The Tribunal by their judgment and order dated 22.12.2015 held that the appeal being preferred before the Appellate Authority beyond the prescribed period of limitation of 90 days, which the Appellate Authority refused to condone, the Tribunal could do nothing in the matter. The power of condonation was vested with the Appellate Authority, which had declined the condonation of delay. The Tribunal held further that since the remedy of appeal had not been exhausted by the petitioner by preferring a competent appeal within the prescribed period of limitation, the claim petition was one instituted without exhausting the statutory alternative remedy. It was on this rather queer logic that the Tribunal dismissed the claim petition.

4. The petitioner challenged the Tribunal's judgment before this Court by means of Writ Petition No.4229 (S/B) of 2016. A Division Bench off this Court vide judgment and order dated 21.09.2016 quashed the order of the Appellate Authority, rejecting the petitioner's statutory appeal as barred by time, as well as the Tribunal's judgment dated 22.12.2015 and restored the appeal to the Appellate Authority's file for re-consideration, bearing in mind the observations carried in the order of the Division Bench. When the petitioner's appeal came up before the Appellate Authority, to wit, the Deputy Inspector General of Police, Lucknow Range, Lucknow afresh on 14.02.2017, it was rejected again substantially on the ground of an uncondonable limitation. The petitioner challenged the order passed by the Appellate Authority by means of a revision under Rule 23 of the Rules to the Inspector General of Police, Lucknow Zone, Lucknow. The Inspector General dismissed the revision vide order dated 12.05.2017 with the remark that the appeal was rightly dismissed as barred by limitation.

5. The petitioner preferred a representation dated 10.08.2017 under Rule 25 of the Rules to the State Government. The State Government passed an order dated 14.08.2017 directing the Superintendent of Police, Kheri to look into the petitioner's case on humanitarian ground and take appropriate action with regard to his reinstatement in service. It appears that at this stage the petitioner filed a writ petition before this Court being Writ Petition No.25392 (S/S) of 2018, seeking a direction to the State Government to dispose of his representation under Rule 25 of the Rules. In the said petition, by way of an instance of a similar order being passed, copy of an order passed in Writ Petition No.7419 (S/S) of 2018 was annexed, which related to a case of a censure. It is possibly on account of the said reason that in the order of this Court dated 06.09.2018, deciding Writ Petition No.25392 (S/S) of 2018, there is a mention that the petitioner was awarded the minor punishment of censure. Be that as it may, this Court, vide order dated 06.09.2018 passed in the writ petition last mentioned, directed the State Government in terms that if any application has been filed by the petitioner to the Government under Rule 25 of the Rules, a decision as to whether it is inclined to exercise its power under Rule 25 or not be recorded within a period of six weeks from the date a certified copy of the order made in the aforesaid writ petition was submitted to the Government. The petition was disposed of in terms of the aforesaid orders.

6. The State Government vide order dated 01.02.2022 dismissed the

petitioner's statutory representation under Rule 25 holding: firstly, that the order of this Court dated 06.09.2018 passed in Writ Petition No. 25392 (S/S) of 2018 was incorrect in that, that this Court was wrong in observing that the petitioner was awarded the minor penalty of a censure whereas he had been dismissed from service, whereagainst he had unsuccessfully filed an appeal and revision to the Statutory Authorities, both of which were rejected as time barred. It was also observed in the order impugned passed by the State Government that the order dated 06.09.2018 was secured by the petitioner by presenting incorrect facts. Secondly, by the order impugned, the State Government has declined to exercise power under Rule 25 of the Rules on the ground that the remedy under Rule 25 was not open to the petitioner as he had appealed his order of dismissal and his remedy before the State Government under Rule 25 did not lie. Thirdly, after all these remarks, the State Government in a paragraph has said that the petitioner has not been able to show anything as to how the charge of unauthorized absence from duty for a period of 849 days, 22 hours and 40 minutes found established against him by the Authorities below, is incorrect. The Government in the last part of their order have endeavoured to discard the petitioner's case on merits.

7. Aggrieved by the order impugned dated 01.02.2022 passed by the State Government, this petition has been instituted under Article 226 of the Constitution.

8. A notice of motion was issued on 27.09.2023 and after a stop order passed on 27.10.2023, a counter affidavit on behalf the State was filed on 03.11.2023. When the matter came up before this Court on 24.01.2024, the learned Counsel for the petitioner waived his right to file a rejoinder. Accordingly, the petition was admitted to hearing, which proceeded on that day with the matter being adjourned for further hearing to 25.01.2024. On 25.01.2024, hearing concluded and judgment was reserved.

9. Heard Mr. Alok Mishra, learned Counsel for the petitioner and Mr. Jogendra Nath Verma, learned Standing Counsel appearing on behalf of the respondents.

