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(2024) 6 ILRA 3
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.06.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 2759 of 2013

U.O.I. ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Chandra Shekhar Sinha, Ajay Kumar Singh

Counsel for the Opposite Parties:
G.A., Sandeep Sharma

Criminal Law - Indian Penal Code, 1860 – Section 21 - Contract Labour (Regulation and Abolition) Act 1970 – Sections 7, 24, 28(1) - Contract Labour (Regulation & Abolition) Central Rules, 1971 – Rule 74, 81(3) - The Code of Criminal Procedure, 1973 – Section 200 - On 20.9.2011 no construction work and inspection was carried out in alleged premises - Field General Manager's office and Regional Office was functional with about 1000 employees of Bank - Applicant has only second floor of Sharda Towers with the 1st and other floors are occupied by Sahara India Group - Applicant had got constructed a building of its own in which wooden interiors, electrical interiors and furnishing work was completed within 17 days of alleged inspection and Field General Manager's office was shifted in a well- furnished premises – Magistrate has not applied its judicial mind and passed a one-word order 'Register' - No order for taking cognizance and issuance of summons has been passed - Allegation of offences has no legal basis since it is not contract of service, but contract for service - Necessary registers and forms were sent to Complainant but he failed to consider them - Applicant cannot be termed as 'Principal Employer' as it was not directly responsible for supervision and control - Banking company is not establishment, which is required to be registered u/s 7 of the Act - Criminal Complaint has been filed against Chief Manager not by his designation, but in his individual capacity, without making the Bank as an accused. (Para 2, 15)

Criminal Application allowed. (E-13)

List of Cases cited:

1. Inder Mohan Goswami Vs St. of Uttaranchal, (2007)12 SCC 1

2. Lalankumar Singh & ors. Vs St. of Mah. reported in 2022 SCC Online SC 1383

3. Pepsi Foods Ltd. Vs Judicial Magistrate reported in (1998) 5 SCC 749

4. Mehmood UL Rehman Vs Khazir Mohammad Tunda & ors. reported in (2015) 12 SCC 420

5. Mahendra Singh Dhoni Vs Yerraguntla Shyamsundar reported in (2017) 7 SCC 760

6. State of Haryana Vs Bhajan Lal reported in 1992 Supp (1) SCC 335

7. R.P. Kapoor Vs St. of Pun., AIR 1960 S.C. 866

8. State of Bihar Vs P.P. Sharma, 1992 SCC (Crl.)192

9. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., (Para-10) 2005 SCC (Cri.) 283

10. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah., AIR 2021 SC 1918

11. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

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

1. Heard Sri S.B. Pandey, learned Senior Advocate, assisted by Sri Varun Pandey, Advocate and Sri Chandra Shekhar Sinha, Advocate, for the applicant/Union of India as well as Sri Sandeep Sharma, Advocate for the opp. party No. 2 and the learned A.G.A. Sri Ashok Kumar Singh, for the State, and also perused the record.

2. The applicant herein, Union Bank of India, has filed this application under Section 482, Cr.P.C. with the prayer to quash the impugned Criminal Complaint Case No. 18 of 2012 under Section 24 of the Contract Labour (Regulation and Abolition) Act 1970, P.S. Gomti Nagar, District Lucknow, pending in the court of Chief Judicial Magistrate, Lucknow, filed by the Labour Enforcement Officer (Central), Lucknow, and all consequential orders arising thereon.

3. In short, the facts of the case are that the complainant/Labour Enforcement Officer (Central), Lucknow, has filed the impugned complaint with the allegations that the complainant is the Public Servant within the definition of section 21 of 1.P.C. and the complaint is being filed by the complainant in discharge of his official duties and such recording of pre-summoning evidence be dispensed in terms of section 200 of the Cr.P.C. The complainant is Labour Enforcement Officer (Central), Lucknow, who has been appointed as an Inspector under section 28(1) of the Contract Labour (Regulation & Abolition) Act, 1970 by the Government of India, Ministry of Labour, New Delhi. The Union Bank of India (in short, referred to as 'the Bank') is Principal Employer, as defined under the Contract Labour (Regulation & Abolition) Act, 1970 and was executing the contract work "Maintenance & Security of Union Bank of India Premises at Lucknow and responsible for the compliance of the provisions of the Contract Labour (Regulation & Abolition) Central Rules, 1971. The establishment of the Bank was inspected by Labour Enforcement Officer (Central), Lucknow/opp. Party No. 2 on 20.09.2011 under the Contract Labour (Regulation & Abolition) Act, 1970 and Contract Labour (Regulation & Abolition) Central Rules, 1971 when the work was in progress with 50 contract labours through one contractors. The establishment is, therefore, covered under the said Act. During the course of inspection of aforesaid establishment of the Bank on 20.09.2011, the Labour Enforcement Officer (Central), Lucknow observed following breaches:-

"a. Register of Contractors is not maintained in form XII vide Rule 74.

b. Return in Form VI-B not submitted to the Inspector in respect of all contractors - Breach of Rule 81(3).

c. Notices showing the rate of wages, hours of work, wage period, date of payment of unpaid wages has not been displayed in English and in Hindi & in the local language understood by the majority of the workers in conspicuous place at the establishment - Breach of Rule 81(1)(i)."

4. The above mentioned breaches of the said Act/Rules as observed by the opp. Party No. 2 were incorporated in the Inspection report cum show cause notice No. LKO.35(25)/2011 dated 20.09.11 which was prepared on workspot within the jurisdiction of Hon'ble Court under section 24 of the said Act and hence the complaint was filed seeking the following prayer:

"The complainant therefore, prays that the Hon'ble Court may be

pleased to take the case on file and dispose off the complaint according to law. The complainant further prays to add subtract, amend or altar the complaint, if necessary with the prior permission of the Hon'ble Court.

The complainant also prays the Hon'ble Court to award a part of the fine imposed on the accused towards the expenses incurred by the department in conducting the prosecution in terms of section 357(1)(a) of Cr.P.C. 1973 and the amount awarded may be ordered to be credited to the Central Head of Account No. 087 Labour and Employment-Pay and Account Officer (CLC), New Delhi."

5. It has been argued on behalf of the Bank that from perusal of the inspection-report it is evident that the inspection was carried out at Kapoorthala, whereas no work was being carried out at Kapoorthala and the entire allegations in the criminal complaint are absolutely wrong and fabricated. In fact, the building of Union Bank of India has been constructed at Vibhuti Khand, Gomti Nagar, Lucknow, completing all the legal requirements, few months before the show-cause notice reached the bank. When the show cause notice dated 20.9.2011 was received by the Bank, then the officers of the applicant overlooking the place of inspection in the show-cause notice, gave a reply dated 12.10.2011 and annexed the relevant papers which are in compliance with the provisions of the 'Act', i.e., Register of Contractors in Form XII as per Rule 74, Form VI-B as per Rule 81(3) of the Contract Labour (R&A) Central Rules 1971. It has been further submitted that in fact on 20.9.2011 no work was in progress even at Vibhuti Khand, Gomti Nagar, Lucknow, where all the construction work had completed and the furnishing and interior work was also at the verge of completion.

6. Clarifying the position, it has also been submitted that in fact the Union Bank of India Field G.M. Office was situated at 2nd Floor, Sharda Tower, Kapoorthala Complex, Lucknow, for the last more than 20 years. The office was situated at the 2nd Floor of Sharda Tower and the 1st floor and other floors above 2nd floor were occupied and in possession of Sahara India. No construction work could be carried out nor it was being carried out in the premises of the applicant at 2nd Floor at Sharda Tower, Kapoorthala, Lucknow, as alleged in the inspection report. After completion of the interiors the Field G.M. Office of the Union Bank of India has shifted from Kapoorthala Complex to Vibhuti Khand, Gomti Nagar, Lucknow in October 2011. The applicant Union Bank of India informed the General Managaer, Reserve Bank of India vide letter dated 7.10.2011 that the Field General Manager's office has been shifted to Vibhuti Khand, Gomti Nagar, Lucknow on 29.9.2011.

7. The applicant-Bank has also invited the court's attention towards the letter dated 7.10.2011 sent by the Dy. General Manager Union Bank of India to the General Manager Reserve Bank of India informing the shifting of office, which has been annexed to the application. The learned counsel has also drawn attention of the court towards theletter dated 22.1.2012 (Annexure No. 5 to the application) vide which the Deputy General Manager, Banking Supervision Department, Reserve Bank of India, has been intimated about

shifting of the Regional Office of the Union Bank of India which was also situated at Kapoorthala, Lucknow, also to the new building at Vibhuti Khand on 16.1.2012.

8. The learned counsel for the applicant has emphasized that both the Field General Manager's office and the Regional Office, which were in operation at Kapoorthala situated on the 2nd floor and the Field General Manager's office had been shifted to the well furnished office at Vibhuti Khand on 7.10.2011, i.e., within 17 days from the date of inspection, in which period it is not possible to complete the construction and the furnishing of the building. Further it is not possible to start any construction work only at the floor in possession of the applicant which was functional with about 1000 workers of the Bank.

9. Learned counsel for the applicant submits that Section 24 of "The ContractLabour (Regulation and Abolition) Act, 1970 is reproduced hereinbelow:-

"If any person contravenes any of the provisions of this Act or of any Rules laid thereunder for which no other penalty is elsewhere provided, he shall be punishable with imprisonment which may extend to three months, or with fine which may extend to one thousand rupees or with both."

10. It has next been argued on behalf of the applicant-Bank that the allegation of offences alleged to be committed by the applicant has no legal basis since the wooden interior/electrical interior work being run by service providers is not a "Contract of Service", but "Contract for Service: and as such the Act is inapplicable. Since the wooden/electrical interior being done by a service provider is under 'contract for service' over which the Union Bank has no supervisory powers or controls. The Bank does not come within the ambit of the Act.

11. Moreover, the Contract Labour (Regulation & Abolition) Act 1970 is an Act to regulate the employment of contract labour in certain establishments and to provide for the abolition of contract labour. The Act was passed to prevent the exploitation of the contract labour and to introduce better conditions of work. It provides for regulation of the service conditions of contract labour. The Act intends to abolish the contract labour wherever practicable and where it cannot be abolished altogether. The policy of the Act is that the working condition of the labour should be regulated so as to ensure payment of wages and provision of essential amenities. To attract the provisions of the Act the establishment must be employing contract labours and the principal employer means the person responsible for the supervision and control of the establishment. The establishment which is required to register and maintain the register is the person, who actually employs the contract labourers. Therefore, the applicant cannot be termed as ?principal employer? as he was not directly responsible for the supervision and control and the banking company is not the establishment which is required to register under Section 7 of the Act as it has issued a work order for interior decoration and electrical work with two independent contractors who have engaged skilled workmen and the same cannot be construed as engagement of contract labour by the bank for any routine banking activity. Proceedings of the aforementioned impugned criminal complaint, the

summoning order and all consequential orders are liable to be quashed/set aside. Proceeding of the criminal complaint, which is wrong and fabricated, is an abuse of process of law, due to which the applicant as the officer of the Bank will suffer irreparable loss, as he will have to appear in the Court of Magistrate, where he will be taken into custody and subjected to bail for no offence committed by the Bank.

12. It has also been argued by the learned Sr. Advocate Sri S.B. Pandey and Sri Chandra Shekhar Singh, Advocate, that the learned Magistrate, while entertaining the criminal complaint, has not applied its judicial mind and has simply passed an order to register the case on 3.11.2012. To the best of knowledge of the applicant no other order has been passed by the Magistrate to summon the applicant, but even then summons have been issued and no order for taking cognizance has been passed by the learned Magistrate. The order dated 3.11.2012 on the complaint only says "Register" which is apparently without the application of judicial mind of the learned Magistrate, more so it does not even say ?isuue summons? and to the best of knowledge of the deponent/applicant there is no other order on the case file. Certified copy of the criminal complaint with the order ?register? has been filed as Annexure No. 1 to the application. In fact the applicant has been falsely implicated in the instant case and has no criminal history and is not a previous convict.

13. It has been contended by the learned counsel for the Union of India that the opp. party no. 2 has filed the impugned complaint under Contract Labour (Regulation and Abolition) Act, 1970 and Contract Labour (Regulation and Abolition) Central Rules 1971 against the applicant-bank after making the inspection and after finding several discrepancies in maintaining the records as required under the Act in their capacity as principal employer of the workers. It is further submitted that the instant application is not maintainable in view of the fact that the Union of India has not been impleaded as opposite party in the case, which is also mandatory, since the Acts under which the complaint is based is Central Act, and, therefore, the case is liable to be dismissed on this very ground. It is also submitted that the applicant has filed the above case with the intention to avoid appearing before the learned Chief Judicial Magistrate, where he can put his entire grievance/case, and for this reason also the case is liable to be dismissed. It is further submitted that the complaint, under Contract Labour (Regulation and Abolition) Act, 1970 and Contract Labour (Regulation and Abolition) Central Rules 1971, after making inspection at the Kapoorthala office i.e. the Office of Principal Employer of the applicant-bank, prepared an inspection note based on the information provided by the representative of the Principal Employer and signed the same and got the same received by the Representative of the Principal Employer i.e. Senior Manager of the Regional Office of the petitioner. It is further submitted that the records mentioned in the paragraph-7 of the application were not made available on demand. It is also submitted that in Annexure-3 to the application, the address of the petitioner is shown (on the stamp) 'Sahara Tower, Second Floor, Kapoorthala Complex, Lucknow', which falsify the stand of the applicant that office has shifted to Gomti Nagar. The applicant was duty bound to intimate the Labour Enforcement Officer within 15 days from the date of commencement or completion of each

contract work in terms of the provision of Section 81 (3) of the Contract Labour (Regulation and Abolition) Central Act, 1970, which was not complied with by the applicant. The bank is having every supervisory control.

14. On behalf of the opp. party no. 2 it has been urged that since the provisions of the Act, referred to above, have been violated by the applicant, the complaint was preferred by the opp. party no. 2 before the learned Magistrate, in which no interference, at this stage, is necessary, as only the summon has been issued to the applicant and further proceedings are yet to be adjudicated on the basis of the evidence adduced by the parties. The applicant will have ample opportunity to put up his case before the learned Magistrate. Since the applicant has opportunity available to put up his case, the present application is liable to be dismissed. The learned Magistrate, after going through the records and applying his judicial mind, has passed the order in the matter and, as such, the application is liable to be dismissed with cost.

15. Considering the arguments advanced by the learned counsel for the parties and perusing the records this court finds favour with the arguments advanced by the learned counsel for the applicant that on 20.9.2011 no construction work was going on at Sharda Towers, Kapoorthala, Aliganj, Lucknow and no inspection was carried out in the premises, as alleged; on 20.9.2011 the Field General Manager's office and the Regional Office was functional with about 1000 employees of the Bank working, as such no construction could have been carried out. Rather, the applicant Union Bank of India has only the second floor of the Sharda Towers with the 1st and other floors above the office of the petitioner are occupied by Sahara India Group, as such also, no construction could have been made; the applicant Union Bank of India had got constructed a building of its own at Vibhuti Khand, Gomti Nagar, Lucknow in which on 20.9.2011 the wooden interiors, the electrical interiors and furnishing work was on the verge of completion and was completed within 17 days of the alleged inspection and the Field General Manager's office was shifted in a well- furnished and well-equipped premises; the learned Magistrate, while entertaining the criminal complaint, has not applied its judicial mind and has simply passed a one-word order 'Register' on 3.11.2012; no order for taking cognizance and issuance of summons has been passed by the learned Magistrate to the best of knowledge of the applicant; the allegation of offences, alleged to be committed by the petitioner, has no legal basis since the wooden/electrical interior work being run by service providers is not a contract of service, but contract for service, and as such the Act is inapplicable in the present case; in reply to the show cause notice the necessary registers and forms were sent to the Labour Enforcement Officer (Central), although the same related to premises at Vibhuti Khand, Gomti Nagar, Lucknow, but the Labour Enforcement Officer failed to consider them and filed the impugned complaint; the applicant cannot be termed as 'Principal Employer' as the bank was not directly responsible for the supervision and control and the banking company is not the establishment, which is required to be registered under Section 7 of the Act, and, the criminal complaint has been filed against the Chief Manager of the Union Bank of India not by his designation, but in his individual capacity, without making the Bank as an accused with a malafide intention to harass and humiliate him.

16. Further, the Hon'ble Supreme Court in the case ***Inder Mohan Goswami v. State of Uttaranchal, (2007)12 SCC 1*** has held that it would be relevant to keep into mind the scope and ambit of section 482 Cr.PC and circumstances under which the extra ordinary power of the court inherent therein as provisioned in the said section of the Cr.P.C. can be exercised, para 23 is being quoted here under:-

"23. This court in a number of cases has laid down the scope and ambit of courts powers under section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under section 482 Cr.P.C. can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court, and

(iii) to otherwise secure the ends of justice."

17. Further, the Hon'ble the Supreme Court in the case of ***Lalankumar Singh and Others vs. State of Maharashtra reported in 2022 SCC Online SC 1383*** has specifically held in paragraph No.38 that the order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. Paragraph No.38 of **Lalankumar Singh and Others (supra)** is being quoted hereunder:-

"38. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect could be made to the judgment of this Court in the case of Sunil Bharti Mittal v. Central Bureau of Investigation, which reads thus:

"51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient ground for proceeding"

appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.""

18. Further, the Hon'ble Supreme Court in the case of ***Pepsi Foods Ltd. v. Judicial Magistrate*** reported in ***(1998) 5 SCC 749*** has been pleased to observe paragraph No.28, which is reproduced hereinunder:-

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

19. Further, the Hon'ble Supreme Court in the case of ***Mehmood UL Rehman v. Khazir Mohammad Tunda and Others*** reported in ***(2015) 12 SCC 420*** has been pleased to observe paragraph No.20, which is reproduced hereinunder:-

"20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in Pepsi Foods Ltd. [Pepsi Foods Ltd. v. Judicial Magistrate, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400] to set in motion the process of criminal law against a person is a serious matter."