10. Upon hearing learned Counsel for the parties, this Court is constrained to remark that while it is true that the Appellate Authority does not have powers to condone a delay beyond six months at all under sub-Rule (6) of Rule 20 of the Rules going by the proviso appended to the sub-Rule, the Division Bench of this Court vide judgment and order dated 21.09.2016, while disposing of Writ Petition No.4229 (S/B) of 2016, remarked and ordered:

> *"In view of the aforesaid submissions, we have examined the order dated 30 November 2012, passed by the Deputy Inspector General of Police, Lucknow Range, Lucknow and found that the appellate authority had considered the provisions of Rules as well as the limitation for filing the appeal, but definitely he did not notice the reasons for condonation of delay explained by the petitioner in para 27 of the memo of appeal, whereas we are of the view that the appellate authority was under obligation to consider the same and pass an appropriate order after considering the reasons explained*

*by the petitioner. Therefore, we feel it appropriate to quash the order dated 30 November 2012, passed by the appellate authority as well as the order dated 22 December 2015, passed by the learned Tribunal and restore the appeal to the record of the appellate authority for his reconsideration in view of the observations made above.*

*It is clarified that we have not given any finding on the merit of the case or on the explanations submitted by the petitioner before the appellate authority to explain the delay."*

11. The Division Bench clearly restored the appeal to the file of the Appellate Authority after quashing its earlier order dismissing the appeal as time barred made on 30.11.2012 and the judgment of the Tribunal dated 22.12.2015 affirming it. Apparently, the Division Bench ordered the delay condonation matter to be considered on merits. May be the proviso to sub-Rule (6) of Rule 20 was not brought to their Lordships' notice, but there is no gainsaying the fact that the order dated 21.09.2016 passed by the Division Bench became final inter partes. Admittedly, the order of the Division Bench dated 21.09.2016 passed in Writ Petition No.4229 (S/B) of 2016 was never challenged by the respondents before the Supreme Court. Whatever be the position of the statute once the judgment has become final inter partes, it was the Appellate Authority's duty to have considered the explanation for the delay on merits, while deciding the delay condonation application in the appeal afresh, pursuant to the command of this Court. Nevertheless, the Appellate Authority observed as follows while rejecting the petitioner's appeal vide order dated 14.02.2017:

"(2) इस नियमावली के नियम 20(6) के प्रावधान में अपील अधिकारी को दर्शाये गये अच्छे कारणों से अपील अवधि को केवल छः मास तक का अधिकार प्रदान करते है तथा छः मास के उपरान्त इस अवधि को बढ़ाने का क्षेत्राधिकार अपीलीय अधिकारी को निहित नहीं है। चूँकि याची द्वारा अपनी अपील 01 वर्ष 23 दिन उपरान्त प्रस्तुत किया है अतः इस नियमावली में अपीलीय अधिकारी को इस अवधि में किसी भी स्थिति में मर्षित करने का अधिकार प्राप्त नहीं है। अतः अपीलकर्ता का यह तर्क विधिक दृष्टि से स्वीकार किये जाने योग्य नहीं है।

(3) अभिलेख से ऐसा स्पष्ट होता है कि अपीलकर्ता द्वारा मा० उच्च न्यायालय के समक्ष सही विधिक एवं तथ्यात्मक स्थिति को प्रस्तुत नहीं किया गया है। जिसके अनुसार किसी भी स्थिति में अपीलीय अधिकारी को अपील की अवधि छः मास से अधिक बढ़ाने का अधिकार प्राप्त नहीं है तथा अपील प्रस्तुत करने में हुआ विलम्ब 01 वर्ष 23 दिवस का है।"

12. Whatever be the position of the law, the Deputy Inspector General of Police, Lucknow Range, Lucknow had no business to speak or opine contrary to the orders of the Division Bench dated 21.09.2016. The only course open to him was to examine the delay condonation application on merits regarding the explanation for the delay in preferring the appeal. He could not have relied on the proviso to sub-Rule (6) of Rule 20 of the Rules and hold the appeal again to be barred by an uncondonable period of limitation. We would not have hesitated to quash the order of the Appellate Authority and ordered the Deputy Inspector General to have decided the delay condonation matter on its merits afresh in accordance with the orders of the Division Bench in Writ Petition No.4229 (S/B) of 2016, but we think that, that course of action may

now not be feasible. The reason is that the State Government have not exercised their powers under Rule 25 of the Rules with some remarks on merits upholding the impugned order of the Disciplinary Authority, though again in an anomalous exercise of jurisdiction, which would be shortly pointed out. Now, if we direct the Appellate Authority to decide the delay condonation matter in the appeal afresh with a possibility where the appeal may be held competent after condonation of delay, we would be requiring the Appellate Authority to sit in judgment over the correctness of the remarks of the State Government carried in the impugned order dated 01.02.2022, or at least licensing the Appellate Authority to opine contrary to the State Government. This would not only be anomalous but illegal. It is for this reason that we refrain from going into the validity of the order passed by the Appellate Authority dated 14.02.2017.