20. Further, the Hon'ble Supreme Court in the case of ***Mahendra Singh Dhoni v. Yerraguntla Shyamsundar*** reported in ***(2017) 7 SCC 760*** has been pleased to observe paragraph No.13, which is read as under:-

"13. Before parting with the case, we would like to sound a word of caution that the Magistrates who have been conferred with the power of taking cognizance and issuing summons are

required to carefully scrutinize whether the allegations made in the complaint proceeding meet the basic ingredients of the offence; whether the concept of territorial jurisdiction is satisfied; and further whether the accused is really required to be summoned. This has to be treated as the primary judicial responsibility of the court issuing process."

21. Further, Hon'ble the Supreme Court has provided guidelines in case of ***State of Haryana Vs. Bhajan Lal*** reported in ***1992 Supp (1) SCC 335*** for the exercise of power under Section 482 Cr.P.C. which is extraordinary power and used separately in following conditions:-

"102.(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused."

(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

22. Further the Hon'ble Supreme Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:- ***(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192, (iii) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283 and (iv) Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918.***

23. In ***S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168***, it has been held by the Hon'ble Apex Court

that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

24. Thus, in view of the law laid down by the Hon'ble Supreme Court and in light of the observations and discussions made above and keeping view the facts and circumstances of the case, and from the perusal of the record, the impugned complaint proceedings pending before the Chief Judicial Magistrate, Lucknow in Criminal Compliant Case No. 18 of 2012; State v. Shri M.P.S. Chauhan, under Section 24 of the Contract Labour (Regulation and Abolition) Act 1970, P.S. Gomti Nagar, District Lucknow, filed by the Labour Enforcement Officer (Central), Lucknow, and all consequential orders arising thereon, are liable to be quashed as in the present case learned Chief Judicial Magistrate, Lucknow has failed to apply his judicial mind to the facts of the case and the law applicable thereto while entertaining the same, the Chief Judicial Magistrate has not examined the nature of allegations made in the complaint and the evidences both oral and documentary in support thereof.

25. Accordingly, the impugned complaint proceedings pending before the Chief Judicial Magistrate, Lucknow in Criminal Compliant Case No. 18 of 2012; State v. Shri M.P.S. Chauhan, under Section 24 of the Contract Labour (Regulation and Abolition) Act 1970, P.S. Gomti Nagar, District Lucknow, filed by the Labour Enforcement Officer (Central), Lucknow, and all consequential orders arising thereon, are hereby **quashed.**

26. For the reasons discussed above, the instant application under Section 482 Cr.P.C. filed by the applicant is **allowed** in respect of the instant applicant, namely-Union Bank of India.

27. Learned Senior Registrar of this Court is directed to transmit a copy of this order to the trial court concerned for its necessary compliance.

28. No order as to cost(s).

(2024) 6 ILRA 12
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.06.2024

BEFORE

THE HON'BLE DR. GAUTAM CHOWDHARY J.

Application U/S 482 No. 13215 of 2024

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

Counsel for the Applicant:
S.M. Faraz I. Kazmi

Counsel for the Opposite Parties:
G.A.

A. Criminal Law – Criminal Procedure Code,1973 – Section 397 – Criminal Revision – Dismissal of the revision in default – No consideration on merit – Permissibility – *Madan Lal Kapoor's* case relied upon – Held, Principle that a criminal appeal should not be dismissed for default would also apply to criminal

revision – High Court set aside the impugned order. (Para 4, 8 and 9)

Application allowed. (E-1)

List of Cases cited:

1. Madan Lal Kapoor Vs Rajiv Thapar; (2007) 7 SCC 623

2. Bani Singh Vs St. of U.P.; (1996) 4 SCC 720

3. Criminal Appeal No. 1150 of 2007; Madan Lal Kapoor Vs Rajiv Thapar and others decided on 31.08.2007

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

1. Heard Shri S. M. Faraz I. Kazmi, the learned counsel for the applicant as well as Shri Sandeep Kumar Srivastava, the learned A.G.A. for the State and perused the record.

2. The present application under Section 482 Cr.P.C. has been filed for setting aside the order dated 05.03.2024 passed by learned Additional Sessions Judge (F.T.C.), Bareilly in Criminal Misc. Case No. 414/2023-1190/2023 (Aman Sinha Vs. Ankit Tandan and others), whereby criminal revision preferred by the applicant has been dismissed in default.

3. Learned counsel for the applicant submits that initially applicant had moved an application under Section 156(3) Cr.P.C. against the opposite party Nos. 2 to 5 herein, which was rejected vide order dated 07.07.2023 passed by learned Chief Judicial Magistrate, Bareilly in Misc. Application No. 935 of 2022 and against which order the applicant preferred criminal revision challenging the order dated 07.07.2023 but the said revision has been dismissed in default by the impugned order herein.

4. Learned counsel for the applicant further submits that the impugned order dated 05.03.2024 passed by the learned revisional court dismissing the revision in default is against the ratio of law laid down by Hon'ble Apex Court in several judgments and he placed reliance upon the case of **Taj Mohammad Vs. State of U.P. & Another [Criminal Appeal No. 2421 of 2023 (Arising out of SLP (Crl.) No. 5298/2023)**, decided on 11.08.2023], wherein in paras-4 to 7 it has been observed as under:

"4. We have carefully gone through the impugned order. It would reveal that the learned counsel for the appellant as also the appellant were absent when the matter was taken up for hearing. The order would further reveal that after noting their absence, the Court perused the records and ultimately passed the order impugned. However, the order does not reflect consideration of the case on merits. In other words, it is a non-reasoned order. When an adverse order would affect the personal liberty of a person, the fact that he is a convict cannot be a reason to deprive him of fair treatment in the matter of consideration of his revision petition in the manner prescribed by this Court, as the law laid down by this Court in that regard is binding on all Courts by virtue of Article 141 of the Constitution of India.

*5. In the decision in **Madan Lal Kapoor v. Rajiv Thapar : (2007) 7 SCC 623**, a Two-Judge Bench of this Court held that the rule laid down by this Court that a criminal appeal should not be dismissed for default would also apply to criminal revisions. The reference thus made was to*

the decision of a Three-Judge Bench of this Court in ***Bani Singh v. State of U.P. : (1996) 4 SCC 720****. In Bani Singh's case (supra), this Court held thus:-*

"14. …… The plain language of Section 385 makes it clear that if the appellate court does not consider the appeal fit for summary dismissal, it 'must' call for the record and Section 386 mandates that after the record is received, the appellate court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the appellate court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record……"

6. We are in perfect agreement with the view taken by the Two-Judge Bench in Madan Lal Kapoor's case (supra) and, therefore, even in the absence of a party or his counsel, a revision petition calls for consideration on merits in accordance with the parameters for consideration of a revision petition.

7. In that view of the matter, without making any observation on the merits, we remand this matter to be considered anew. Taking note of the fact that the revision petition is of the year 2017, we request the Hon'ble High Court to consider the revision petition expeditiously."

5. Learned counsel for the applicant has also placed reliance upon another judgment of Hon'ble Apex Court in the case of **Madan Lal Kapoor Vs. Rajiv Thapar and others [Criminal Appeal No. 1150 of 2007 (Arising out of SLP (Criminal) No. 3303 of 2006), decided on 31.08.2007],** wherein in paras-3 to 6 it has been observed as under:

"3. This appeal is directed against the order passed by the learned Single Judge of the High Court of Delhi in Criminal Revision Petition No. 42 of 2000 dated August 8, 2005. The learned Single Judge dismissed the Criminal Revision Petition filed by the appellant herein by the order which reads thus;

"In spite of notice, nobody appears for the petitioner today. Crl. Rev. P. 42/2000 is accordingly dismissed in default for non-prosecution."

4. The matter relates to administration of criminal justice. As held by this Court, a criminal matter cannot be dismissed for default and it must be decided on merits. Only on that ground the appeal deserves to be allowed.

5. There is, however, an additional reason also. Earlier when the petition was dismissed, the aggrieved appellant approached this Court and in Criminal Appeal No. 309 of 2002 a two-Judge Bench of this Court by an order dated February 22, 2002 allowed the appeal, set aside the order of the High

Court and observed that the matter should be decided by the High Court after application of mind and by passing a reasoned order. Unfortunately, in the impugned order, there are no reasons and the merits have not been considered at all.

6. Hence, the appeal is allowed. The order of the High Court is set aside and the matter is remitted back to the High Court. The High Court will decide the matter on merits. Since the matter is very old, we request the High Court to decide it as early as possible preferably within a period of four months."

6. Learned counsel for the applicant, thus, submits that in view of the ration laid down by Hon'ble Apex Court, the impugned order dated 05.03.2024 is liable to be set aside.

7. Learned A.G.A. for the State could not dispute the above submissions as advanced by the learned counsel for the applicant.

8. A perusal of the impugned order dated 05.03.2024 does not reflect consideration of case on merits by which criminal revision preferred by applicant has been dismissed in default by the revisional court. Thus, this Court, in agreement with the observations made in the aforesaid judgments cited above, thinks it appropriate to set aside the impugned order herein.

9. Accordingly, the impugned order dated 05.03.2024 passed by learned Additional Sessions Judge (F.T.C.), Bareilly in Criminal Misc. Case No. 414/2023-1190/2023 (Aman Sinha Vs. Ankit Tandan and others) is hereby **set aside** and the matter is remanded before the concerned revisional court for passing fresh orders.

10. With the above observations/ directions the present application under Section 482 Cr.P.C. **is allowed.**

(2024) 6 ILRA 15
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.06.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY J.

Application U/S 482 No. 14659 of 2024

Kamlesh Singh ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Shreyas Srivastava

Counsel for the Opposite Parties:
G.A., Surya Pratap Singh Prmar, Ved Prakash Dwivedi

Criminal Law- Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code-1860-Sections 419, 420, 467, 468 & 471-After a period of more than a decade it has been alleged that applicant was not empowered to execute the power of attorney and it was a piece of fraud and forgery-There is a growing tendency to conduct purely civil dispute into criminal cases, there is an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement-Dispute between parties of civil nature-Ingredients of offences levelled not made out- Result-Entire proceedings quashed-Application U/s 482 CrPC allowed.(Para 2, 3, 8, 9, 13, 14) (E-15)

List of Cases referred-

1. A.M. Mohan Vs State Represented by SHO & anr., 2024 SCC OnLine SC 339

2. G. Sagar Suri Vs St. of U.P. (2000) 2 SCC 636

3. Naresh Kumar & anr. Vs The St. of Karn. & anr., 2024 INSC 196

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Applicant-Kamlesh Singh (accused) and Complainant-Ishwar Singh (Opposite Party No. 4) are resident of Mumbai. The matter pertains to properties situated in District Mainpuri, details of which are mentioned in para 8 of present application.

2 . The case is further arising out of a registered power of attorney purportedly executed by accused in favour of one, Shiv Ram Mishra in the year 2008. After a period of more than a decade it has now been alleged that applicant was not empowered to execute the said power of attorney and it was a piece of fraud and forgery.

3. It is not in dispute that after execution of power of attorney there were civil proceedings between applicant and Opposite Party No. 4 (Complainant) that a suit for perpetual injunction being Original Suit No. 171 of 2012 (Ishwar Singh Vs. Kamlesh Singh and others) was filed wherein on basis of a compromise, the suit was withdrawn though now it has been contended that referred compromise was entered by a person not empowered to do so. However, it is not in dispute that neither said compromise was challenged nor order to withdraw the suit was challenged. The Complainant has not taken any subsequent action, either civil or criminal, for a decade till he has lodged F.I.R. dated 14.07.2023 against applicant wherein after investigation a charge sheet was filed, which is subject matter of present case, alleging that a fraud was played by applicant with regard to properties referred above as well as power of attorney was also a result of a fraud.

4. In pursuance of above referred F.I.R. investigation was conducted and a charge sheet dated 30.08.2023 was filed in Case Crime No. 0471 of 2023, under Sections 419, 420, 467, 468, 471 I.P.C. wherein Trial Court took cognizance and applicant has been summoned vide order dated 22.09.2023, which is impugned in present application.

5. Sri Manish Tiwari, learned Senior Advocate assisted by Sri Pranav Tiwari, learned Counsel for applicant, has vehemently urged that even considering the material available before Investigating Officer, the offences referred above are not made out. The Complainant has given a cloak of criminal offence to a dispute which is essentially of civil nature and which has already been settled by way of a compromise and on its basis an earlier suit was withdrawn. Learned Senior Advocate also added that recently Complainant has filed a fresh suit against applicant on same issue. Learned Senior Advocate further referred that an inquiry was conducted on a complaint of Complainant by a Senior Police Officer wherein it was found that allegations against applicant were of civil nature. Learned Senior Advocate referred ingredients of offences, that they are not made out.

6. Per-contra, Sri Ved Prakash Dwivedi, learned counsel for Opposite Party No. 4, has vehemently urged that applicant has not only executed a power of

attorney, though he was not entitled to do so, but under the garb of power of attorney number of transactions of property situated at District Mainpuri were executed as well. The factum of compromise and withdrawal of earlier suit was not disputed, however, learned counsel has submitted that not only power of attorney was a paper of fraud but compromise itself was a creature of fraud though admittedly compromise or order of withdrawal of civil suit have not been challenged further. Power of attorney was also not challenged before an FIR was lodged after about 15 years. Learned counsel has drawn attention of Court to the statement of Complainant recorded under Section 161 Cr.P.C during investigation, which is part of application being Annexure-9, and for reference the same is reproduced hereinafter:-

"ईश्वर सिंह पुत्र स्व० गंगा सिंह चौहान निवासी लाल सिंह मान सिंह बिल्डिग लोहार चाल चतुर्थ तल, रूम नं० बी 53 व बी० 55 मुम्बई उम्र करीब 78 वर्ष ने पूछने पर बताया कि साहब मेरा बाबा श्री मोती सिंह पुत्र स्व० लाल सिंह के नाम मोजा आराजी लाईन देहात मैनपुरी गाटा संख्या 201/1 रकबा 0.036 हे०, गाटा संख्या 201/3 रकबा 0.142 हे० गाटा संख्या 252 रकबा 0.057 हे०, गाटा संख्या 253 रकबा 0.121 हे०, गाटा संख्या 254 रकबा 0.024 हे०, गाटा संख्या 256/1 रकबा 0.109 हे०, गाटा संख्या 257/1 रकबा 0.519 हे०, गाटा संख्या 558 रकबा 0.008 हे० गाटा संख्या 259 रकबा 0.073 हे0, गाटा संख्या 260 रकबा 0.053 हे0, गाटा संख्या 261 रकबा 0.045 हे०, गाटा संख्या 262 रकबा 0.194 हे0, गाटा संख्या 263/2 रकबा 0.048 हे0, गाटा संख्या 263/3 रकबा 0.016 हे0 कुल 14 किता गाटा में कुल रकबा 1.4450 हे0 था जो मोती सिंह के नाम फसलीः वर्ष 1386 तक अंकित रही मेरे बावा मौती सिंह की मृत्यु के पश्चात उक्त जमीन विरासत के आधार पर राजस्व निरीक्षक के आदेश दिनांक 01.04.1977 के अनुसार फसली वर्ष 1387 से फसली वर्ष 1392 वर मोती सिंह के दोनों पुत्र हरनाम सिंह व गंगा सिंह के नाम अंकित होकर शुद्ध खाता बन गया। उसके पश्चात फसली वर्ष 1393 से 1398 में उपरोक्त जमीन के अभिलेखों में कमलेश के नाम पर भूलवस चढ़ गया और जमीन सिर्फ हरनाम सिंह के नाम अंकित हो गया। हरनाम सिंह की मृत्यु के पश्चात उक्त जमीन हरनाम सिंह के दत्तक पुत्र कमलेश सिंह के नाम फसली वर्ष 1411 से 1416 में अंकित हो गयी। प्रार्थी मुम्बई में निवास करता है। प्रार्थी के भाई भूपेन्द्र सिंह, किशोर सिंह, दिगविजय सिंह अमेरिका में रहते हैं। इस कारण इस सम्बन्ध में कोई जानकारी नहीं हो सकी। वर्ष 2008 में प्रार्थी को जानकारी होने पर प्रार्थी द्वारा राजस्व संहिता की धारा 33/39 के अन्तर्गत उप जिलाधिकारी मैनपुरी के न्यायालय में बाद सं0 281/2008 योजित किया जिसपर तहसील दार मैनपुरी द्वारा जांच कर लेखपाल आख्या, कानूनगो आख्या व तहसील दार मैनपुरी की आख्या दिनांक 18.09.2008 को उपरोक्त गाटाओं में प्रार्थी के पिता श्री गंगा सिंह का नाम उक्त जमीन में कमलेश सिंह के साथ सह खातेदार के रूप में जोडने की रिपोर्ट न्यायालय उपजिलाधिकारी सदर मैनपुरी को प्रेषित की गयी जिस पर न्यायालय उपजिलाधिकारी मैनपुरी सदर के द्वारा पक्षकार कमलेश सिंह को नोटिस जारी किये। वाद की सुनवाई के दौरान तत्कालीन उप जिलाधिकारी मैनपुरी के द्वारा आदेश दिनांक 01.02.2010 के स्थगन आदेश द्वारा विवादित आराजी पर यथा स्थिति बनाये रखने तथा दोनो पक्षों को किसी अन्य व्यक्ति को अन्तर्ण/बिक्री पर रोक लगाई थी। उपजिलाधिकारी मैनपुरी का स्थगन आदेश दिनांक 01.02.2010 आज भी प्रभावी है। इसी दौरान कमलेश सिंह के द्वारा दिनांक 09.09.2008 को उपनिबन्धक कार्यालय तहसील भोगाँव में शिवराम पुत्र परमेश्वर दयाल निवासी नई बस्ती देवपुरा के पक्ष में एक मुख्तार नामा तैयार करवाया गया जिसमें दोनों पक्षों के द्वारा अपने फर्जी पते अंकित कराये गये। कमलेश सिंह ने अपना पता छोटा बाजार भोगाँव तथा शिवराम ने अपना पता छोटा बाजार भोगांव दर्शाया जबकि छोटा बाजार भोगाँव में उक्त लोगो द्वारा कभी निवास नहीं किया है। तत्समय शासनादेश पत्र संख्या 2890/शि०का०लख०/2003 दिनांक 25.07.2003 के अनुसार मुख्तार नामा अपने रक्त सम्बन्ध में कराने का नियम था तथा खून के रिस्तेदार से हटकर मुख्तारआम के लिए जिलाधिकारी की अनुमति अनिवार्य थी। उपनिबन्धक कार्यालय अलीगंज जिला एटा में रजिस्टर्ड करवायी गयी पावर आफ आटर्नी में जिलाधिकारी महोदय की अनुमति का जिक्र है। किन्तु यह अनुमति किस जनपद के जिलाधिकारी से ली गयी है यह बात पावर आफ आटर्नी में छिपाई गयी है। कमलेश सिंह के द्वारा किये गये मुख्तारआम में शिवराम को अपने रक्त सम्बन्ध में आने वाले चचाजात भाई बताया गया जबकि कमलेश सिंह ठाकुर जाति से तथा शिवराम सिंह मिश्रा ब्राह्मण जाति से है इस प्रकार उक्त कमलेश सिंह व शिवराम सिंह के द्वारा गलत बयानी के आधार पर उपनिबन्धक कार्यालय भोगांव से तैयार कराये गये फर्जी मुख्तार आम के आधार पर जमीन की बिक्री की गयी। तत्पश्चात उपरोक्त लोगो के द्वारा दिनांक 31.12.2009 को एक मुख्तारआम पुनः उपनिबन्धक कार्यालय तहसील अलीगंज एटा में पंजीकृत करवाया जिसमें कमलेश सिंह के द्वारा अपना पता लाला