13. So far as the order of the State Government is concerned, it is apparent that in accordance with the executive rules of business, an Additional Chief Secretary to the Government has acted on their behalf in deciding the petitioner's statutory representation under Rule 25 of the Rules. In the first part of the order, the Additional Chief Secretary has virtually held the order of this Court dated 06.09.2018 passed in Writ Petition No.25392 (S/S) of 2018 to be suffering from an error apparent, in concluding the first part, with a remark that this Court was misguided by the petitioner in passing the order. This part of the Additional Chief Secretary's order reads:

> "6- प्रश्नगत प्रकरण में मा० उच्च न्यायालय द्वारा याची का प्रत्यावेदन नियम 25 के कम में परीक्षण करते हुये निस्तारित करने के आदेश देते हुए आदेश उल्लेख किया गया है कि याची को लघु दण्ड प्रदान किया गया। याची द्वारा उक्त दण्डादेश के विरूद्ध अपील प्रस्तुत नहीं की गयी है, जबकि जनपद लखीमपुर खीरी द्वारा उपलब्ध करायी गयी दण्ड पत्रावली एवं आख्या से स्पष्ट है कि याची को लघु दण्ड नहीं वरन दीर्घ दण्ड (सेवा से पदच्युत) किया गया है तथा उक्त दण्डादेश के विरूद्ध याची द्वारा सक्षम अधिकारियों के समक्ष अपील एवं रिवीजन प्रस्तुत किया गया है, जिसे कालबाधित/ नियमविरूद्ध होने के फलस्वरूप अस्वीकार कर निस्तारित किया गया है। याची श्री सिराज हुसैन, पदच्युत (डिसमिस) आरक्षी द्वारा मा० न्यायालय के समक्ष गलत तथ्यों को प्रस्तुत किया गया है।"

14. We must say at once that even if there was an error apparent in the orders passed by this Court, it is both beyond ken and jurisdiction of the Additional Chief Secretary to say that this Court has committed an error apparent. He also could not have at all blamed learned Counsel for the petitioner, saying that this Court had been misguided into passing the order dated 06.09.2018. There is absolutely no power or jurisdiction with the Additional Chief Secretary to comment on the record or proceedings of this Court in the slightest measure. The remarks in paragraph No.6 of the impugned order are ex facie contumacious, of which we could have taken cognizance. However, adopting a magnanimous view in the matter, we rest the matter here so far as the facet of contents of the order impugned are concerned. But, it does not mean that we can allow these kind of remarks to be made by the Additional Chief Secretary regarding our record and proceedings. The proper course for the Additional Chief Secretary was to have understood the order in the best way possible within the limits of his jurisdiction and decide the matter without commenting on the worth or validity of this Court's order or saying if we were misguided into passing it. He had no

business to blame the learned Counsel, who appeared in the matter earlier of misguiding this Court. If for some reason, the Additional Chief Secretary felt that he could not decide the matter without writing that our order in Writ Petition No. 25392 (S/S) of 2018 dated 06.09.2018 suffered from some kind of an error apparent, the only course of action open to him was to stay proceedings before him and make an application before the Hon'ble Judge, who passed that order, seeking clarification of the remarks about the 'minor penalty' mentioned in the order. We think that it was not at all necessary to seek any clarification because whether the penalty was minor or major, it had no bearing on the directions issued by this Court that were harmlessly limited to a command to the State Government to decide the petitioner's representation preferred under Rule 25 of the Rules. The remarks about the order incorrectly mentioning that the petitioner had been punished with a censure instead of dismissal and virtually castigating our order for an error apparent, is to say the least, the most undesirable transgression of hierarchy in jurisdiction by the Additional Chief Secretary.

15. So far as the second part of the order impugned is concerned, by which the Additional Chief Secretary has held the representation under Rule 25 of the Rules not maintainable, we find it to be utterly flawed. Rule 25 of the Rules reads:

> **"25. Power of Government**.– Not withstanding anything contained in these Rules the Government may, on its own motion or otherwise call for and examine the records of any case decided by an authority subordinate to it in the exercise of any power conferred on such authority by these rules, and against which no appeal has preferred under these rules and–
>
> (a) confirm modify or revise order passed by such authority, or
>
> (b) direct that a further inquiry be held in the case, or
>
> (c) reduce or enhance the penalty imposed by the order, or
>
> (d) make such other order in the case as it may deem fit.
>
> Provided that where it is proposed to enhance the penalty imposed by any such order the police officer concerned shall be given an opportunity of showing cause against the proposed enhancement."

16. The Additional Chief Secretary too has quoted the above rule in extenso. The second part of his reasoning carried in the impugned order dated 01.02.2022, we find flawed for the reason that in the Additional Chief Secretary's opinion, the petitioner's remedy under Rule 25 of the Rules was barred because he had appealed the order of punishment, which excluded the State Government's power under Rule 25 whereas in this case, there was really no appeal ever carried by the petitioner. The petitioner did attempt to lodge an appeal with the Appellate Authority praying for condonation of delay, which was twice denied. The Appellate Authority having denied the petitioner's condonation of delay in the matter of his appeal, no competent appeal on the petitioner's behalf ever came into existence. All that was dealt with by the Appellate Authority was a delay condonation application, which he rejected, in consequence whereof no appeal can be said to have ever been instituted by the

petitioner against the Disciplinary Authority's order under Rule 20 of the Rules. If there was no appeal ever competently instituted against the order of the Authority of first instance, the clause in Rule 25 excluding the State Government's jurisdiction to exercise power under Rule 25 does not come into play at all. It is here where the Additional Chief Secretary has erred in saying the petitioner's statutory representation under Rule 25 was not maintainable. For the said reason, the order of the Additional Chief Secretary on this count is held bad and vitiated.

17. The last part of the order impugned where the Additional Chief Secretary has attempted to show that he has considered the merits of the petitioner's case as well, is besides the point. Once he has held the proceedings to be incompetent before him, his remarks on merits lose all significance. Even if the remarks on merits are to be taken as valid expression of an opinion by the State Government under Rule 25, we are not at all impressed by the reasoning, in that that the conclusions are laconic, cryptic and perfunctory. We must say that the petitioner has been denied his right of appeal and revision on the technical ground of delay under Rules 20 and 23 of the Rules. The remedy under Rule 25 is of wide import casting a duty on the State Government to see that no injustice is done. In this case, virtually the State Government while exercising powers under Rule 25 would be doing a review of the order of punishment passed by the Disciplinary Authority. It has, therefore, to consider the matter almost as carefully as would be expected of the Appellate Authority, if not precisely by the same procedure. On the basis of contentions raised, the procedural fairness, the evidence appearing against the petitioner, the tenability of his defence based on documents that the petitioner has offered to justify his absence, must all be carefully scrutinized to affirm, modify or pass any other order under Rule 25 of the Rules. It cannot be done by the State Government at least in this case by a cryptic remarks that the petitioner has shown nothing that may demonstrate his innocence as to the charge. The State Government must satisfy themselves if in this case the Establishment have discharged their burden of bringing home the charge by evidence, both documentary and oral, after fixing a date, time and place for holding an inquiry. These are the procedural aspects, which must be gone into by the State Government while deciding the petitioner's statutory representation under Rule 25 of the Rules. The quantum of punishment, and if it is disproportionate, would always be open to the State Government to consider while making their orders afresh under Rule 25.

18. In the circumstances above enumerated, this petition succeeds and is **allowed in part**. The impugned order dated 01.02.2022 passed by the State Government is hereby **quashed**. The petitioner's statutory representation under Rule 25 of the Rules is restored to the State Government's file to be decided afresh within six weeks of receipt of a copy of this order bearing in mind the guidance in this judgment.

19. There shall be no orders as to costs.

20. Let a copy of this order be communicated to the Additional Chief Secretary (Home), Government of U.P., Lucknow by the Senior Registrar.

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**(2024) 7 ILRA 1504**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 29.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ-A No. 7795 of 2024

**C/M Kunwar Rukum Singh Vaidik Inter College & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Prabhakar Awasthi, Suresh Singh

**Counsel for the Respondents:**
C.S.C., Shivendra Bahadur Singh

**A. Service Law – Seniority - U.P. Intermediate Education Act, 1921 - Regulation 3 of Chapter II - The District Inspector of Schools has no authority under provisions of the regulations framed under the U.P. Intermediate Education Act or under any other statutory provision to interfere with the seniority list issued by the committee of management of the college or to issue a direction to the committee of management to issue a fresh seniority list and to appoint officiating principal as per the modified seniority list to be issued as per the directions of the District Inspector of Schools.** (Para 10)

Regulation 3 does not confer any power on the District Inspector of Schools to interfere with the seniority list published by the Committee of Management of any institution. Regulation 3(1)(f) provides that any person aggrieved by fixation of his seniority, may file an appeal before the Regional Deputy Director of Education and the appellate authority can pass suitable orders in exercise of his appellate jurisdiction. However, even the Regional Deputy Director of Education has not been granted any authority to *suo motto* interfere with the seniority list issued by the Committee of Management under the provisions of Regulation 3(1) of Chapter II of the regulations framed under the Act. (Para 9)

The impugned orders dated 27.03.2024 and 15.04.2024 are unsustainable in law. (Para 11)

**Writ petition allowed.** (E-4)

**The present writ petition challenges the validity of an orders dated 27.03.2024 and 15.04.2024, passed by the District Inspector of Schools, Badaun, rejecting the seniority list of Lecturers in the petitioners' institution, prepared by the petitioners and directing them to issue a fresh seniority list as per the earlier seniority list published by the petitioners in the year 2020-21 and directing the petitioners to hand over charge of the post of Principal, failing which the proceedings will be initiated for superseding the managing committee of the college, respectively.**

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

1. Heard Sri Prabhakar Awasthi, the learned counsel for the petitioners, Sri Shailendra Singh, the learned Standing Counsel representing the opposite parties no. 1, 2 & 3 and Sri Manish Kumar holding brief of Sri Shivendra Bahadur Singh, the learned counsel for the opposite party no. 4.

2. By means of the instant writ petition filed under Article 226 of the Constitution of India, the petitioners-Committee of Management, Kunwar Rukum Singh Vaidik Inter College, Badaun and its Manager have challenged validity of an order dated 27.03.2024 passed by the District Inspector of Schools, Badaun, rejecting the seniority list of Lecturers in the petitioners' institution, prepared by the petitioners and directing them to issue a fresh seniority list as per the earlier seniority list published by the petitioners in

the year 2020-21 in furtherance of an order dated 02.03.2017 passed by the Joint Director of Education, Bareilly Division, Bareilly. The petitioners have also challenged validity of an order dated 15.04.2024 passed by the District Inspector of Schools, Badaun, directing the petitioners to hand over charge of the post of Principal to the opposite party no. 4, failing which the proceedings will be initiated for superseding the managing committee of the college.