सिंह मान सिंह बिल्डिंग, लोहार चाल मुम्बई दर्शाया गया तथा शिवराम का पता नई बस्ती देवपुरा मैनपुरी दर्शाया गया तथा सम्बन्ध में मित्र व विश्वासपात्र बताया। इस प्रकार कमलेश सिंह व शिवराम मिश्रा के द्वारा फर्जी व कूट रचित दस्तावेज तैयार कर तथा उपजिलाधिकारी मैनपुरी के द्वारा बिक्री पर रोक के उपरान्त भी प्रार्थी के पिता गंगा सिंह के हिस्से की ½ भाग की जमीन की बिक्री कर दी गयी है। यह भी अवगत करा दूं कि कमलेश सिंह चौहान द्वारा मुम्बई में भी फ्राड किया गया था। जिसके सम्बन्ध में कमलेश सिंह के विरूद्ध थाना मटुंगा जिला मुम्बई महाराष्ट्र में मु०अ०सं० 541/2021 धारा 419/420/467/ 468/471/34 भादवि में दिनांक 26.11.2021 को मुकदमा दर्ज हुआ था उपरोक्त कमलेश सिंह आदि प्रार्थी की पूर्वजों की सम्पत्ति को धोखाधडी व कूट रचना करके हडपने की पूरी कोशिश कर रहे हैं और मेरा नुकसान करने पर आमादा है। यही मेरा बयान है।.....

प्रश्न..... आपका वर्ष 2012 में माननीय न्यायालय में राजीनामा हो गया था उसके पश्चात आपने उक्त एफआईआर अंकित करायी है। ..... उत्तर.... राजीनामा हमारा इस आधार पर हुआ था कि उक्त भूमि हरनाम सिंह व गंगा सिंह दोनों की थी। और आपसी बातें घर पर बैठकर कर लेंगे जिसमें हम भाईयों को अपना हिस्सा देने की बात मूँह जुबानी कही थी अब तक हिस्सा न देने और स्टे के बाद भी बैनामा कराने पर मेरे द्वारा यह एफआईआर दर्ज करायी थी।" (Emphasis supplied)

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 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 misconceived 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 ofArchana 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)

9. As referred above, it is not in dispute that power of attorney was executed/ registered on 09.09.2008, i.e., almost about 15 years ago. It is also not in dispute that Complainant has filed an application under Section 33/39 of U.P. Revenue Code wherein an order was passed in his favour and there was a stay. However, the effect of it, i.e., whether power of attorney could be executed or not, could have been decided by a Civil Court but execution of power of attorney was never challenged. It is not the case of Complainant that he was not aware about power of attorney. It is also not in dispute that a civil suit was filed between parties in the year 2012, which on basis of a compromise, was withdrawn. Execution of compromise has not been disputed though now it has been alleged that it was forgery. There was no challenge at the instance of Complainant either to execution of compromise or withdrawal of suit. It is further not in dispute that recently a civil suit has also been filed by Complainant with regard to property in question.

10. In aforesaid background, I find merit in argument of learned Senior Advocate appearing for applicant that even considering the above referred statement of complainant recorded under Section 161 Cr.P.C., the ingredients of above referred offences which are also discussed in **A.M. Mohan (Supra)** are not made out. There is no element that applicant has dishonestly induced the complainant to deliver any property as well as since power of attorney has not been challenged for last about 15 years before any Civil Court, only on basis of statement of Complainant recorded under Section 161 Cr.P.C., offence under Sections 420 and 468 I.P.C. i.e., "cheating" and "forgery" are not even prima facie made out.

11 The contention of learned counsel for Opposite Party No. 4 has no legal substance as bare perusal of statement of Complainant recorded during investigation does not disclose that any offence referred was made out. Power of attorney is alleged to be a piece of forgery and cheating mainly it being irregular. No ingredients of offence such as deception of a person, fraudulently inducing any person to deliver any property and dishonest intention, are present. Similarly ingredients of forgery are also not made out since only allegation is that power of attorney could not be prepared due to a legal impediment and applicant was not empowered to execute it, which would fall short to make out an offence of forgery.

12. The investigation in present case appears to be conducted in a very casual manner, therefore, in this regard, reference of outcome of an inquiry conducted by Police Officer become relevant that it was a purely civil dispute. In this regard, an answer to a question of Investigating Officer given by Complainant also become relevant that:

*"प्रश्न..... आपका वर्ष **2012** में माननीय न्यायालय में राजीनामा हो गया था उसके पश्चात आपने उक्त एफआईआर अंकित करायी है। ..... उत्तर.... राजीनामा हमारा इस आधार पर हुआ था कि उक्त भूमि हरनाम सिंह व गंगा सिंह दोनों की थी। और आपसी बातें घर पर बैठकर कर लेंगे जिसमें हम भाईयों को अपना हिस्सा देने की बात मूँह जुबानी कही थी अब तक हिस्सा न देने और स्टे के बाद भी बैनामा कराने पर मेरे द्वारा यह एफआईआर दर्ज करायी थी।"*

13. In above background, Court takes note of observations made by Supreme Court in **A.M. Mohan (Supra)** that there is

a growing tendency to conduct purely civil dispute into criminal cases and further observation that there is an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement and for that the observations made by Supreme Court in **G. Sagar Suri v. State of U.P. (2000) 2 SCC 636** are also relevant.

14. In aforesaid circumstances, I find that it is a fit case where in exercise of inherent power under Section 482 Cr.P.C. the impugned charge-sheet and cognizance and summoning order can be quashed since it is an outcome of investigation which appears to be very casual in nature and as discussed above dispute between parties is of civil in nature, which could not be given a criminal angle, only to harass accused i.e., applicant as well as ingredients of offences levelled are not made out.

15. It would be appropriate to mention following paragraph of a 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 can 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)

16. In the result, application is allowed. Impugned charge sheet dated 30.08.2023, summoning order dated 22.09.2023 and all further proceedings in Case No. 4206 of 2023, arising out of Case Crime No. 0471 of 2023, under Sections 419, 420, 467, 468, 471 IPC, Police Station

Kotwali, District Mainpuri, are hereby quashed.

17. Registrar (Compliance) to take steps.

(2024) 6 ILRA 24
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.06.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY J.

Application U/S 482 No. 19550 of 2024

Sanjay Gupta @ Sanju Mohan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Kamal Singh

Counsel for the Opposite Parties:
G.A., Kartikeya Shukla

Criminal Law – Criminal Procedure Code, 1973 – Sections 156(3), 200, 202, 204 & 482 - The Indian Panel Code, 1860 - Sections 383 & 387: - Application u/s 482 – for quashing the summoning order U/s 204 of Cr.P.C. - both the parties (Applicant & Complainant) are in litigation on the issue of trade mark and copyright – complaint case was filed by complainant - to put pressure upon the applicant to compromise in the case – court finds that, 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 is absolutely missing – however, it was not a case of Complainant that he actually handed over Rs. 5 lacs to accused - held, in order to committing of extortion u/s 387 IPC act of extortion has to be concluded in terms of section 383 IPC – since, in this case, ingredient of section 387 IPC are not made out therefore, in view of law settled in case of A.M. Mohan (SC) it is a fit case, where in exercise of inherent power, impugned criminal proceedings can be quashed – hence, instant application is allowed.

(Para – 11, 13, 14, 15)

Application Allowed. (E-11)

List of Cases cited:

1. A. M. Mohan Vs St. Represented by SHO & anr.(2024 SCC Online SC 339),

2. Dhananjay @ Dhandnjay Kumar Singh Vs St. of Bihar & ors. (2007 14 SCC 768),

3. Salib @ Shalu @ Salim Vs St. of UP & ors.(2003 INSC 687),

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Applicant is aggrieved by summoning order dated 28.08.2023 passed under Section 204 Cr.P.C. by Additional Sessions Judge/ Special Judge (Dacoity Affected Area), Jalaun at Orai in Complaint Case No. 58 of 2022 (M/s Balaji Traders Proprietor Manoj Kumar Agarwal vs. Sanjay Gupta @ Sanju Mohan), whereby applicant has been summoned to face trial for offence under Section 387 IPC.

2. It has been pointed out that both parties are in litigation on the issue of trade mark and copyright with regard to packaging of Supari which is pending before appropriate Court. It is the case of applicant that Complainant has initiated present proceedings only to put pressure on him to compromise in the case.

3. It is the case of Complainant that alleged occurrence took place on 22.05.2022 when accused side have threatened him and tried to kidnap him by pointing a gun in order to procure Rs. 5

lacs to permit him to run the business of Gutkha (Sudh Supari Dana) and when Police Authorities failed to lodge FIR, an application under Section 156(3) Cr.P.C. was filed. It is further case of Complainant that under the orders of Court it was treated as complaint case and statements under Sections 200 and 202 Cr.P.C. were recorded and applicant was summoned by impugned order to face trial under Section 387 IPC.

4. Sri Kamal Singh, learned counsel for applicant, submitted that even considering above referred contents of complaint and statements, no offence is made out against applicant as it is not the case of Complainant that he has given any money to applicant. It has also been urged that absolutely a false case was lodged only in order to put pressure on applicant. Learned counsel referred the judgments passed by Supreme Court in **R.S. Nayak vs. A.R. Antulay, 1986 Vol. LXXXVIII Page 260; Mrs. Dhanalakshmi vs. R. Prasanna Kumar and others, Manu/SC/0159/1989; Medchi Chemicals & Pharma P. Ltd. vs. Biological E. Ltd. and others, (2000)3 SCC 269; and State of Haryana and others vs. Ch. Bhajan Lal and others, AIR 1992 SC 604** to contend that it is a fit case to exercise inherent power envisaged under Section 482 Cr.P.C.

5. Per contra, Sri Kartikeya Shukla, learned counsel appearing for Opposite Party No. 2, i.e., Complainant, urged that impugned order assigned reasons as required under Section 204 Cr.P.C. that there are sufficient ground to proceed against applicant. He also referred the statements recorded under Sections 200 and 202 Cr.P.C. as well as impugned summoning order.

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

7. 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."

8. In aforesaid factual and legal background the Court has to consider, whether on basis of material available ingredients of Section 387 IPC are made out as well as what is the effect of rival litigation on the issue of Trademark and Copyright. For reference definition of 'extortion' as given in Section 383 IPC and Section 387 IPC are reproduced hereinafter:

***"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".”

*“**387. Putting person in fear of death or of grievous hurt, in order to commit extortion.**-Whoever in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”*

9. In order to further appreciate the rival submissions it would be apt to reproduce the relevant part of complaint, statement of Complainant recorded under Section 200 Cr.P.C., statements of witnesses recorded under Sections 202 Cr.P.C. and impugned order, as under:

Relevant part of Complaint:

*“4. यह कि घटना दिनांक 22.05.2022 समय करीब 3 बजे दिन की है, प्रार्थी बाजार से अपने घर स्कूटी से आ रहा था, कि जैसे ही राठ रोड उरई से सत्कार मैरिज हाउस वाले रास्ते पर अपने घर के लिये चला तभी एक स्कार्पियों कार आकर रूकी, और प्रार्थी की स्कूटी के आगे लगा दी, उसमें से उक्त संजय गुप्ता एवं 3 अज्ञात व्यक्ति जो अपने-अपने हाथों में राइफल लिये थे, जिन्हे सामने आने पर प्रार्थी पहिचान सकता है, गाड़ी से उतरे और उक्त संजय गुप्ता प्रार्थी से बोला कि अपना सुपारीदाना गुटखा बन्द कर दो, और हमने जो तुम्हारे सुपारीदाना के नाम से निकाला है, उसे बाजार में चलने दो और उसमें से मुनाफे का कुछ हिस्सा तुमको दे देगें, तो प्रार्थी ने मना कर दिया तो **उपरोक्त लोग आग बबूला होकर के सीने पर राइफले लगाकर कहा कि यदि अपना गुटखा चलाओगे तो प्रतिमाह5 लाख रूपया देना पड़ेगा**, प्रार्थी द्वारा इन्कार करने पर उपरोक्त लोग प्रार्थी को मारपीट कर जबरन अपहरण करने के उद्देश्य से गाड़ी में डालने लगे प्रार्थी द्वारा चिल्लाने पर रास्ते से निकल रहे राजा सिंह पुत्र रणवीर सिंह निवासी नया रामनगर उरई एवं राममनोहन पुत्र रामदयाल निवासी गांधी नगर उरई, जिला जालौन तथा मुहल्ले के कई लोग आ गये तो **उपरोक्त सभी लोग प्रार्थी को गुटखा (शुद्ध सुपारी दाना) बाजार में बेचने पर व 5 लाख रूपया प्रतिमाह ना देने पर जान से मारने की धमकी देते हुये स्कार्पियों में बैठकर भाग गये।"***

Relevant part of statement of Complainant:

*"दिनांक 22.05.2022 को समय करीब 3.00 बजे दिन में मैं बाजार से स्कूटी से घर आ रहा था राठ रोड सत्कार मैरिज हाउस के एक स्कार्पियो कार आकर उसकी स्कूटी के सामने रूकी और उस गाडी से सजय गुप्ता एवं तीन अज्ञात व्यक्ति अपने-अपने हाथों में राइफल लिये उतरे और संजय गुप्ता मुझे बोला कि अपना सुपारीदाना गुटखा बंद कर दो और जो हमने तुम्हारे सुपारी दाना के नाम से निकाला है उसे बाजार में चलने दो, हम लोग कुछ मुनाफा तुम्हें दे देगे। मेरे मना करने पर वह नाराज होकर मेरे सीने में राइफल लगा दिया और कहा कि यदि अपना गुटखा चलाओगे तो हमें 05 लाख रूपया देना पड़ेगा, मेरे मना करने पर मुझे मारपीट करके जबरन गाडी में डालने लगे। मेरे चिल्लाने पर राहगीर राजा सिंह पुत्र राणादीर सिंह एवं राममनोहर पुत्र रामदयाल तथा मुहल्ले के कई लोग आ गये। वह **लोग मुझे गुटखा बाजार में बेचने पर व 5 लाख रूपया प्रतिमाह न देने पर जान से मारने को धमकी देते हुये गाडी में बैठकर भाग गये।** मै कोतवाली उरई रिपार्ट करने गया व पुलिस अधीक्षक जालौन स्थान उरई को प्रार्थनापत्र पंजीकृत डाक से प्रेषित किया।"*

Relevant part of statement of PW-1:

*"घटना दिनांक 22 मई सन् 2022 की समय करीब 3.00 बजे दिन की है मैसर्स बालाजी ट्रेडर्स के मालिक मनोज अग्रवाल अपनी स्कूटी से बाजार से चलकर कटिका वाले रास्ते से अपने घर जा रहे थे तभी स्कूटी के आगे एक स्कार्पियों कार रूकी कार के अंदर से संजय गुप्ता व तीन अज्ञात कत्रिम जो अपने हाथ में बंदूक लिए थे उतरे। संजय गुप्ता ने मनोज अग्रवाल से कहा कि मैंने तुम्हारे नाम से जो सुपारी दाना निकाला है उसे चलने दो और अपना जो चला रहे हैं उसे बंद कर दो मैं जो चल रहा हूँ मुनाफे में से कुछ हिस्सा देता रहूंगा मनोज अग्रवाल ने ऐसा करने से मना कर दिया तो वह **गुस्से में आकर बंदूक तान दी और बोले कि अगर अपना गुटखा चलाना हो तो मुझे रू० 500,000 रूपये हर महीने दो और मारपीट करने लगे और खींचकर गाड़ी में डालने लगे वहाँ चिल्लाने की आवाज सुनकर 10-20 आदमियों की भीड़ इकट्ठा हो गई फिर मुल्जिमान यह धमकी देते हुए कि अगर रू०***