3. On the last date, this Court had passed an order that locus standi of the petitioners to challenge validity of the seniority list will be examined by this Court as the committee of management has challenged the seniority list and the persons affected by the impugned order, who would become junior to the opposite party no. 4 by implementation of the impugned order, has not come forward to assail validity of the impugned orders.

4. Regarding locus standi of the petitioners, the learned counsel for the petitioners has submitted that under the provisions contained in Regulation 3 of Chapter II of the Regulations framed under U.P. Intermediate Education Act, 1921 the Committee of Management has been given the responsibility to prepare a seniority list of teachers. Officiating Principals are appointed in accordance with the seniority of the teachers.

5. In exercise of powers conferred by Regulation 3 of Chapter II of the aforesaid regulations, the petitioners have fixed seniority of teachers, as per which it is entitled to appoint the senior-most teacher Dr. Yogendra Pal as officiating principal of the college. By the impugned order, the opposite party no. 3 has directed the petitioners to issue a fresh seniority list by placing the opposite party no. 4 at the senior-most position and hand over the charge of the principal of the college. This order would affect the petitioners directly, as it mandates the petitioners to issue a fresh seniority list as per the directions issued by the opposite party no. 3 and to hand over charge of the post of Principal to the opposite party no. 4, who is not otherwise entitled to be appointed as Principal as per the seniority list issued by the petitioners.

6. In view of the aforesaid fact, this Court is of the considered opinion that the petitioners are affected by the impugned orders and they have the locus standi to challenge the same by filing a writ petition under Article 226 of the Constitution of India.

7. Accordingly, I proceed to examine the merits of the writ petition.

8. The petitioners have published a seniority list of teachers for the year 2023-24, which has been disapproved by the District Inspector of Schools. The relevant provision, which is contained under Regulation 3 of Chapter II of the Intermediate Education Act, 1921 is being reproduced below:-

> "3. (1) The Committee of Management of every institution shall cause a seniority list of teachers to be prepared in accordance with the following provisions-
>
> (a) The seniority list shall be prepared separately for each grade of teachers whether permanent or temporary, on any substantive post;

(b) Seniority of teachers in a grade shall be determined on the basis of their substantive appointment in that grade. If two or more teachers were so appointed on the same date, seniority shall be determined on the basis of age;

[(bb) Where two or more teachers working in a grade are promoted to the next higher grade on the same date, their seniority inter se shall be determined on the basis of the length of their service to be reckoned from the date of their substantive appointment in the grade from which they are promoted:

Provided that if such length of service is equal, seniority shall be determined on the basis of age.]

(c) A teacher in a higher grade shall be deemed to be senior to a teacher in the lower grade irrespective of the length of service:

(d) If a teacher who is placed under suspension is reinstated on his original post his original seniority in the grade shall not be affected;

(e) Every dispute about the seniority of the teacher shall be referred to the Committee of Management which shall decide the same giving reasons for the decision;

[(f) उपखण्ड (ङ) के अधीन प्रबन्ध समिति के विनिश्चय से व्यथित कोई अध्यापक ऐसा विनिश्चय ऐसे अध्यापक को सूचित किये जाने के दिनांक से 15 दिन के भीतर सम्बन्धित क्षेत्रीय उप-शिक्षा निदेशक को अपील कर सकता है. और अपील पर सम्बन्धित पक्षों को सुनवाई का अवसर देने के उपरान्त उप शिक्षा निदेशक अपना निर्णय कारण सहित देगा, जो अन्तिम होगा और प्रबन्ध समिति द्वारा कार्यान्वित किया जायेगा।"]

[g) यदि एक ग्रेड में कार्यरत दो या अधिक अध्यापक किसी एक ही तिथि पर पदोन्नति किए जाएँ तो उनकी ज्येष्ठता का आधार उस ग्रेड का सेवाकाल होगा, जिसमें वे कार्यरत थे, परन्तु यदि सेवाकाल बराबर है, तो पदोन्नति को दशा में आयु के आधार पर ज्येष्ठता निर्धारित की जायेगी।

(2) The seniority list shall be revised every year and the provisions of Clause (1) shall mutatis mutandis apply to such revision."

9. Regulation 3 does not confer any power on the District Inspector of Schools to interfere with the seniority list published by the Committee of Management of any institution. Regulation 3(1)(f) provides that any person aggrieved by fixation of his seniority, may file an appeal before the Regional Deputy Director of Education and the appellate authority can pass suitable orders in exercise of his appellate jurisdiction. However, even the Regional Deputy Director of Education has not been granted any authority to Suo motto interfere with the seniority list issued by the Committee of Management under the provisions of Regulation 3(1) of Chapter II of the regulations framed under the Act.

10. In any case, the District Inspector of Schools has no authority under provisions of the regulations framed under the U.P. Intermediate Education Act or under any other statutory provision to interfere with the seniority list issued by the committee of management of the college or to issue a direction to the committee of management to issue a fresh seniority list and to appoint officiating principal as per the modified seniority list to be issued as

per the directions of the District Inspector of Schools.

11. In view of the aforesaid discussion, this Court is of the considered opinion that the impugned orders dated 27.03.2024 and 15.04.2024 are unsustainable in law.

12. Accordingly, the writ petition is ***allowed***.

13. Both the orders dated 27.03.2024 and 15.04.2024 passed by the District Inspector of Schools, Badaun are hereby quashed.

14. In case, any person affected by the seniority list files an appeal under Regulation 3(1)(f) of Chapter II of the U.P. Intermediate Education Act, 1921 the same will be decided in accordance with law, without being influenced by any observations made in this order.

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**(2024) 7 ILRA 1507**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 31.07.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ-A No. 8170 of 2024

**Udai Narayan Sahu ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Opp. Parties**

**Counsel for the Petitioner:**
Siddharth Khare, Sr. Advocate

**Counsel for the Opp. Parties:**
C.S.C.

**A. Service Law – Pension – A bare perusal of the Rules makes it manifest that deduction towards C.P.F./G.P.F. is not a condition precedent for eligibility of an employee for receiving pension.** Therefore, the mere fact that no deduction was made towards G.P.F. from the salary of the petitioner would not affect his eligibility to get pension after his retirement. (Para 15)

The petitioner has expressed his willingness to pay his contribution towards G.P.F., the reason for non deduction of General Provident Fund from the petitioner's salary was that although the petitioner was in service since the year 2004, initially he was not paid salary and after he was paid salary in compliance of the order passed by this Court in Writ A No. 36436 of 2005, the same was not paid from the date of his initial appointment. The petitioner was compelled to file another Writ A No. 6461 of 2011 which was allowed with costs on 01.04.2016, after which he was paid salary from the date of his initial appointment in the year 2004, but **he was allotted a G.P.F. account number only on 03.10.2022, when less than six months remained to his retirement. The petitioner was not at all guilty for non deduction of the amount of G.P.F. contribution from his salary.** (Para 16)

**B. No person can be made to suffer for a fault, for which he is not responsible.** Apparently, the petitioner was in no manner responsible for non allotment of G.P.F. account number and for non deduction of contribution towards G.P.F. by the Authority is concerned. Therefore, he cannot be penalized in any manner for non deduction of General Provident Fund for which he is not responsible. (Para 17)

**C. The Contributory Provident Fund Scheme was replaced by General Provident Fund w.r.f 01.03.1977. It does not apply to any teacher appointed after 31.03.1978, when Contributory Provident Fund was no more in existence and it had been substituted by G.P.F. Scheme.** As the petitioner was appointed in the year 2004 i.e. much after the closure of the Contributory Provident Fund Scheme and its replacement by the G.P.F. Scheme, the provisions of the aforesaid GO dated 31.03.1978 are not relevant

for deciding the claim of petitioner for payment of retiral dues. (Para 18)

The petitioner would be entitled to receive the amount of General Provident Fund and directing the petitioner to deposit the amount merely for the amount being refund to him immediately thereafter, would not serve any purpose. Therefore, this Court does not find it necessary to direct the petitioner to deposit the amount of GPF. (Para 19)

**Writ petition allowed**. (E-4)

**The petitioner has prayed for issuance of a direction to the respondents to pay pension to him, as he has retired from the post of Assistant Teacher L.T. Grade in M.M. Ali Memorial Higher Secondary School, Bekanganj, Kanpur Nagar and has sought a direction to the respondents to permit him to deposit the outstanding amount of contribution towards General Provident Fund (G.P.F.) in case the same is to be treated as a condition precedent for sanction payment of pension.**

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

1. Upon an oral prayer made by learned counsel for the petitioner, he is permitted to implead the Deputy Director of Education (Secondary) Kanpur Region, Kanpur as opposite party no. 7.

2. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare, learned counsel for the petitioner and Sri Saurabh, learned counsel appearing for respondents no. 1 to 5.

3. By means of the instant writ petition filed under Article 226 of the Constitution of India, the petitioner has prayed for issuance of a direction to the respondents to pay pension to him, as he has retired from the post of Assistant Teacher L.T. Grade in M.M. Ali Memorial Higher Secondary School, Bekanganj, Kanpur Nagar. The petitioner has also sought a direction to the respondents to permit him to deposit the outstanding amount of contribution towards General Provident Fund (G.P.F.) in case the same is to be treated as a condition precedent for sanction payment of pension.

4. In furtherance of an advertisement issued by the Management of M.M. Ali Memorial Higher Secondary School, Kanpur Nagar for making appointments against four posts of Assistant Teacher L.T. Grade in the college, the petitioner had participated in the selection process and he was selected. An appointment letter dated 06.11.2004 was issued to him after seeking approval from the District Inspector of Schools, Kanpur Nagar. The petitioner joined his duties on 08.11.2004.

5. The District Inspector of Schools passed an order dated 17.03.2005 declining sanction for payment of salary to the petitioner. The petitioner filed Writ-A No. 36436 of 2005, which was allowed by means of a judgment and order dated 23.07.2009, passed by this Court directing the D.I.O.S. Kanpur to reconsider the petitioner’s case.

6. The D.I.O.S. passed an order dated 20.11.2009, sanctioning payment of salary to the petitioner with effect from the date of the aforesaid order. The petitioner challenged the order dated 20.11.2009 by filing Writ-A No. 6461 of 2011, which was allowed with costs by means of a judgment and order dated 01.04.2016 and the order passed by the D.I.O.S., which limited in payment of salary to the petitioner only from the date of approval granted by him, was quashed and it was ordered that the

petitioner would be paid salary since the date of his joining i.e. on 08.11.2004. Thereafter, the D.I.O.S. passed an order dated 05.09.2016 ordering payment of arrears of salary to the petitioner in compliance of an order passed by this Court. However, while paying salary to the petitioner, no deduction was made towards his contribution to the General Provident Fund.