500,000 रूपए हर महीना नहीं दिया तो जान से मार देंगे और उसी गाड़ी में बैठकर चले गए।"

Relevant part of statement of PW-2:

"घटना दिनांक 22/05/2022 की है समय करीब 3.00 बजे दिन की घटना है मैसर्स बालाजी ट्रेडर्स के मालिक मनोज अग्रवाल अपनी स्कूटी से अपने घर जा रहे थे वह सरकर कटिका वाले रास्ते से जा रहे थे तभी स्कूटी के आगे स्कार्पियों कार रूकी कार के अंदर से संजय गुप्ता व तीन अज्ञात कत्रिम उतरे जो अपने हाथ में बंदूक लिए थे संजय गुप्ता ने मनोज अग्रवाल से कहा कि मैंने तुम्हारे नाम से जो सुपारी दाना गुटका निकाला है उसे चलने दो और जो अपना गुटखा चला रहे हो उसे बंद कर दो मैं अपने गुटके की आमदनी में से कुछ हिस्सा देता रहूंगा मनोज गुप्ता ने ऐसा करने से मना किया तो ***उन्होने गुस्से में आकर बंदूक के तान दी और बोले अगर अपना गुटखा चलाना हो तो मुझे 5 लाख रूपया हर महीने का दो और मारपीट करने लगे खींचकर गाड़ी में डालने लगे चिल्लाने की आवाज सुनकर वहां पर 10-20 लोग इकट्ठे हो गए और फिर मुल्जिमान धमकी देते हुए कि अगर रू० 500,000 हर महीना नहीं दिया तो जानसे मार देंगे और गाड़ी में बैठकर चले गए।"***

Relevant part of impugned order:

"उपरोक्त सुस्थापित विधि के आलोक में हस्तगत प्रकरण के तथ्यों व परिस्थितियों की समीक्षा से स्पष्ट है कि ***परिवादी को गुटका (शुद्ध सुपारी दाना) बाजार में बेंचने पर एवं 5,00,000/- रूपये प्रतिमाह न देने पर जान से मारने की धमकी देने तथा कथन किया है। परिवादी की ओर से परीक्षित साक्षी पी०डब्लू०1 राममनोहर व पी०डब्लू० 2 राजा सिंह ने परिवादी के कथनों का समर्थन किया है।***

इस स्तर पर परिवाद कथानक व समर्थन में व इस स्तर पर उपलब्ध साक्ष्य के आधार पर न्यायालय के मत में विपक्षी संजय गुप्ता उर्फ संजू गोहन के विरूद्ध प्रथम दृष्टया धारा 387 भा०दं०सं० का अपराध गठित होना पाया जाता है। उपरोक्तानुसार विपक्षी संजय गुप्ता उर्फ संजू गोहन को धारा 387 भा०दं०सं के अपराध में विचारण हेतु आहूत किये जाने का पर्याप्त आधार है। "

(Emphasis supplied)

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."

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)*

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)]**

15. The outcome of above discussion is that, ingredients of Section 387 IPC are not made out, therefore, in view of **A.M. Mohan (supra),** it is a fit case where in exercise of inherent power present criminal proceedings can be quashed.

16. In the result, application is allowed. Impugned summoning order dated 28.08.2023 as well as entire proceedings of Complaint Case No. 58 of 2022 (M/s Balaji Traders Proprietor Manoj Kumar Agarwal vs. Sanjay Gupta @ Sanju Mohan), under Section 387 IPC, Police Station Kotwali Orai, District Jalaun, pending in the Court of Additional Sessions Judge/ Special Judge (Dacoity Affected Area), Jalaun at Orai, are hereby quashed.

17. Registrar (Compliance) to take steps.

(2024) 6 ILRA 31
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.06.2024

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Crl. Misc. Bail Application No. 6338 of 2024

Brajesh Singh @ Pappu Singh ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Rajendra Prasad Mishra

Counsel for the Respondent:
G.A.

Criminal Law - Bail - Abetment of Suicide - Criminal Procedure Code,1973 - Section 439 - Indian Penal Code,1860 - Section 306 - Abetment of Suicide - Section 107 - Abetment of a Thing - In the suicide note,

the deceased had written that although he had returned a substantial amount of money along with the interest, he was being harassed by the applicant and that if anything happened to him, the applicant should be held liable - It was argued on behalf of the applicant that no case u/s 306 IPC was made, as there was no abetment at the instance of the applicant as defined u/s 107 IPC - Held - prima facie, the abetment as defined u/s 107 IPC is missing at the instance of the applicant - Applicant entitled to bail (Para 6)

Allowed. (E-5)

List of Cases cited:

Mariano Anto Bruno & anr. Vs Inspector of Police; 2022 SCC Online SC 1387

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

1. Heard learned counsel for the applicant, Sri Yogeshwar Saran Srivastava who appears for the informant as well as learned AGA and perused the record.

2. The accused-applicant seeks bail in Case Crime No.148 of 2024 under section 306 IPC, P.S. Kotwali Wazirganj, District Gonda.

3. In terms of the FIR registered under section 306 IPC, it was alleged that the husband of the informant used to run a jewellery shop and kitchen utensils. It was also stated that he has taken certain money advanced from some persons and he had also returned substantial amount along with the interest. It was also stated that on account of harassment for recovery of the money, the husband of the informant had died and his body was recovered along with a suicide note. The said suicide note is on record as Annexure no.5, wherein the deceased had expressed that although he had returned the substantial amount of money along with the interest, he was being harassed. It was also stated that if anything happened against him, the applicant should be liable for that. The cause of death, as per the postmortem report, is ante-mortem firearm injury.

4. In the light of the said material, the counsel for the applicant argues that even accepting the said suicide notice to be gospel truth for the sake of argument, no case can be made under section 306 IPC as there was no abetment at the instance of the applicant as defined under section 107 IPC, as such, the applicant may be enlarged on bail. The criminal history as pointed out by the learned AGA are minor offences.

5. The counsel for the informant strongly opposes the bail application by arguing that the bail application of the co-accused is pending being Bail Application No.5880 of 2024 and this court had directed the FSL verification of the suicide note vide order dated 30.05.2024.

6. Considering the submissions made at the bar, prima-facie in terms of the FIR, the allegations are of commission of offence under section 306 IPC. From the material on record including the suicide note, prima-facie the abetment as defined under section 107 IPC is missing at the instance of the applicant as such, considering the law as explained in the case of the **Mariano Anto Bruno and another vs. Inspector of Police; 2022 SCC Online SC 1387** and finding that abetment as defined under section 107 IPC is missing, the applicant who is in custody since 17.04.2024 and the criminal history are of minor offences, the applicant is entitled for the bail. Thus the bail application is allowed.

7. Let the applicant ***Brajesh Singh Alias Pappu Singh*** be released on bail in aforesaid first information report number subject to his furnishing a personal bond and two reliable sureties of Rs.20,000/- (Twenty Thousand) each of the like amount 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.

(2024) 6 ILRA 33
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.06.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Misc. Writ Petition No. 4459 of 2024

Vijay Kumar Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Neelam Pandey

Counsel for the Respondents:
G.A.

A. Constitution of India, 1950-Article 226-Criminal Procedure Code, 1973-Section 41-A-Indian Penal Code, 1860-Sections 341, 308, 323, 504, 506, 286-The punishment for the offences in the impugned FIR is less than seven years, the provisions of section 41-A Crpc shall be strictly followed as per guidelines of the Apex Court judgment in case of Arnesh Kumar-directions issued. (Para 1 to 7)

B. In the case of Arnesh Kumar, the Apex Court examined the application of section 41-A of the CrPC, which outlines certain procedures before making an arrest. This decision strike a balance between preventing misuse of law and protecting the rights of those accused. Failure of these directions could result in the police officer being held in contempt of court. (Para 7)

The writ petition is disposed of. (E-6)

List of Cases cited:

Arnesh Kumar Vs St. of Bih. & ors. (2014) 8 SCC 273

(Delivered by Hon'ble Attau Rahman Masoodi, J.
&
Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard learned counsel for the petitioner and learned Additional Government Advocate for the State.

2. This petition seeks issuance of a direction in the nature of certiorari for quashing the impugned F.I.R. registered as Case Crime/F.I.R. No. 0098 of 2024 under Sections 341, 308, 323, 504, 506 and 286 I.P.C., Police Station Maheshganj, district Pratapgarh.

3. The punishment for the offences mentioned in the impugned F.I.R. is less than seven years.

4. In view of the order proposed to be passed in this writ petition, issuance of notice to the opposite party no. 4 is dispensed with.

5. Learned Additional Government Advocate looking to the gravity of punishment being less than seven years has stated that the provisions of Section 41-A Cr.P.C. shall be strictly followed in terms of judgment rendered by Hon'ble Supreme Court of India in a case reported in ***(2014) 8 SCC 273: Arnesh Kumar vs. State of Bihar and another.***

6. The present petition deserves to be disposed of in terms of the statement made by learned A.G.A.

7. Accordingly, this petition is **disposed of** in view of the provisions of Section 41-A Cr.P.C. and the law as laid down by Apex Court in the case of ***Arnesh Kumar (supra)***.

(2024) 6 ILRA 34
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.06.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ C No. 4810 of 2024

Sahara Prime City Ltd. ...Petitioner
Versus
The Central Government Industrial Tribunal & Ors. ...Respondents

Counsel for the Petitioner:
Nirmit Srivastava, Aakchad Nath, Amrandra Nath Tripathi, Chandra Kant Rai, Rahul Sajan Yadav

Counsel for the Respondents:
Akhilesh Pratap Singh

A. Civil Law - The Limitation Act, 1963 - Section 5 - Delay Condonation - if there is any possible way which may be permissible under the law to allow the application for condonation of delay to hear and decide the lis or issue or controversy or dispute before the court of law or tribunal etc. on merits, that very application must be allowed so that the controversy or dispute etc. before the competent court of law could be decided on merits - technical approach rejecting the lis or issue or controversy or dispute etc. on the ground of limitation should be avoided and the endeavour of the Tribunal etc. should be to decide the issue etc. on merits (Para 31)

B. Employees' Provident Fund and Miscellaneous Provisions Act, 1952 - Tribunal (Procedure) Rules, 1997 - Section 7(2) - Appeal - Delay Condonation - Any person aggrieved by an order passed by any authority under the Act may, within 60 days from the date of issue of the order, prefer an appeal to the Tribunal - Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days.

C. Civil Law - The Limitation Act, 1963 - Section 14 - In computing the period of limitation, the time during which the plaintiff has been prosecuting with due diligence and in good faith another civil proceeding, in a court which, due to defect of jurisdiction or other cause of a similar nature, is unable to entertain it, shall be excluded.

D. Petitioner challenged the order dated 31.03.2021 passed by the Assessing Officer/Regional Provident Fund Commissioner-II/EPFO - Appeal should have been filed within 120 days i.e. on or before 31.07.2021 - Appellate Tribunal at Lucknow was not functional when the impugned order was passed Petitioner, in

the critical condition of Covid-19 and without any other efficacious or statutory remedy, filed a writ petition before the High Court of Delhi on 13.09.2021 - After the Tribunal became functional in 2023, the petition was dismissed as withdrawn on 28.03.2023, with liberty to approach the Tribunal - Petitioner filed the statutory appeal immediately thereafter on 31.03.2023 - Appeal was dismissed as being barred by the period of limitation - Held - Delay in filing the statutory appeal should have been condoned in light of S. 14 of the Limitation Act - Additionally, the Hon'ble Apex Court in Suo Motu Writ Petition (Civil) No. 3 of 2020 in re: Cognizance for Extension of Limitation directed that in cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, all persons shall have a limitation period of 90 days from 01.03.2022 - Impugned order was quashed, and the Appellate Tribunal was directed to decide the appeal on merits (Para 31, 32, 33)

Allowed. (E-5)

List of Cases cited:

1. Consolidated Engg. Enterprises Vs Irrigation Deptt. (2008) 7 SCC 169;

2. Laxmi Srinivas R. & P. Boiled Rise Mill Vs St. of Andhra Pradesh & anr. 2022 SCC Online 1790

3. M.P. Steel Corporation versus CCE (2015) 7 SCC 58

4. M/s Associated 10 Auto-mobile Vs Central Government Industrial Tribunal cum Labour Court & ors. 2023 LLR 682

5. Rauzagaon Chini Mills Ltd. Vs St. of U.P. & ors. 2019 SCC Online All 5541

6. Amit Metaliks Ltd. & ors. Vs Central Government Industrial Tribunal-Cum-Labour Court & anr. 2023 SCC Online Cal 5551

7. Ketan vs Parekh Vs Special Director Directorate of Enforcement & anr. (2011) 15 SCC 30.

8. Oil & Natural Gas Corp. Ltd. Vs Gujarat Energy Transmission Corporation Ltd & Ors., Civil Appeal No. 1315 of 2010 dt 01.03.2017

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

1. Heard Shri Amrendra Nath Tripathi, learned counsel for the petitioner assisted by Shri Rahul Tripathi and Shri Nirmit Srivastava, learned counsels for the petitioner and Shri Akhilesh Pratap Singh, learned counsel for the respondent nos. 2 and 3.

2. There is no need to issue notice to the opposite party no.1 as the opposite party no.1 is an appellate Tribunal.

3. By means of this petition, the petitioner has prayed following main relief(s):-

"(I.) To issue a writ of certiorari quashing/setting aside the impugned judgment/order dated 18.04.2024 passed by the Opposite Party No. 1 in appeal No. 18 of 2023 in Re: Sahara Prime City Ltd. Vs. Central Board of Trustees, (EPFO) and Ors, as contained in Annexure No. 1.

(II.) A writ, order or direction in the nature of Certiorari quashing the assessment order dated 30.03.2021 along with its corrigendum dated 31.03.2021 passed by Opposite Party No. 3, as contained in Annexure No. 2 to the petition."

4. At the very outset, Shri Tripathi has drawn attention of this Court towards SA-1 of the supplementary affidavit filed on 18.6.2024, which is

the show cause notice, before issue of arrest warrant under Form No. CP-25 dated 31.5.2024, issued by the Recovery Officer, Regional Office, Lucknow of Employees' Provident Fund Organization.

5. Shri Tripathi has submitted that earlier the warrant was issued on 19.1.2024 but at that point of time, the order was reserved by the appellate Tribunal in Appeal No. 18 of 2023 (Sahara Prime City Limited vs. CBT & others) and also in Appeal No. 20 of 2023 (Sahara Net Corp. Limited vs. CBT & another), therefore, after passing the impugned appellate order in both the Appeals on 18.4.2024, that warrant has lost its efficacy.

6. Learned counsel for the petitioner has, precisely, assailed the impugned judgement and order dated 18.4.2024 passed by the Appellate Tribunal in Appeal No. 18 of 2023 in re: Sahara Prime City Ltd. Vs. Central Board of Trustees, (EPFO) and others on the ground that the aforesaid appellate order has been passed solely on the ground that the appeal filed by the appellant is barred by the period of limitation, as provided under Rule 7(2) of the Tribunal (Procedure) Rules, 1997. Notably, the appeal had been filed challenging the orders dated 30.3.2021 and its corrigendum order dated 31.3.2021 passed by the opposite party no.3, Assessing Officer/Regional Provident Fund Commissioner-II/EPFO, Lucknow. Undisputedly, the period of limitation to file an appeal is 60 days and further extended period is 60 days, therefore, as per statutory prescription, the aforesaid appeal should have been filed on or before 31.7.2021.

7. To clarify the controversy in hand, Shri Tripathi has drawn attention of this Court towards Annexure Nos. 24 and 25 which are the orders dated 03.06.2021 and 04.06.2021 respectively passed by the Division Bench of this Court in Misc. Bench No. 11379 of 2021.

8. For the convenience, the aforesaid orders dated 03.06.2021 and 04.06.2021 respectively are being reproduced hereunder:-

"The case has been taken up through Video Conferencing.

Heard learned counsel for the petitioner as well as Sri Akhilesh Pratap Singh, learned counsel appearing for opposite party Nos.2 to 4.

Learned counsel for the petitioner submits that on the basis of impugned recovery certificate the opposite parties are pressing hard to recover the alleged outstanding amount, although the petitioner has already preferred an appeal under Section7-I of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 before the Central Government Industrial Tribunal (in short "CGIT") against the order dated 23.03.2021, pursuant to which recovery proceedings have been initiated, alongwith an application for waiver of the deposit. In appeal interim relief has also been sought. It is also stated that learned Tribunal is not functional at present as there is no Presiding Officer.

Learned counsel for the opposite party Nos.2 to 4 may seek instructions in the matter particularly

as to whether the Central Government Industrial Tribunal is functional at present or not and as to whether the cases listed before it are being heard or not. He may also seek instruction as to whether during the pendency of the appeal of the petitioner the opposite parties are going to press for recovery on the basis of impugned recovery certificate or not.

Put up tomorrow i.e. 04.06.2021."

XXX

"The case is taken up through Video Conferencing.

Heard Mr. Akhilesh Kalra, learned counsel for the petitioner as well as Sri Akhilesh Pratap Singh, learned counsel for the opposite parties no.2 to 4.

The instant writ petition has been filed seeking following reliefs:

"(i) Issue a writ order or direction in the nature of certiorari quashing the recovery certificate dated 17.05.2021 annexed as Annexure No.1.

(ii) Issue a writ order or direction in the nature of mandamus directing the respondent not to take any coercive steps pursuant to the order dated 23.03.2021 during till disposal of Appeal pending before the Appellate Tribunal against the order dated 23.03.2021;

(iii) Ad-interim mandamus to the aforesaid effect.

(iv) Any order or direction may also be passed as this Hon'ble Court deems fit in the facts and circumstances of the case."

Mr. Akhilesh Kalra, learned counsel for the petitioner submitted that petitioner is a Public Limited Company dealing in Insurance Business. The petitioner-company is under the supervisory control of Insurance Regulatory and Development Authority of India (in short "IRDA"). The provisions of the Insurance Act, 1938 and Insurance Regulatory and Development Authority Act, 1999 and the rules and regulations made thereunder are applicable to the petitioner-company. It is submitted that after providing Provident Fund Code numbers to the petitioner vide letter dated 11.01.2013 the respondent no.2 issued a notice dated 15.04.2013 under Section 7A(3) of Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (in short "Act of 1952") to the petitioner. After conclusion of enquiry, which required under Section 7A of the Act of 1952, the enquiry officer submitted his report before the respondent no.2 on 22.03.2021. It is also stated that after submission of enquiry report the petitioner requested for awarding an opportunity to cross-examine the enquiry officer, however, the said opportunity was not provided and the respondent no.2 without providing the reasonable opportunity to the petitioner passed the order dated 23.03.2021, whereby determined the amount due from petitioner. The amount determined by respondent No.2 vide order dated23.03.2021 is Rs.62,48,07,169.00 (Sixty Two Crore Forty Eight Lac Seven Thousand One

Hundred Sixty Nine Only). It is also stated that the respondent no.2 has passed the order dated 23.03.2021 without considering the material evidence on record as also without providing reasonable opportunity of hearing.

Learned counsel for the petitioner further submitted that being aggrieved by the order dated 23.03.2021 the petitioner has approached the Appellate Tribunal by filing a statutory appeal under Section 7-I of the Act of 1952. This appeal was filed by the petitioner within the time prescribed under the statute. In the appeal the interim relief has also been sought. The appeal has been filed along with an application for waiver of pre-deposit as the Appellate Tribunal is empowered to waive the conditions of pre-deposit, as provided under the Act.

It is further submitted that immediately after filing of the appeal the opposite party no.2 initiated the recovery proceedings for recovering the amount as determined vide order dated 23.03.2021 passed by respondent no.2, which is subjudice before the Appellate Tribunal in the appeal filed by the petitioner.

Learned counsel for the petitioner has also stated that being aggrieved by initiation of the recovery proceedings during pendency of statutory appeal, wherein interim relief has also been sought by the petitioner as also the fact that the Appellate Tribunal at Lucknow is vacant, where the appeal has been preferred by the petitioner, and the Central Government Industrial Tribunal, Kanpur (in short "CGIT") is holding the charge of Appellate Tribunal, Lucknow, however, due to the Covid-19 pandemic the Appellate Tribunal at Lucknow is not functional therefore the appeal as well as application for waiver preferred by the petitioner within time are pending consideration before the Appellate Tribunal, as such, the petitioner has approached this Hon'ble Court for the reliefs sought in the writ petition and if in the given facts and circumstances of the case indulgence is refused by this Hon'ble Court then in that event the petitioner would suffer irreparable loss and injury. It is also submitted that considering the situation of the entire State on account of Covid-19 pandemic this Court in Public Interest Litigation (PIL) No.564 of 2020, vide order dated 26.03.2020 issued certain directions to prevent the miscarriage of justice. The relevant portion of order dated 26.03.2020 is reproduced as under:

"Only with the view to ensure that citizens are not deprived of their right to approach the Courts of law, we propose to exercise our jurisdiction under Articles 226 and 227 of the Constitution of India by issuing certain directions. The directions are required to be issued to ensure that litigants should not suffer on account of their inability to approach the Courts of law. We issue the following directions:

(i) All interim orders passed by the High Court of Judicature at Allahabad as well as at Lucknow, all the District Courts, Civil Courts, Family Courts, Labour Courts, Industrial Tribunals and all other Tribunals in the State over which this Court has power of superintendence,

which have been expired subsequent to 19th March, 2020 or are due to expire within a period of one month from today, will continue to operate upto 26th April, 2020. We, however, make it clear that those interim orders which are not of a limited duration and are to operate till further orders will remain unaffected;

(ii) If the Criminal Courts in the State have granted bail orders or anticipatory bail for a limited period which are likely to expire in one month from today, the said orders will stand extended for a period of one month from today;

(iii) If any orders of eviction, dispossession or demolition are already passed by the High Court, District or Civil Courts, the same shall remain in abeyance for a period of one month from today;

(iv) Considering the fact that it will be practically impossible for the citizens to approach the Courts for redressal of their grievances for a period of twenty one days specified in the order of the Ministry of Home Affairs dated 24th March 2020, we sincerely hope that the State Government, Municipal Authorities and the agencies and instrumentalities of the State Government will be slow in taking action of demolition and eviction of persons.

This order be published in the official website of this Court. A softcopy of this order shall be sent to all concerned Courts and Tribunals; the learned Advocate General; the learned Additional Solicitor General of India; the learned Assistant Solicitor General of India; State Public Prosecutor and the Chairman of Bar Council of Uttar Pradesh."

Learned counsel for the petitioner further submitted that in the facts and circumstances of the case as also taking into account the spirit of the order dated 26.03.2020, passed by this Court in Public Interest Litigation (PIL) No.564 of 2020, the interest of the petitioner may kindly be protected during pendency of the statutory appeal else the purpose of filing of appeal against the order of respondent no.2 dated 23.03.2021 would become a futile exercise by the petitioner. The prayer is to allow the writ petition.

At this juncture, it would be appropriate to mention here that after considering the relevant materials available on record as also the submissions made by learned counsel for the parties this court has passed the following order on i.e. 3.6.2021:

"The case has been taken up through Video Conferencing.

Heard learned counsel for the petitioner as well as Sri Akhilesh Pratap Singh, learned counsel appearing for opposite party Nos.2 to 4.

Learned counsel for the petitioner submits that on the basis of impugned recovery certificate the opposite parties are pressing hard to recover the alleged outstanding amount, although the petitioner has already preferred an appeal under Section7-I of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 before the Central Government Industrial Tribunal (in

short "CGIT") against the order dated 23.03.2021, pursuant to which recovery proceedings have been initiated, alongwith an application for waiver of the deposit. In appeal interim relief has also been sought. It is also stated that learned Tribunal is not functional at present as there is no Presiding Officer.

Learned counsel for the opposite party Nos.2 to 4 may seek instructions in the matter particularly as to whether the Central Government Industrial Tribunal is functional at present or not and as to whether the cases listed before it are being heard or not. He may also seek instruction as to whether during the pendency of the appeal of the petitioner the opposite parties are going to press for recovery on the basis of impugned recovery certificate or not.

Put up tomorrow i.e. 04.06.2021."

On a query being put in the light of the order dated 3.6.2021, as quoted above, Mr. Alhilesh Pratap Singh, learned counsel appearing on behalf of respondents no.2 to 4 could not dispute that the Appellate Tribunal at Lucknow is vacant and in regard to the second query it is submitted that the process of recovery would be taken up as per the procedure prescribed under the Act and the Rules made thereunder as there is no stay from any competent court of law on the issue of recovery of the amount determined by respondent no.2 vide order dated 23.03.2021.

We have considered the submissions made by parties counsel and perused the material available on record.

It is undisputed between the parties that against the order dated 23.03.2021 passed by respondent no.2 the petitioner has preferred an appeal before the Appellate Tribunal at Lucknow, within time, along with an application for waiver and in the appeal the petitioner has sought interim relief. It is also not disputed that the appellate tribunal at Lucknow is vacant and CGIT, Kanpur is holding the charge of Appellate Tribunal at Lucknow. It is further not in dispute that the delay in disposal of the application for waiver or interim relief or appeal is not on account of fault or dilatory tactics adopted by the petitioner. The appeal is statutory appeal under Section 7-I of the Act of 1952.

Considering the admitted position that the Appellate Tribunal at Lucknow is vacant and the Appeal, which has been filed within time, can not be heard nor the application for dispensation of pre-deposit, which is said to have been filed along with Appeal, could be heard and in the given facts the delay, if any, for non-disposal of the same is not attributable to the petitioner as also that the petitioner who has a right of statutory appeal can not be burdened with financial liability under the impugned order without the appeal being heard, it is provided that Appellate Tribunal at Kanpur, which is holding the charge of Appellate Tribunal at Lucknow, as stated in para 43 of the writ petition, shall consider and the decide the Appeal of the petitioner filed along with the

application for waiver of the statutory deposit with expedition say within a period of six weeks from today, as per law. The interim relief in the appeal, if any, may also be decided considering the urgency in the matter. The Appellate Tribunal may hold virtual hearing, if required. Till six weeks from today the opposite parties shall not take any coercive measure to recover the amount determined vide order dated 23.03.2021 passed by the respondent No.2. In the proceedings before the Appellate Tribunal the petitioner shall not take unnecessary adjournments.

With the aforesaid observations/ directions, the writ petition is disposed of."

9. Shri Tripathi has submitted that by means of the aforesaid order dated 03.06.2021, the Division Bench of this Court directed the learned counsel for the opposite party nos. 2 to 4 to seek specific instructions as to whether the Central Government Industrial Tribunal is functional or not and also as to whether the cases listed before it are being heard or not. On the basis of the instructions, the Division Bench has passed an order on 04.06.2021 to the effect that the appellate Tribunal, Lucknow is vacant and the appeal which has been filed within time cannot be heard nor the application for dispensation of pre-deposit, which is said to have been filed along with the appeal, could be heard. Though the CGIT, Kanpur is holding the charge of Appellate Tribunal, Lucknow.

10. In light of the aforesaid admitted position, the present petitioner, instead of filing an appeal before the appellate Tribunal at Lucknow, has approached the High Court of Delhi by filing a writ petition on 13.9.2021 bearing Writ Petition (C) No. 11387 of 2021 (Sahara Prime City Ltd. vs. Union of India and others). Notably, that writ petition at the High Court of Delhi has been dismissed being withdrawn vide order dated 28.3.2023 which reads as under:-

"1. Petitioner inter alia seeks to impugn section 7-O of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 and seeks quashing of orders dated 30.03.2021 passed by the Central Board of Trustees.

2. Learned Senior Counsel appearing for the petitioner submits that petitioner was constrained to approach this court for the reason that the Employee Provident Fund Appellate Tribunal was not functional for lack of quorum.

3. It is pointed out by learned counsel for the respondent that since the filing of the petition, the constitution of the Tribunal has been augmented and now the Tribunal is fully functional.

4. Learned Senior Counsel for the petitioner accordingly, prays that the petition be permitted to be withdrawn reserving the liberty of the petitioner to approach the Tribunal.

5. Learned Senior Counsel prays that since the petitioner had approached this court, the petitioner be granted benefit of the period from which this petition has been pending

before this court for the purposes of computation of limitation.

6. In view of the above, the petition is dismissed as withdrawn with liberty to the petitioner as prayed for. However, it is clarified that the question of limitation for filling the appeal would be appropriately considered by the Tribunal in accordance with the law."

11. Shri Tripathi has submitted that the learned counsel for the respondent has itself intimated the High Court of Delhi that *'now the Tribunal is fully functional'.* On the basis of the aforesaid intimation by the learned counsel for the respondent, the petitioner requested before the Division Bench of the High Court of Delhi that his petition may be dismissed being withdrawn and he may be given liberty to file an appeal before the appellate Tribunal making request that he may be granted the benefit of period from which this petition has been pending before the High Court for the purposes of computation of limitation. The Hon'ble High Court of Delhi dismissed the petition with the aforesaid liberty making further clarification that the question of limitation for filing an appeal would be appropriately considered by the Tribunal strictly in accordance with law. After dismissal of the writ petition by the High Court of Delhi on 28.3.2023, the petitioner immediately filed an appeal before the appellate Court on 31.03.2023.

12. Though Shri Tripathi has fairly submitted that the appeal, which should have been filed on or before 31.07.2021 before the appellate authority, could not be filed within time due to compelling circumstances i.e., extreme condition of Covid-19 but has approached the High Court of Delhi on 13.09.2021 after some delay. However, he has referred Annexure-22 which is the order dated 10.01.2022 passed by the Hon'ble Apex Court in Suo Motu Writ Petition (Civil) No. 3 of 2020 in re: Cognizance for Extension of Limitation.

13. Shri Tripathi has referred the relevant portion of the aforesaid judgement of the Hon'ble Apex Court, which is indicated in para nos. III and IV which read as under:

"*III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022, is greater than 90 days, that longer period shall apply.*

IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings."

14. Shri Tripathi has further submitted that considering the extreme

condition of Covid-19, the Apex Court has condoned the delay in all the cases where the period of limitation is prescribed w.e.f. 15.3.2020 to 28.02.2022. As per Shri Tripathi, during the aforesaid period, the petitioner had approached the High Court of Delhi on 13.09.2021, as stated above.

15. Shri Tripathi has also referred Section 14 of the Limitation Act, 1963 which provides exclusion of time of proceeding bona fide in the court without jurisdiction. To explain this Section, Shri Tripathi has submitted that in terms of Section 14 of the Limitation Act, such period of limitation may be excluded if that period has been consumed while approaching any court of law which has, however, got no jurisdiction to entertain such petition.

16. Shri Tripathi has further submitted that even if the petitioner had not sought time before the High Court of Delhi for condoning the delay for which the writ petition was pending at the High Court of Delhi, even then that period would have been excluded in view of Section 14 of the Limitation Act. He has further submitted that even Section 29(2) of the Limitation Act does not specifically bar the aforesaid eventuality as the aforesaid Section provides that the provisions contained in Sections 4 to 24 (inclusive) of the Limitation Act shall apply only in so far as the, and to the extent to which, they are not expressly excluded by such special or local law.

17. In support of his aforesaid submissions, Shri Tripathi has drawn attention of various judgements of the Apex Court viz., ***Consolidated Engg. Enterprises vs. Irrigation Deptt. reported in (2008) 7 SCC 169; Laxmi Srinivas R. and P. Boiled Rise Mill versus State of Andhra Pradesh and another reported in 2022 SCC Online 1790; M.P. Steel Corporation versus CCE reported in (2015) 7 SCC 58; M/s Associated Auto-mobile versus Central Government Industrial Tribunal cum Labour Court and others reported in 2023 LLR 682; Rauzagaon Chini Mills Ltd. Versus State of U.P. and others reported in 2019 SCC Online All 5541; Amit Metaliks Limited and another versus Central Government Industrial Tribunal-Cum-Labour Court and another reported in 2023 SCC Online Cal 5551; and Ketan vs. Parekh versus Special Director Directorate of Enforcement and another reported in (2011) 15 SCC 30***. However, he has pressed the relevant para nos. 3 and 4 of the judgement of the Apex Court in re: ***Laxmi Srinivas R. and P. Boiled Rise Mill versus State of Andhra Pradesh and another reported in 2022 SCC Online 1790*** which reads under:-

"3. It is an accepted position that the appellant had filed a writ petition before the High Court on 24.02.2018, which was not entertained vide the order dated 07.03.2018 on the ground that the appellant should approach the Appellate Authority. The appellant is entitled to ask for exclusion of the said period in terms of Section 14 of the Limitation Act, 1963. Exclusion of time is different, and cannot be equated with condonation of delay. The period once excluded, cannot be counted for the purpose of computing the period for which delay can be condoned. Of course for exclusion of

time under Section 14 of the Limitation Act, 1963, the conditions stipulated in Section 14 have to be satisfied.

4. In the facts of the present case, we find that the period from the date of filing of the writ petition on 24.02.2018 and the date on which it was dismissed as not entertained viz. 07.03.2018, should have been excluded. The writ proceedings were maintainable, but not entertained. Bona fides of the appellant in filing the writ petition are not challenged. Further, immediately after the dismissal of the writ petition, the appellant did file an appeal before the Appellate Authority. On exclusion of the aforesaid period, the appeal preferred by the appellant would be within the condonable period. Accordingly, we direct that the application for condonation of delay filed by the appellant would be treated as allowed. The delay is directed to be condoned."

18. To sum up his aforesaid arguments, Shri Tripathi has submitted with vehemence that admittedly, the appellate Tribunal at Lucknow was not functional, as specific information to this effect has been given before the Division Bench of this Court by the learned counsel for the respondent itself. The benefit of limitation w.e.f. 15.3.2020 to 18.2.2022 was provided by the general direction/order of the Apex Court in re: **Cognizance for Extension of Limitation case (supra)** and during the aforesaid period, the petitioner had approached the High Court of Delhi on 13.09.2021 for the reason that the appellate Tribunal was not functional at Lucknow and when the very fact that the appellate Tribunal has now been functional as has been apprised by the counsel for the respondent itself to the High Court of Delhi, the petitioner got his petition dismissed being not pressed seeking liberty to approach the appellate Tribunal making request that the period of limitation may be exempted for the reason that the petitioner was aware that as per statutory bar, the appeal could have not been filed after a lapse of 120 days and the petitioner filed an appeal before the Appellate Tribunal at Lucknow on 31.03.2023, immediate after dismissal of his writ petition on 28.03.2023, therefore, in view of the aforesaid facts and circumstances, dismissing the appeal of the petitioner on the ground of limitation is patently illegal, arbitrary and uncalled for.

19. He has further submitted that on account of the aforesaid impugned appellate order, the right of the petitioner to be heard on merit on the substantial issue has been jeopardized, therefore, Shri Tripathi has requested that the aforesaid impugned appellate order may be set aside and the appellate Tribunal may be directed to hear the matter of the petitioner on merits.

20. Per contra, Shri Akhilesh Pratap Singh, learned counsel for the respondents has submitted that since there is a statutory bar to approach the appellate Tribunal within a maximum period of 120 days, so the petitioner must approach the appellate Court within time so prescribed. If the petitioner has not approached the appellate Tribunal within time so prescribed, the appellate Tribunal has rightly dismissed the appeal of the petitioner on the ground of limitation.