7. On 13.10.2022, the Finance and Accounts Officer (Secondary Education), Office of D.I.O.S. Kanpur sent a letter to the Principal of M.M. Ali Memorial Higher Secondary School, Kanpur Nagar informing that G.P.F. account No. 370407 had been allotted to the petitioner and it was directed that 10% of the basic salary payable to the petitioner be deducted towards G.P.F. contribution. In reply to the aforesaid letter, the Principal of the college wrote a letter dated 19.10.2022 to the Finance and Account Officer stating that the petitioner was scheduled to retire on 31.03.2023 and as per the relevant Rules, G.P.F. deduction stops six months prior to his retirement. Merely 05 months and 13 days remained to petitioner's retirement and, therefore, monthly deduction towards G.P.F. contribution of the petitioner was not permissible as per rules.

8. The college forwarded the requisite papers for payment of pension to the petitioner on 20.03.2023. The petitioner retired on 31.03.2023, but pension has not been paid to him and the instant writ petition has been filed by the petitioner for the aforesaid reason.

9. The D.I.O.S. has filed his personal affidavit inter alia stating that the Government Order dated 31.03.1978 provided for payment of pension to teachers who had worked in Government-aided secondary institutions and it further provided that 10% of their basic salary shall be deducted towards GPF. Since, the G.P.F. account number was allotted to the petitioner on 13.10.2022 and he was going to retire on 31.03.2023 i.e. after merely 05 months and 13 days whereas as the rules deduction of G.P.F. has to stopped six month prior to the date of retirement of a teacher, no deduction towards G.P.F. could be made from the petitioner's salary and pension is not payable to him for this reason.

10. A copy of a Government Order dated 31.03.1978 has been annexed with the personal affidavit of the D.I.O.S., which provides that all the permanent, full-time and regular teachers of aided Higher Secondary Schools run and managed by private managements or local bodies who retire on 01.03.1977 or thereafter, will be entitled to get pension at the same rate at which it is payable to the teachers of similar category of government schools. This Government Order also provided that in place of Contributory Provident Fund, deduction towards G.P.F. will be made from the salary of such teachers on the rates applicable to the teachers of Government Schools. The contributions made by the private managements or local bodies towards Contributory Provident Fund of such teachers till 28.02.1977, alongwith interest accrued thereon, will be deposited the Government treasury under a specified account and no contribution will be made by the Government / Management with effect from 01.03.1977.

11. The aforesaid Government Order dated 31.03.1977 further provided that only such teachers would be entitled to benefit of parity in pension, contribution

payable by the management / local body in respect of whom and interest thereon is deposited in the Government treasury.

12. The petitioner has retired while working as an Assistant Teacher in a private Government-aided High School and payment of General provident fund from insurance and pension to him is governed by the provisions of U.P. General Provident Fund, Insurance, Pension Scheme Rules. Chapter III of the aforesaid rules deals with General Provident Fund and Rule 6 falling in this Chapter provides that: -

> *"6. The employee of the State aided privately managed institutions as well as the employees of the institution maintained by a Local Body shall continue to be governed by the existing Contributory Provident Fund Rules applicable to them."*

13. However, the Contributory Provident Scheme ceased to exist with effect from 28.02.1977 and it was replaced by the General Provident Fund Scheme with effect from 01.03.1977.

14. The relevant provisions of the Uttar Pradesh State Aided-educational Institution Employee's Contributory Provident Fund-Insurance-Pension Rules are being reproduced below: -

***CHAPTER V***

***Pension***

*"17.* ***An employee shall be eligible for pension on****-*

*(i)* ***retirement on attaining the age of superannuation*** *or on the expiry of extension granted beyond the superannuation age.*

*(ii) voluntary retirement after completing 25 years of qualifying services;*

*(iii) retirement before the age of superannuation under a medical certificate of permanent incapacity for further service; and*

*(iv) discharge due to abolition of post or closure of an institution due to withdrawal of recognition or other valid causes.*

*Note - (1) The age of compulsory retirement of an employee shall be such a prescribed in the relevant rules applicable to him.*

*The date of superannuation shall be reckoned from the date of birth of an employee as entered in his Service Book or other records. In case the year of birth only is known, but not the month, the first July of the year shall be taken as the date of birth, similarly when both the year and the month of birth are known, but not the date, the 16th of the month shall be taken as the date of birth.*

*(2) An employee may retire from service voluntarily any time after completing 25 years of qualifying service, provided that he shall give in this behalf a notice in writing to the management at least 3 months before the date on which he wishes to retire.*

*18.* ***The amount of pension that may be granted shall be determined by the length of qualifying service, vide Rule 31*** *below. Fractions of a year shall not be taken into account in the calculation of pension under these rules. Pension shall be calculated to the nearest multiple to 5 paise :*

> *(a) The full pension admissible under these rules will not be sanctioned unless the service rendered has been considered*