21. He has referred Section 29(2) of the Limitation Act, 1963 which categorically provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 of the Limitation Act categorically provides about the bar of the limitation, therefore, in light of Section 29(2) of the Limitation Act, the appeal of the petitioner has been rightly rejected by the appellate Tribunal on the ground of limitation.

22. Shri Singh has placed reliance on para nos. 5 to 9 of the Apex Court in re: **Oil & Natural Gas Corp. Ltd. vs. Gujarat Energy Transmission Corporation Ltd & Ors., Civil Appeal No. 1315 of 2010 [Judgement & order dated 01.03.2017],** which read as under:

"5. On a plain reading of the aforesaid provision, it is clear as crystal that this Court, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the period of 60 days from the date of communication of the decision or order of the appellate tribunal to him, may allow the same to be filed within a further period not exceeding 60 days. It is quite clear that this Court has the jurisdiction to condone the delay but a limit has been fixed by the legislature, that is, 60 days.

*6. **In Chhattisgarh State Electricity Board vs. Central Electricity Regulatory Commission & Ors. (2010) 5 SCC 23**, the issue that arose before this Court was whether Section 5 of the Limitation Act can be invoked for allowing the aggrieved person to file an appeal under Section 125 of the Act after more than 120 days from the date of communication of the decision of the tribunal. It adverted to the anatomy of Section 125 and the Appellate Tribunal for Electricity (Procedure, Form, Fee and Record of Proceedings) Rules, 2007 and opined thus:-*

"25. Section 125 lays down that any person aggrieved by any decision or order of the Tribunal can file an appeal to this Court within 60 days from the date of communication of the decision or order of the Tribunal. Proviso to Section 125 empowers this Court to entertain an appeal filed within a further period of 60 days if it is satisfied that there was sufficient cause for not filing appeal within the initial period of 60 days. This shows that the period of limitation prescribed for filing appeals under Sections 111(2) and 125 is substantially different from the period prescribed under the Limitation Act for filing suits etc. The use of the expression `within a further period of not exceeding 60 days' in Proviso to Section 125 makes it clear that the outer limit for filing an appeal is 120 days. There is no provision in the Act under which this Court can entertain an appeal filed against the decision or order of the Tribunal after more than 120 days."

*7. The two-Judge Bench placed reliance on **Singh Enterprises vs. C.C.E., Jamshedpur & Ors. (2008) 3 SCC 70 and Commissioner of Customs and Central Excise v. Hongo India Private Limited & Ar. (2009) 5 SCC 79***

and came to hold that Section 5 of the Limitation Act cannot be invoked by this Court for maintaining an appeal filed against the decision or order of the tribunal beyond the period of 120 days in view of the prescription under Section 125 of the Act and the proviso appended thereto. In that context, the Court held:-

"Any interpretation of Section 125 of the Electricity Act which may attract applicability of Section 5 of the Limitation Act read with Section 29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing an appeal against the decision or order of the Tribunal and proviso to Section 125 will become nugatory."

8. After so stating, as we find, the Court adverted to the concept of communication and eventually opined:-

"37. The issue deserves to be considered from another angle. As mentioned above, Rule 94(2) requires that when the order is reserved, the date of pronouncement shall be notified in the cause list and that shall be a valid notice of pronouncement of the order. The counsel appearing for the parties are supposed to take cognizance of the cause list in which the case is shown for pronouncement. If title of the case and name of the counsel is printed in the cause list, the same will be deemed as a notice regarding pronouncement of order. Once the order is pronounced after being shown in the cause list with the title of the case and name of the counsel, the same will be deemed to have been communicated to the parties and they can obtain copy through e-mail or by filing an application for certified copy."

9. The eventual conclusion that was arrived at by the Court was that there is no escape from the conclusion that the appeal, in the said case, had been filed for more than 120 days from the date of communication of the tribunal's order and, therefore, as such the same could not be entertained."

23. On being confronted as to whether while rejecting the appeal of the petitioner, the judgement of the Apex Court in re: '**Cognizance for Extension of Limitation case (supra)'** which came on 10.01.2022 has been considered by the appellate Tribunal or not, Shri Singh has submitted that though the petitioner had taken a specific ground in his appeal, but citing other similar judgements, the appellate Tribunal does not find it proper to return any specific findings thereon, however, the said judgement has been indirectly considered by the appellate Tribunal.

24. On being further confronted on the point that before the Division Bench of this Court, the specific information was provided on 4.6.2021 (supra) to the effect that no appellate tribunal is functional at Lucknow at that point of time, Shri Singh has submitted that though he was counsel in that case before the Division Bench of this Court and has provided the information to the Court on the basis of instructions so received but some alternative arrangement was going on at Kanpur. However, he has fairly submitted that

on account of non-functioning of the appellate Tribunal at Lucknow, the parties were facing some problem.

25. On being further confronted as to why the order of the High Court of Delhi has not been assailed, wherein the statement of the respondent has been recorded on 28.03.2023 that the 'now the appellate Tribunal is fully functional', after filing of the writ petition of the petitioner on 13.09.2021, Shri Singh has submitted that he had no instructions to challenge the order dated 28.3.2023 passed by the High Court of Delhi. However, he has submitted that the very fact had been apprised to the appellate Tribunal and the appellate Tribunal has considered that fact in its order which is impugned herein.

26. Heard learned counsel for the parties and perused the material available on record and the judgements of the Apex Court cited by the learned counsel for the parties.

27. Notably, the petitioner could not approach the appellate Tribunal on or before 31.7.2021, which is the time so stipulated by the Act i.e., 120 days, challenging the impugned orders dated 30.3.2021 and 31.3.2021 for the reason that the appellate Tribunal was not functional at Lucknow and having no other efficacious and statutory remedy, he approached the High Court of Delhi under Article 226 of the Constitution of India on 13.9.2021 and that writ petition remained pending till 28.3.2023. When the counsel for the respondent itself informed the High Court of Delhi to the effect that *'now the appellate Tribunal is fully functional',* the petitioner got his writ petition dismissed being not pressed seeking liberty to approach the appellate Tribunal making further request that the period of limitation may be condoned and thus, the High Court of Delhi dismissed that petition on the aforesaid request of the petitioner on 28.03.2023 further clarifying that the question of limitation for filing an appeal would be appropriately considered by the appellate Tribunal. Admittedly, the petitioner filed statutory appeal immediately on 31.03.2023 before Appellate Tribunal at Lucknow.

28. The aforesaid observations so given by the High Court of Delhi was purposeful that while considering the application for condonation of delay of the petitioner, the relevant aspect that his writ petition was pending consideration before the High Court of Delhi since 13.9.2021 to 28.3.2023, would be considered in light of Section 14 of the Limitation Act. Besides, the order of the Hon'ble Apex Court dated 10.01.2022 in re: '**Cognizance for Extension of Limitation case (supra)**' would be taken in its letter and spirit, whereby general period of limitation has been condoned by the Apex Court w.e.f. 15.3.2020 to 28.02.2022.

29. Notably, for the repetition sake, after dismissal of the writ petition by the High Court of Delhi on 28.3.2023, the petitioner approached the appellate Court for filing an appeal immediately on 31.3.2023. The Hon'ble Apex Court in re: **Laxmi Srinivas (supra)** has categorically directed that the period for which any petition/writ petition is pending before the appropriate court of law, must be

condoned for the purpose of computation of limitation in view of Section 14 of the Limitation Act. Section 29(2) of the Limitation Act also provides that the provisions contained in Sections 4 to 24 (inclusive) shall apply in specific circumstances and the facts and circumstances of the present case are having specific circumstances to invoke the provisions of Section 14 of the Act.

30. So far as the judgement so cited by Shri Singh, leaned counsel for the respondent nos. 2 and 3 in re: **Oil & Natural Gas Corp. Ltd. (supra)** is concerned, the Apex Court in re: **'Cognizance for Extension of Limitation (supra)'** has issued general direction on 10.01.2022 condoning period of limitation with effect from 15.03.2020 to 28.02.2022 and this judgement of three-Judge Bench in subsequent to the judgement cited by the counsel for the respondent. Further, the Apex Court in re: **Laxmi Srinivas (supra)** has specifically directed to allow the benefit of Section 14 of the Act, if any petition of the party is pending consideration before any court of law and this judgement is also subsequent to the judgement cited by the respondent. Besides, in re: **Oil & Natural Gas Corp. Ltd. (supra)**, there is no finding or observation of the Apex Court regarding Section 14 of the Act, so the judgment of the Apex Court in re: **Laxmi Srinivas (supra)** would be applicable in this case.

31. In nutshell, it has been noted that since the Appellate Tribunal at Lucknow was not functional when the impugned assessment order dated 30.03.2021 and its corrigendum order dated 31.03.2021 was passed by the assessing authority, to be more precise it was functional in the year 2023 as informed by the counsel for the respondent to the High Court of Delhi, the petitioner, in the critical condition of Covid-19 was not having any other efficacious or statutory remedy, filed writ petition before the High Court of Delhi on 13.09.2021, the period which was exempted for limitation by the Apex Court in re: **'Cognizance for Extension of Limitation (supra)**' i.e., from 15.03.2020 to 18.02.2022, that writ petition remained pending till 28.03.2023 and he filed the statutory appeal immediately thereafter on 31.3.2023, therefore, the delay in filing that statutory appeal should have been condoned in the light of Section 14 of the Limitation Act and the appeal must have been decided on merits by the Appellate Tribunal, Lucknow. I am of the considered opinion that if there is any possible way which may be permissible under the law to allow the application for condonation of delay to hear and decide the lis or issue or controversy or dispute before the court of law or tribunal etc. on merits, that very application must be allowed so that the controversy or dispute etc. before the competent court of law could be decided on merits. Normally, the technical approach rejecting the lis or issue or controversy or dispute etc. on the ground of limitation should be avoided and the endeavour of the Tribunal etc. should be to decide the issue etc. on merits as per law by affording an opportunity of hearing to the parties. The facts and circumstances of the present case convince me, in the light of the aforesaid judgements of the Apex Court, that instead of rejecting the

appeal of the petitioner on the ground of limitation, it must have been decided on merits strictly in accordance with law.

32. Therefore, in view of the aforesaid facts and circumstances as considered and discussed above, the judgements of the Apex Court as considered above as well as the relevant statutory provisions, the impugned order dated 18.4.2024 passed by the appellate Tribunal, whereby the appeal of the petitioner has been dismissed being barred by the period of limitation is unwarranted and uncalled for and is hereby **set aside.**

33. However, the appeal No. 18 of 2023 (Sahara Prime City Limited vs. CBT & others) is hereby remanded back to the Appellate Tribunal at Lucknow to pass a fresh order strictly in accordance with law. While adjudicating/deciding the aforesaid appeal of the petitioner on merits, the Appellate Tribunal may not influence from any observations of the order of this Court inasmuch as this order is only confined to the effect that the appeal of the petitioner was dismissed on the ground of being barred by the period of limitation, therefore, the appellate Tribunal shall decide the aforesaid appeal on merits strictly in accordance with law by affording an opportunity of hearing to the parties concerned with expedition. It is needless to say that if the petitioner files an application for interim relief before the appellate Tribunal, the same may heard and disposed of with expedition strictly in accordance with law.

34. In view of the above, the writ petition is **allowed.**

35. No order as to costs.

(2024) 6 ILRA 49
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.06.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Misc. Writ Petition No. 4464 of 2024

Tilakram & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Upendra Prakash Pathak

Counsel for the Respondents:
G.A.

Criminal Law – Constitution of India, 1950 - 226 - Indian Penal Code, 1860 - Sections 323, 354, 452 & 506 - Criminal Procedure Code, 1973 - Section 41-A: - Writ Petition – for quashing of FIR - punishment for offences mentioned in FIR is less than Seven Years - held that looking to the gravity of punishment being less than 7 years, the provisions of Section 41-A of Cr.P.C. shall be strictly followed - hence, writ petition disposed of in same terms as law laid down by the Apex Court in the case of Arnesh Kumar.
(Para - 5, 7)

Writ Petition disposed of. (E-11)

List of Cases cited:

Arnesh Kumar Vs St of Bihar & anr. (2014 vol. 8 SCC 273.

(Delivered by Hon'ble Attau Rahman Masoodi, J.
&
Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard learned counsel for the petitioners and learned Additional Government Advocate for the State.

2. This petition seeks issuance of a direction in the nature of certiorari for quashing the impugned F.I.R. registered as Case Crime/F.I.R. No. 242 of 2024 under Sections 452, 354, 323, 506 I.P.C., Police Station Huzoorpur, district Bahraich.

3. The punishment for the offences mentioned in the impugned F.I.R. is less than seven years.

4. In view of the order proposed to be passed in this writ petition, issuance of notice to the opposite party no. 4 is dispensed with.

5. Learned Additional Government Advocate looking to the gravity of punishment being less than seven years has stated that the provisions of Section 41-A Cr.P.C. shall be strictly followed in terms of judgment rendered by Hon'ble Supreme Court of India in a case reported in ***(2014) 8 SCC 273: Arnesh Kumar vs. State of Bihar and another.***

6. The present petition deserves to be disposed of in terms of the statement made by learned A.G.A.

7. Accordingly, this petition is **disposed of** in view of the provisions of Section 41-A Cr.P.C. and the law as laid down by Apex Court in the case of ***Arnesh Kumar (supra)***.

(2024) 6 ILRA 50
ORIGINAL JURISDICTION
CRIMINAL SIDE

DATED: LUCKNOW 14.06.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 1252 of 2024

Ishrat ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Prashant Vikram Singh, Akshaya Pratap Singh, Bhanu Pratap Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code, 1860 - Section 188 - Code of Criminal Procedure, 1973 - Section 195 - The Representative of People Act,1951 -Sections 123 & 125- Summoning order impugned-allegations of offering illegal gratification to the voters in Panchayat Elections and flouting COVID guidelines-sec. 195(1) (a) (i) mandates that no court shall take cognizance of an offence u/s 188 IPC except on a written complaint by the concerned public servant-absence of such complaint invalidates the cognizance of the offence-prosecution has failed to provide any evidence-which is crucial evidence u/s 123 of the Representation Act no prior criminal record-impugned order and proceeding quashed.

Application allowed. (E-9)

List of Cases cited:

1. Fazil & ors Vs The State & ors. High Court of Madras in the Case Crl. O. P. No. 21123 and Crl. M. P. No. 8982 of 2020, Madras High Court

2. St. of Har. Vs Bhajan Lal 1992 Suppl. (1)SCC 335 (Para 108 AIR Cri LJ)

3. M/s Pepsi Food Ltd. and another Vs Special Judicial Magistrate and others: 1998 UPCrR 118

4. Lalankumar Singh & ors. Vs St. of Mah. reported in 2022 SCC Online SC 1383

5. R.P. Kapoor Vs St. of Pun., AIR 1960 S.C. 866

6. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.)192

7. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., (Para-10) 2005 SCC (Cri.) 283

8. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah., AIR 2021 SC 1918

9. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

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

1. Heard Sri Prashant Vikram Singh, learned counsel for the applicant as well as Ms. Ankita Tripahti, learned A.G.A. for the State.

2. As per Office report dated 21.02.2024 notice has been served personally on opposite party No.2, but till date neither anyone has put in appearance nor any counter affidavit has been filed on behalf of the opposite party No.2.

3. The present application under Section 482 Cr.P.C. has been filed for quashing of the impugned Summoning Order dated 05.1.2022 issued against the applicant by Court of Chief Judicial Magistrate, District Unnao, and also to quash entire proceedings of the Case No. 1834/2022, (State of U.P. Versus Chhote Lal and Others) arising out of Case Crime No. 0124 of 2021, Under Section 188, 171-E, 269 and 270 of I.P.C. and Section 123 and 125 of The Representation of People Act,1951 (herein after referred to as "Act,1951), registered at Police Station Safipur, District Unnao, pending before Learned Court of Judicial Magistrate, Safipur, District Unnao.

4. Learned counsel for the applicant submits that the informant/opposite party no. 02, Ram Awtar has lodged an F.I.R. dated 25.04.2021 bearing Case Crime No. 0124 of 2021, Under Section 188, 171-E, 269 and 270 of I.P.C. and Section 123 and 125 of the Act 1951, at Police Station Safipur, District Unnao, against the applicant and six other named and 15 unknown persons alleging therein that the applicant along with other six named co-accused and 15 other unknown persons were offering illegal gratification to the Voters in Panchayat Elections and one co-accused namely Sumanlata w/o Chhote Lal was distributing Saree to the Voters and they all were collectively and. deliberately flouting the Covid-19 guidelines.

5. Learned counsel for the applicant further submits that as per version of the F.I.R dated 25.04.2021 the applicant was distributing sarees to the voters through co-accused namely Sumanlata w/o Chhote Lal whereas there was no such mention of the bribery given by the applicant or by his agent or by any other person with the consent of the applicant, which in itself is the most essential ingredient to make out an offence under Section 123 of the Act,1951.

6. Learned counsel for the applicant further submits that Section 125 of the Act,1951 is also levelled against the applicant, which talks about Promoting enmity between classes in connection with election. But, by bare reading of the contents of the F.I.R. the offence of Section 125 of the Act does not make out against the applicant.

7. Learned counsel for the applicant further submits that the statement of the informant and only one witness namely Gokaran Singh, Head Constable was also

recorded under Section 161 of Cr. P.C., in which they repeated the version of the F.I.R..

8. Learned counsel for the applicant further submits that the the allegations made by the informant in the F.I.R. are frivolous, concocted and are based on absolutely false statements with a malicious intention to harass the applicant who is a reputed member of the society and has no past criminal record and are not associated with any such activities by far.

9. Learned counsel for the applicant further submits that it is pertinent to mention here that on 03.02.2021, the Secretary (Home), Government of India, New Delhi has issued a letter no. 40-3/2020- DM-I(A) to the Chief Secretaries of all the States, in which certain directions were issued regarding withdrawal/review of criminal cases resulting from alleged violation of standard COVID-19 protocols on merits.