*satisfactory and is approved by the Controlling Authority.*

*(b) If the service has been thoroughly satisfactory the authority sanctioning the pension may order such reduction in the amount as it thinks proper.*

*19. (a)* ***Service will not count for pension unless the employee holds a substantive post on a permanent establishment.***

*(b)* ***Continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service.*** *(See also C.S.R. Para 422).*

*(c) Leave without allowance, suspension allowed to stand as a specific penalty, overstayed of joining time or leave not subsequently regularised, and period of breaks in service shall not be reckoned as qualifying service.*

*(d) Period of breaks between 2 periods of service due to termination of service, for no fault of the employee shall not be treated as interruption involving forfeiture of post qualifying service. In other cases breaks due to other causes shall result in forfeiture of past service unless condoned by Government.*

*(e) Time passed on earned leave shall fully count as qualifying service, but time passed on other kinds leave with allowances shall count as qualifying service as follows :*

*(i) If the total service is not less.than 13 years, but less than 30 years, one year of such leave shall count as qualifying service;*

*(ii) If the total service is not less than 30 years, two years of such leave shall counts as qualifying service.*

*Notes - (1) The term 'Earned Leave' means leave on full average pay.*

*(2) In case of a married woman employee time passed on maternity leave may be allowed to count as qualifying service, provided that the period covered by such leave and also earned leave shall not exceed what: would have been admissible had she availed of the whole of the earned leave to which she was entitled under the rules.*

*(3) '****Total Service' means total service reckoning from the date of commencement of service qualifying for pension and includes periods of leave referred to above.***

*(4) The service put in by an employee before he has completed 18 years of age or after attaining the age of superannuation unless extended by competent authority or on re-employment after retirement shall not qualify for pension.*

*(5) The entry relating to confirmation of an employee in the service book shall be countersigned.*

*(6) In cases not covered by these rules qualifying service shall be determined by Government and its decision shall be final.*

* * *

*29. Cases requiring the grant of any concession not contemplated in these rules shall be*

*submitted to Government for orders.*

* * *

*34. In matters concerning pension/family pension not provided to specifically in these rules, the. corresponding procedure laid down in respect of State Government employees shall apply mutatis mutandis.*

15. A bare perusal of the aforesaid Rules makes it manifest that deduction towards C.P.F./G.P.F. is not a condition precedent for eligibility of an employee for receiving pension. Therefore, the mere fact that no deduction was made towards G.P.F. from the salary of the petitioner would not affect his eligibility to get pension after his retirement.

16. Further, although the petitioner has expressed his willingness to pay his contribution towards G.P.F., the reason for non deduction of General Provident Fund from the petitioner's salary was that although the petitioner was in service since the year 2004, initially he was not paid salary and after he was paid salary in compliance of the order passed by this Court in Writ A No. 36436 of 2005, the same was not paid from the date of his initial appointment. The petitioner was compelled to file another Writ A No. 6461 of 2011 which was allowed with costs on 01.04.2016, after which he was paid salary from the date of his initial appointment in the year 2004, but he was allotted a G.P.F. account number only on 03.10.2022, when less than six months remained to his retirement. The petitioner was not at all guilty for non deduction of the amount of G.P.F. contribution from his salary.

17. It is a rudimentary principle of law that no person can be made to suffer for a fault, for which he is not responsible. Apparently, the petitioner was in no manner responsible for non allotment of G.P.F. account number and for non deduction of contribution towards G.P.F. by the Authority is concerned. Therefore, even if deduction of G.P.F. contribution was necessary, the petitioner was not at fault for non-deduction thereof and he cannot be penalized in any manner for non deduction of General Provident Fund for which he is not responsible.

18. The Contributory Provident Fund Scheme was replaced by General Provident Fund with effect from 01.03.1977. Clause 3 of the Government Order dated 31.03.1978 referred to the teachers, who were earlier covered by the Contributory Provident Fund Scheme and whose contribution had not been deposited. It does not apply to any teacher appointed after 31.03.1978, when Contributory Provident Fund was no more in existence and it had been substituted by G.P.F. Scheme. As the petitioner was appointed in the year 2004 i.e. much after the closure of the Contributory Provident Fund Scheme and its replacement by the G.P.F. Scheme, the provisions of the aforesaid Government Order dated 31.03.1978 are not relevant for deciding the claim of petitioner for payment of retiral dues.

19. Keeping in view the aforesaid discussion, so far as the petitioner's offer of depositing the amount of General Provident Fund, this Court does not find it necessary to direct the petitioner to deposit the amount of General Provident Fund for more than one reason. Firstly, the deduction toward General Provident Fund is not a condition precedent for eligibility to receive pension. Secondly, the petitioner was not at fault for non-deduction of the

contribution by the authorities. Thirdly, having been retired, the petitioner would be entitled to receive the amount of General Provident Fund and directing the petitioner to deposit the amount merely for the amount being refund to him immediately thereafter, would not serve any purpose.

20. Therefore, this Court finds no reason to direct the petitioner to deposit his contribution towards General Provident Fund at this stage when he already stands retired.

21. Keeping in view the aforesaid discussion, the writ petition is allowed.

22. The respondents no. 2 and 7 are directed to ensure payment of pension and its arrears to the petitioner within a period of three months from the date of receipt of a certified copy of this order.

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