10. Learned counsel for the applicant further submits that Hon'ble High Court sitting at Allahabad passed several orders in CRLP No. 7787 of 2021 (Vinay Kumar and Others Vs State of U. P. and 2 Others) for the compliance of the letter dt. 03.02.2021 issued by the Secretary (Home), Government of India.

11. Learned counsel for the applicant further submits that it can be asserted here that the cognizance taken by the learned Court is based upon, concocted facts and no offence under Section 188, 171-E, 269 and 270 of I.P.C. and Section 123 and 125 of the Act, 1951 is made out against the applicant and the summoning order dated 05.01.2022 passed by Chief Judicial Magistrate, Unnao is based upon the F.I.R. and statements of the informant and witness without taking into consideration the material evidences available on record and without any application of its judicial mind upon the circumstances of this case is liable to be quashed.

12. Learned AGA submits that the FIR was lodged based on credible information received by the informant about illegal activities conducted by the applicant and co-accused during the Panchayat Elections and allegations of offering illegal gratification to voters and violating COVID-19 guidelines are supported by witness statements and material evidence collected during the investigation.

Learned AGA further submits that the charges under Sections 188, 171-E, 269, and 270 of IPC, and Sections 123 and 125 of the Act, 1951, are applicable based on the actions and intentions of the accused as stated in the FIR and supported by evidence. Section 125 of the Act, concerning promoting enmity, is relevant given the nature of activities and their impact on social harmony during the election period.

The summoning order was issued by the Chief Judicial Magistrate, Unnao, following due procedure and based on the investigation's findings.

The FIR includes specifics about the distribution of sarees to voters, indicating bribery practices as defined under Section 123 of the Representation of People's Act, 1951.

13. After considering the argument advanced by learned counsel for the applicant and learned A.G.A. for the State,

this Court finds that the allegations brought against the applicant under Section 188, 171-E, 269, and 270 of the IPC, as well as Sections 123 and 125 of the Representation of People's Act, 1951, appear to be baseless and malicious. The FIR lodged by the informant, Ram Awtar, is riddled with inconsistencies and lacks the essential ingredients necessary to constitute the offenses alleged.

It is well-established that under Section 195(1)(a)(i) Cr.P.C., no court shall take cognizance of an offense under Sections 172 to 188 IPC except on the complaint in writing by the public servant concerned or some other public servant to whom he is administratively subordinate. The absence of such a complaint in this case renders the proceedings procedurally flawed.

14. Detailed discussion of Relevant Sections with reference to this case are as under:

Section 123 in The Representation of the People Act, 1951

123. Corrupt practices.—

The following shall be deemed to be corrupt practices for the purposes of this Act:—

(1) "Bribery", that is to say—

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing—

(a) a person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election, or as a reward to—

(i) a person for having so stood or not stood, or for having withdrawn or not having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting;

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward—

(a) by a person for standing or not standing as, or for withdrawing or not withdrawing from being, a candidate; or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate to withdraw or not to withdraw his candidature.

Explanation.—

For the purposes of this clause the term "gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78."

In the instant case, the applicant argues that the allegations do not meet the essential ingredients of bribery as defined under Section 123 of the Act. The FIR alleges that the applicant was involved in distributing sarees to voters, but it does not specify any direct act of bribery by the applicant or his agent with his consent. The lack of detailed allegations fails to substantiate a prima facie case under Section 123.

Section 125. Promoting enmity between classes in connection with election -

"Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall he punishable, with imprisonment for a term which may extend to three years, or with fine, or with both."

Similarly, the allegations do not support the offense under Section 125 of the Act, which deals with promoting enmity between classes in connection with elections.

The FIR does not contain any specific assertions that the applicant attempted to promote enmity based on religion, race, caste, community, or language.

Sections 269 and 270 IPC: These sections pertain to negligent acts likely to spread infection of disease dangerous to life.

The FIR's allegations about COVID-19 guideline violations do not provide sufficient specifics to sustain charges under these sections.

Section 188 I.P.C. r/w Section 195 Cr.P.C

Section 188 I.P.C. : (Disobedience to Order Duly Promulgated by Public Servant): Disobedience to an order lawfully promulgated by a public servant.

"195 Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence (1) No Courts shall take cognizance-

(a) (i) of any offence punishable under section 172 to 188 (both inclusive) of the Indian penal code(45 of 1860), or

(ii) Of any abetment of, attempt to commit such offence, or

iii) of any criminal conspiracy to commit, such offence, except on (the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate.

In FAZIL AND ORS. VS. THE STATE AND OTHERS HIGH COURT OF MADRAS in the Case Crl. O. P. No. 21123 and Crl. M. P. No. 8982 of 2020, Madras High Court has deal the same issue and observed that-

"Para-25. In view of the discussion, the following guidelines are issued insofar as an offence under section 188 of IPC, is concerned:

(a) A police offence cannot register an FIR for any of offences falling under section 172 to 188 of IPC.

(b) A Police officer by virtue of the powers conferred under section 41 of Cr.P.C. will have the authority to take action under section 41 of Cr.P.C., when a cognizable offence under section 188 IPC is committed in his presence or where such action is required, to prevent such person from committing an offence under section 188 of IPC.

(c) The role of the police office will be confined only to the preventive action as stipulated under section 41 of Cr.P.C. and immediately thereafter, he has to inform about the same to the public servant concerned / authorized, to enable such public servant to give a complaint in writing before the jurisdictional Magistrate, who shall take cognizance of such complaint on being prima facie satisfied with the requirements of section 188 of IPC. (d) In order to attract the provisions of section 188 of IPC, the written complaint of the public servant concerned should reflect the following ingredients namely;

(i) That there must be an order promulgated by the public servant:

(ii) That such public servant is lawfully empowered to promulgate it;

(iii) That the person with knowledge of such order and being directed by such order to abstain from doing certain act or to take certain order with certain property in his possession and under his management, has disobeyed, And

(iv) That such disobedience causes or tends to cause;

(a) Obstruction, annoyance or risk of it to any person lawfully employed; or

(b) Danger to human life, health or safety; or

(c) A riot or affray.

(d) The promulgation issued under section 30(2) of the police act, 1861, must satisfy the test of reasonableness and can only be in the nature of a regulatory power and not a blanket power to trifle any democratic dissent of the citizens by the police.

(e) The promulgation through which, the order is made known must be by something done openly and in public and private information will not b e promulgation. The order must be notified or published by beat of drum or in a gazette or published in a newspaper with a wide circulation.

(f) No judicial Magistrate should take cognizance of Final Report when it reflects an offence under section 172 to 188 of IPC. An FIR or a Final Report will not become void ab initio insofar as offences other than section 172 to 188 of IPC and a Final Report can be taken cognizance by the Magistrate insofar as offences not covered under section 195(1)(a)(i) of Cr.P.C.

(g) The Director General of Police, Chennai and Inspector General of the various Zones are directed to immediately formulate a process by specifically empowering public servants dealing with for an offence under section 188 of IPC to ensure that there is no delay in filling a written complaint by the public servants concerned under section 195 (1) (a) (i) of Cr.P.C."

That the case of applicant is squarely covered in point no. (1) of the **Paragraph No. 108 of STATE OF HARYANA V. BHAJAN LAL 1992 Suppl. (1)SCC 335 (Para 108 AIR Cri LJ) which is as follows-**

"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 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 process of any court or otherwise to secure the ends of justice, though it may not be possible to la down any precise, clearly defined and sufficiently channelized an inflexible guidelines or rigid formulate and to give an exhaust 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-

(II) Where the allegations in the First Information Report and other materials if any accompanying the FIR do not disclose a cognizable offence justifying an investigation by police officers under section 156(1) of the code except under an order of a Magistrate within the purview of section 155(2) of the code.

(III) Where the uncontroverted allegations made in the FIR or Complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(IV) Where the allegation in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by police officer without an order of a Magistrate as contemplated under section 155(2) of the code.

(V) Where the allegations made in the FIR or Complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(VI) Where there is an express legal bar engrafted in any of the provisions of the code or the concerned act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the code or the concerned act providing efficacious redress for the grievance of the aggrieved party"

Section 195(1)(a)(i) Cr.P.C. mandates that no court shall take cognizance of an offence under section 188 IPC except on a written complaint by the concerned public servant.

In this case, the absence of such a complaint invalidates the cognizance of the offence under this section. As mandated by section 195(1)(a)(i) Cr.P.C., a court cannot take cognizance of an offence under section 188 IPC without a written complaint from the concerned public servant.

15. In **M/s Pepsi Food Ltd. and another Vs. Special Judicial Magistrate and others:** 1998 UPCrR 118, Hon'ble Apex Court has observed:

"Summoning of an accused in a criminal case, is a serous matter. Criminal law can not be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning the accused. Magistrate had to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

16. Further Hon'ble the Supreme Court of India in the case of ***Lalankumar Singh and Others vs. State of Maharashtra reported in 2022 SCC Online SC 1383*** has specifically held in paragraph No.38 that the order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. Paragraph No.38 of Lalankumar Singh and Others (supra) is being quoted hereunder:-

"38. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect could be made to the judgment of this Court in the case of Sunil Bharti Mittal v. Central Bureau of Investigation, which reads thus:

"51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."

17. Further the Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:- ***(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192, (iii) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283 and (iv) Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918.***

18. In ***S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168***, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

19. In the instant case, the prosecution has failed to to provide any evidence or mention of bribery by the applicant or his agent, which is a crucial element for an offense under Section 123 of the Act and the FIR does not contain any allegations that fit the definition of promoting enmity between classes on the grounds of religion, race, caste, community, or language, which is required for an offense under Section 125 of the Act.

The allegations appear to be fabricated and aimed solely at harassing the applicant, who has no prior criminal record and is a reputed member of society. The statements recorded under Section 161 of Cr.P.C. by the informant and the witness do not add any substantive evidence to support the charges.

The letter dated 03.02.2021 from the Secretary (Home), Government of India, and the subsequent orders passed by the Hon'ble Court in CRLP No. 7787 of 2021, emphasize the need to review and withdraw criminal cases related to alleged violations of COVID-19 protocols. This directive was not considered by the Learned Court while taking cognizance of the matter.

20. Thus, in view of the law laid down by the Hon'ble Apex Court and the facts and circumstances, as narrated above, summoning Order dated 05.1.2022 issued against the applicant by Court of Chief Judicial Magistrate, District Unnao, and the entire proceedings of the Case No. 1834/2022, (State of U.P. Versus Chhote Lal and Others) arising out of Case Crime No. 0124 of 2021, Under Section 188, 171-E, 269 and 270 of I.P.C. and Section 123 and 125 of The Representation of People Act,1951 (herein after referred to as

"Act,1951), registered at Police Station Safipur, District Unnao, pending before Learned Court of Judicial Magistrate, Safipur, District Unnao are against the spirit and directions issued by the Hon'ble Apex Court are liable to be quashed.

21. Accordingly, keeping in view the discussions/observations and judgments of Hon'ble the Apex Court referred above and the facts and circumstances, summoning Order dated 05.1.2022 issued against the applicant by Court of Chief Judicial Magistrate, District Unnao, and entire proceedings of the Case No. 1834/2022, (State of U.P. Versus Chhote Lal and Others) arising out of Case Crime No. 0124 of 2021, Under Section 188, 171-E, 269 and 270 of I.P.C. and Section 123 and 125 of The Representation of People Act,1951 (herein after referred to as "Act,1951), registered at Police Station Safipur, District Unnao, pending before Learned Court of Judicial Magistrate, Safipur, District Unnao are hereby quashed.

22. For the reasons discussed above, the instant application filed by the applicant-Ishrat under Section 482 Cr.P.C. is **allowed.**

23. Learned Senior Registrar of this Court is directed to transmit a copy of this order to the trial court concerned for its necessary compliance.

(2024) 6 ILRA 59
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.06.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Misc. Writ Petition No. 4465 of 2024

Sagar Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Lal Bahadur Khan, Shashi Dhar Pathak

Counsel for the Respondents:
G.A.

Criminal Law - Quashing of F.I.R. - Essential Commodities Act, 1955 - F.I.R. u/s 3, 7 - Penalties u/s 7 may extend to seven years - Criminal Procedure Code, Section 41-A - The court, considering that the gravity of the punishment was less than seven years, directed that the provisions of Section 41-A Cr.P.C. be strictly followed in accordance with the judgment in Arnesh Kumar vs. State of Bihar and another, (2014) 8 SCC 273.

Allowed. (E-5)

List of Cases cited:

Arnesh Kumar Vs St. of Bihar & anr., (2014) 8 SCC 273.

(Delivered by Hon'ble Attau Rahman Masoodi, J.
&
Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard learned counsel for the petitioner and learned Additional Government Advocate for the State.

2. This petition seeks issuance of a direction in the nature of certiorari for quashing the impugned F.I.R. registered as Case Crime/F.I.R. No. 72 of 2024 under Sections 3/7 Essential Commodities Act,1955, Police Station Mahigawan, district Lucknow.

3. The punishment for the offences mentioned in the impugned F.I.R. is less than seven years.

4. In view of the order proposed to be passed in this writ petition, issuance of notice to the opposite party no. 4 is dispensed with.

5. Learned Additional Government Advocate looking to the gravity of punishment being less than seven years has stated that the provisions of Section 41-A Cr.P.C. shall be strictly followed in terms of judgment rendered by Hon'ble Supreme Court of India in a case reported in ***(2014) 8 SCC 273: Arnesh Kumar vs. State of Bihar and another.***

6. The present petition deserves to be disposed of in terms of the statement made by learned A.G.A.

7. Accordingly, this petition is **disposed of** in view of the provisions of Section 41-A Cr.P.C. and the law as laid down by Apex Court in the case of ***Arnesh Kumar (supra).***

(2024) 6 ILRA 60
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.06.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 5145 of 2024

Sandeep Miglani ...Applicant
Versus
U.O.I. & Anr. ...Opposite Parties

Counsel for the Applicant:
Rama Soni, Rohit Kumar Tripathi, Shubhanjali Shukla

Counsel for the Opposite Parties:
Kushagra Dikshit

Criminal Procedure Code,1973 - Section 202 Cr.P.C - Prohibition of Benami Property Transaction Act, 1988 -.-- Summoning order impugned- complaint u/s 53 of the Act filed stating that search & seizure u/s 132 of Income Tax Act, 1961 was conducted- During inquiry Applicant admitted on oath that amount was a benami transaction–inquiry under statutory provision of sec.202 Cr.P.C. is mandatory-complaint filed after obtaining sanction-before Special Court having jurisdiction-limited enquiry by Magistrate to ascertain whether any case for summoning is made out-contention of complaint was sufficient for holding an enquiry u/s 202 Cr.P.C. –no illegality in the impugned order.

Application dismissed. (E-9)

List of Cases cited:

1.Vishwakalyan Multistate Credit Coop. Society Ltd. Vs Oneup Entertainment (P) Ltd., 2023 SCC OnLine SC 1749

2. Azim Premji Vs St. of U.P., 2024 SCC OnLine All 1956

3. Divyajot Singh Jendu Vs Manikaran Analytics Ltd.: 2022 SCC OnLine Cal 200

4. Cheminova India Ltd. Vs St. of Pun.: 2021 SCC OnLine SC 573

5. "In Re : Expeditious Trial of Cases Under Section 138 of N.I. Act, 1881": 2021 SCC OnLine SC 325

6. Rosy Vs St. of Kerala: (2000) 2 SCC 230

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

1. Heard Sri Rohit Kumar Tripathi, the learned counsel for the petitioner, Sri Neerav Chitravanshi and Sri Kushagra Dixit, the learned counsel for the opposite parties.

2. By means of the instant application filed under Section 482 Cr.P.C., the petitioner has challenged validity of an order dated 27.02.2024 passed by the IX

Additional Sessions Judge, Lucknow in Complaint Case No. 277 of 2024 whereby the trial court has taken cognizance of offence under Section 53 read with Section 3 of the Prohibition of Benami Property Transaction Act, 1988 (hereinafter referred to as 'Benami Act') and he has been summoned to face trial.

3. The opposite party no. 1-Union of India has filed a complaint under Section 53 of Benami Act through a Deputy Commissioner of Income Tax/Initiating Officer, Benami Prohibition, Benami Unit, Kanpur, after obtaining sanction for prosecution from the Principal Director of Income Tax (Investigation) Kanpur under Section 55 of the Benami Act on 29.01.2024.

4. The complaint states that a search and seizure under Section 132 of the Income Tax Act, 1961 was conducted on 18.01.2017, which revealed that M/s Shyam Trading Company (a proprietorship concern of Ghanshyam Patel) had used its bank account maintained with J & K Bank, Ghaziabad to deposit a cash amount of Rs.30,00,000/- on 12.11.2016. Out of the aforesaid amount, Rs.7,50,000/- were transferred to the bank account of the applicant being maintained with Axis Bank, Delhi through NEFT on 12.11.2016. Ghanshyam Patel denied ownership of the amount deposited in his bank account. After inquiry, the matter was transferred to the Banami Prohibition Unit, Kanpur for initiating proceedings under Benami Act. During further inquiry held by the Benami Prohibition Unit, Kanpur, the applicant admitted on oath that the aforesaid sum of Rs. 7,50,000/- deposited into the bank account of M/s Shyam Trading Company was the applicant's unaccounted cash, which was deposited during demonetization period and had been transferred to his bank account. Ghanshyam Patel, proprietor of M/s Ghanshyam Trading Company, also admitted in his statement that the amount of Rs. 7,50,000/- deposited in his bank account in cash was a benami transaction.

5. The Deputy Commissioner of Income Tax/ Initiating Officer, Benami Prohibition Benami Unit, Kanpur filed a complaint dated 25.02.2024 on the basis of the aforesaid facts. The learned IX Additional Session Judge, Lucknow took cognizance of the alleged offence on the same date i.e. 27.02.2024 and summoned the applicant to face the trial.

6. The learned counsel for the applicant has assailed the validity of the summoning order dated 27.02.2024 on the sole ground that the applicant resides at New Delhi, i.e. beyond the territorial jurisdiction of the Court which has passed the summoning order and, therefore, as per the statutory provision contained in Section 202 Cr.P.C., it was mandatory for the Court to have conducted an inquiry before taking cognizance of the offence and summoning the applicant.

7. In support of his contention, the learned counsel for the applicant has relied upon a decisions in **Vishwakalyan Multistate Credit Coop. Society Ltd. v. Oneup Entertainment (P) Ltd.,** 2023 SCC OnLine SC 1749, a decision rendered by a coordinate Bench of this Court in

Azim Premji v. State of U.P., 2024 SCC OnLine All 1956 and a decision rendered by an Hon'ble Single Judge of Calcutta High Court in **Divyajot Singh Jendu v. Manikaran Analytics Ltd.:** 2022 SCC OnLine Cal 200.

8. Per contra, Sri Neerav Chitravanshi, the learned counsel for the opposite parties has submitted that the Proviso (a) appended to Section 200 Cr.P.C. provides that the Magistrate need not examine the complaint and the witnesses, if a complaint has been made by a public servant. He has relied upon a decision of the Hon'ble Supreme Court in the case of **Cheminova India Limited v. State of Punjab**: 2021 SCC OnLine SC 573.

9. Before proceeding with the matter, it would be appropriate to have a look to the relevant statutory provisions. Section 50 of the Benami Act reads as under:-

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

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

(3) The Special Court shall not take cognizance of any offence punishable under this Act except upon a complaint in writing made by—

(i) the authority; or

(ii) any officer of the Central Government or State Government authorised in writing by that Government by a general or special order made in this behalf.

(4) Every trial under this section shall be conducted as expeditiously as possible and every endeavour shall be made by the Special Court to conclude the trial within six months from the date of filing of the complaint.

10. In exercise of powers conferred by Section 50 of the Benami Act, the Ministry of Finance, Government Of India has issued a Notification dated 16.10.2018 whereby IX Additional District & Sessions Judge, Lucknow has been designated as the Special Court for the purpose of trial of offences punishable under the Benami Act for certain Districts, including Ghaziabad District, where the cash amount of Rs.30,00,000/- was deposited in the Bank account of M/s Shyam Trading Company and from where an amount of Rs.7,50,000/- was transferred to the Bank account of the applicant. Therefore, the Complaint has rightly been filed before the Special Court constituted under Section 50 of the Benami Act.

11. Sections 200 & 202 of Criminal Procedure Code, 1973 read as under:-

***"200. Examination of complainant**.—A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:*

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses—

(a) if a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

* * *

***202. Postponement of issue of process.**—(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdication, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:*

Provided that no such direction for investigation shall be made,—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

12. In **Cheminova India Limited v. State of Punjab:** 2021 SCC OnLine

SC 573, the Hon'ble Supreme Court held that: -

"18. The legislature in its wisdom has itself placed the public servant on a different pedestal, as would be evident from a perusal of proviso to Section 200 of the Code of Criminal Procedure. Object of holding an inquiry/investigation before taking cognizance, in cases where the accused resides outside the territorial jurisdiction of such Magistrate, is to ensure that innocents are not harassed unnecessarily. By virtue of proviso to Section 200 of the Code of Criminal Procedure, the Magistrate, while taking cognizance, need not record statement of such public servant, who has filed the complaint in discharge of his official duty. Further, by virtue of Section 293 of Code of Criminal Procedure, report of the Government Scientific Expert is, per se, admissible in evidence. The Code of Criminal Procedure itself provides for exemption from examination of such witnesses, when the complaint is filed by a public servant."

13. In **Vishwakalyan Multistate Credit Coop. Society Ltd. v. Oneup Entertainment (P) Ltd.,** 2023 SCC OnLine SC 1749, the appellant had filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 . On 26.06.2021, the Judicial Magistrate issued process on the complaint. The High Court held that as the respondent was having its office outside the jurisdiction of the Magistrate, it was necessary for the Magistrate to hold an inquiry under Section 202 Cr.P.C. and non-compliance with the mandate of Section 202 Cr.P.C. vitiates the order issuing process. Therefore, the High Court set aside the order issuing process, without issuing any further direction to the Magistrate to hold an inquiry under Section 202 Cr.P.C. The Hon'ble Supreme Court referred to its Constitution Bench decision in the case of "**In Re : Expeditious Trial of Cases Under Section 138 of N.I. Act, 1881":** 2021 SCC OnLine SC 325, in which the Constitution Bench has directed as under: -

"3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses."

The aforesaid decision given in the background of a private complaint filed under Section 138 of the Negotiable Instruments Act cannot apply to the facts of the present case, where the complaint has been filed by a public servant under the Benami Act.

14. In **Azim Premji v. State of U.P.,** 2024 SCC OnLine All 1956, a coordinate Bench of this Court held that where the Magistrate, failed to ensure the compliance of Section 202 Cr.P.C., although the accused resides outside the jurisdiction of the court concerned, an enquiry on fact is mandatory before issuing a summoning order. However, this judgment does not take into consideration the provision contained in Section 200 Cr.P.C. granting exemption to public servants or the judgment of the Hon'ble Supreme Court in the case of **Cheminova India Limited** (Supra).

15. In **Divyajot Singh Jendu v. Manikaran Analytics Ltd.**, 2022 SCC OnLine Cal 200, while dealing with a complaint filed by a person other than a public servant, the Calcutta High Court held that as the learned Magistrate did not hold any inquiry under Section 202 of Cr.P.C though the accused resided outside the jurisdiction of the court where the complaint has been lodged and the Magistrate merely held an inquiry under section 200 of Cr. P.C simpliciter and only examined the complainant and no other witness or document, the summoning order was vitiated. This judgment also does not take into consideration the provision contained in Section 200 Cr.P.C. granting exemption to public servants or the judgment of the Hon'ble Supreme Court in the case of Cheminova India Limited (Supra).

In **Rosy v. State of Kerala:** (2000) 2 SCC 230, the Hon'ble Supreme Court explained the nature and purpose of the enquiry under Section 202 Cr.P.C. in the following words: -

"11…it is settled law that the inquiry under Section 202 is of a limited nature. Firstly, to find out whether there is a prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceeding against the accused". The standard to be adopted by the Magistrate in scrutinising the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 CrPC the accused has no right to intervene and that it is the duty of the Magistrate while making an inquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made."

16. When we examine the impugned cognizance and summoning order dated 27.02.2024 in light of the law laid down in the above referred cases, it appears that the complaint has been filed by the Union of India through Deputy Commissioner of Income Tax / Initiating Officer, Benami Prohibition, Benami Prohibition Unit, Kanpur. The Special Court has referred to the contents of the complaint that during a search and seizure operation conducted under Section 132 of the Income tax Act, 1961, it transpired that a cash amount of Rs.30,00,000/- had been deposited in the account of M/s Shyam Trading Company maintained with J & K Bank, Ghaziabad on 12.11.2016 and on the same date, an amount of Rs.7,50,000/- was transferred from that account through NEFT to the bank account of the applicant. Ghanshyam Patel, Proprietor of M/s Shyam Trading Company, has denied ownership of the amount and he stated that his account was misused by Rahul Chaudhary. The Initiating Officer, Benami Prohibition Unit conducted an

enquiry, during which the applicant admitted that the amount deposited in the bank account of M/s Shyam Trading Company was unaccounted cash, which was deposited during demonetization. After enquiry, the Initiating Officer found that the aforesaid property was Benami property and he passed an attachment order under Section 24(4) of the Benami Act. The adjudicating Authority gave an opportunity of hearing to the applicant, during which the applicant admitted on oath that the aforesaid sum of Rs. 7,50,000/- deposited into the bank account of M/s Shyam Trading Company was the applicant's unaccounted cash, which was deposited during demonetization period and had been transferred to his bank account. Thereafter the complaint was filed after obtaining sanction from Principal Director, Income Tax (Investigation) before the Special Court having jurisdiction under the Act.

17. Section 202 Cr.P.C. merely directs that the Magistrate shall hold an enquiry inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Section 202 Cr.P.C. does not prescribe the manner of holding an enquiry under this provision. The Special Court has passed the impugned order dated 27.02.2024 taking cognizance of the offence and summoning the applicant after taking into consideration the aforesaid facts and after recording a satisfaction that from the averments made in the complaint and the documents filed with the complaint, there is sufficient ground for proceeding against the applicant.

18. The limited enquiry which the Magistrate can hold at this stage is meant to ascertain whether any case for summoning the accused person is made out. The perusal of the averments made in the complaint made by the Union of India through a Public Servant and examination of the documents accompanying the complaint was sufficient for holding an enquiry under Section 202 Cr.P.C. for recording a satisfaction that there is sufficient ground for proceeding against the applicant. The summoning order passed after taking into consideration the averments made in a complainant filed by the Union of India through a public servant, after perusing the documents filed with the complaint and after recording a satisfaction that there is sufficient ground for proceeding against the applicant, fulfills the requirement of holding an enquiry under Section 202 Cr.P.C.

19. In view of the aforesaid discussion, there appears to be no illegality in the impugned order dated 27.02.2024 taking cognizance of the offence and summoning the applicant to face the trial and in any case, it does not cause a failure of justice to the applicant.

20. The application under Section 482 Cr.P.C. filed by the applicant lacks merit and the same is hereby ***dismissed.***

(2024) 6 ILRA 67
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.06.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Misc. Writ Petition No. 4468 of 2024

Yogendra Pratap Singh @ Annu ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ajay Pratap Singh Rathore, Manoj Kumar Yadav

Counsel for the Respondents:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 41 -A – Notice of appearance before police officer - Indian Penal Code, 1860 - Sections 323, 354, 504 & 506 - Punishment for the offences mentioned in the F.I.R. - less than seven years – Held - Provisions of section 41-A CrPC must be strictly followed for punishments less than seven years.

Petition disposed of. (E-7)

List of Cases cited:

Arnesh Kumar Vs St. of Bihar & anr., (2014) 8 SCC 273

(Delivered by Hon'ble Attau Rahman Masoodi, J.
&
Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard learned counsel for the petitioner and learned Additional Government Advocate for the State.

2. This petition seeks issuance of a direction in the nature of certiorari for quashing the impugned F.I.R. registered as Case Crime/F.I.R. No. 196 of 2024 under Sections 323, 354, 504, 506 I.P.C., Police Station Vibhuti Khand, district Lucknow.

3. The punishment for the offences mentioned in the impugned F.I.R. is less than seven years.

4. In view of the order proposed to be passed in this writ petition, issuance of notice to the opposite party no. 4 is dispensed with.

5. Learned Additional Government Advocate looking to the gravity of punishment being less than seven years has stated that the provisions of Section 41-A Cr.P.C. shall be strictly followed in terms of judgment rendered by Hon'ble Supreme Court of India in a case reported in ***(2014) 8 SCC 273: Arnesh Kumar vs. State of Bihar and another.***

6. The present petition deserves to be disposed of in terms of the statement made by learned A.G.A.

7. Accordingly, this petition is disposed of in view of the provisions of Section 41-A Cr.P.C. and the law as laid down by Apex Court in the case of Arnesh Kumar (supra).

(2024) 6 ILRA 68

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.06.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 5169 of 2024

Sumit Kumar @ Sumit Kumar Gupta & Ors. ...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Alok Srivastava, Pranav Tivaree

Counsel for the Opposite Parties:
G.A.

A. Criminal Law – Indian Penal Code,1860 - Sections 323, 504, 506 & 241 - Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections 3(1)(Da)(Dha) & 14-A – Maintainability – Alternative remedy - While the constitutional and inherent powers of this Court are not "ousted" by Section 14A, they cannot be invoked in cases and situations where an appeal would lie u/s 14A. (Para 8)

Inherent powers of this Court u/s 482 Cr. P.C. cannot be invoked in cases and situations where an appeal would lie u/s 14A and aggrieved person having remedy of appeal u/s 14A of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court u/s 482 Cr. P.C. (Para 8)

B. A decision is not an authority for the proposition which did not fall for its consideration. 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. (Para 11, 12)

Application dismissed, leaving it open to the applicant to avail the statutory remedy u/s 14-A of the 14-A of the Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act, 1989. (E-4)

Precedent followed:

1. Pawan Kumar @ Pawan Yadav Vs St. of U.P. & ors., 2024 AHC LKO 13846 (Para 4)

2. Shivam Kashyap Vs St. of U.P., 2024 SCC OnLine All 376 (Para 8)

3. Ghulam Rasool Khan Vs St. of U.P., 2022 SCC OnLine All. 975 (Para 8, 9)

4. Amrendra Pratap Singh Vs Tej Bahadur Prajapati, (2004) 10 SCC 65 (Para 11)

5. St. of Orissa Vs Mohd. Illiyas, (2006) 1 SCC 275 (Para 11)

6. P.S. Sathappan Vs Andhra Bank Ltd., (2004) 11 SCC 672 (Para 12)

Precedent distinguished:

1. Devendra Yadav & ors Vs St. of U.P. & ors., Application u/s 482 Cr.P.C. No. 11043 of 2023, decided on 10.04.2023; 2023 SCC OnLine All. 164 (Para 5, 9)

2. Ramawatar Vs St. of M. P., 2021 SCC OnLine SC 966 (Para 9, 10)

3. B. Venkateswaran Vs P. Bakthavatchalamreported in 2023 SCC OnLine SC 14 (Para 9, 10)

Present petition seeks quashing of the charge-sheet No. 01/2023 dated 16.03.2023 as well as the summoning order dated 25.05.2023 and the order dated 27.03.2024 passed by the learned Special Judge SC/ST Act, Gonda.

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

1. Heard Sri Alok Srivastava-II, the learned counsel for the applicant, Sri

Anurag Verma, the learned AGA-I for the State and perused the record.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has sought quashing of the charge-sheet No. 01/2023 dated 16.03.2023 as well as the summoning order dated 25.05.2023 and the order dated 27.03.2024 passed by the learned Special Judge SC/ST Act, Gonda issuing a non-bailable warrant against the applicant and the entire proceedings of Sessions Case No. 806 of 2023; State versus Sumit Kumar Gupta & Ors, relating to Case Crime No. 70 of 2023, under Sections 323, 504, 506, 241 IPC & Sections 3 (1)(Da)(Dha) of Scheduled Caste and Scheduled Tribe Act, Police Station Kaudia, District Gonda pending in the Court of learned Special Judge SC/ST Act, Gonda.

3. The learned AGA-I has raised a preliminary objection that the applicant has got a statutory remedy of filing an appeal under Section 14-A of the Scheduled Castes and Scheduled Tribe (Prevention of Atrocities) Act, and, therefore, the application under Section 482 Cr.P.C. should not be entertained.

4. The learned AGA-I has relied upon a decision of this Court in **Pawan Kumar Alias Pawan Yadav v. State of UP & Ors:** 2024 AHC LKO 13846: Application under Section 482 Cr.P.C. No. 730 of 2024 decided on 16.02.2024.

5. Per contra, the learned counsel for the applicant has relied upon a decision rendered by the coordinate Bench of this Court in **Devendra Yadav & 7 Ors v. State of U.P & Os:** Application under Section 482 Cr.P.C. No. 11043 of 2023 decided on 10.04.2023.

6. Section 14-A of the Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act, 1989 (which will hereinafter be referred to as 'the Act') provides as follows:—

"14-A. Appeals.—(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law.

(2) Notwithstanding anything contained in sub-section (3) of Section 378 of the Criminal Procedure Code, 1973 (2 of 1974), an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.

(3) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

(4) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

7. A bare perusal of Section 14-A of the Act shows that it starts with the words ***"Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974)".***

8. The question of maintainability of an application under Section 482 Cr.P.C. in spite of availability of remedy of filing an appeal under Section 14-A of the S.C./S.T. Act has been considered by this Court in **Shivam Kashyap v. State of U.P.:** 2024 SCC OnLine All 376, and the relevant part of the aforesaid judgment are being reproduced below: -

"7. In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amen dment Act, 2018 SCC OnLine All 2087 : (2018) 6 ALJ 631, the five questions considered by the Full Bench, and answers given to those questions, were as follows:—

"A. Whether provisions of sub-section (2) of Section 14-A and the second proviso to subsection (3) of Section 14-A of the Amending Act, are violative of Articles 14 and 21 of the Constitution, being unjust, unreasonable and arbitrary?

While we reject the challenge to section 14A(2), we declare that the second proviso to Section 14A(3) is clearly violative of both Articles 14 and 21 of the Constitution. It is not just manifestly arbitrary, it has the direct and unhindered effect of taking away the salutary right of a first appeal which has been recognised to be an integral facet of fair procedure enshrined in Article 21 of the Constitution. The absence of discretion in the Court to consider condonation of delay even where sufficient cause may exist renders the measure wholly capricious, irrational and excessive. It is consequently struck down.

B. Whether in view of the provisions contained in Section 14-A of the Amending Act, a petition under the provisions of Article 226/227 of the Constitution of India or a revision under Section 397 of the Code of Criminal Procedure or a petition under Section 482 Cr. P.C., is maintainable. OR in other words, whether by virtue of Section 14-A of the Amending Act, the powers of the High Court under Articles 226/227 of the Constitution or its revisional powers or the powers under Section 482 Cr. P.C. stand ousted?

We therefore answer Question (B) by holding that ***while the constitutional and inherent powers of this Court are not "ousted" by Section 14A, they cannot be invoked in cases and situations where an appeal would lie under Section 14A****. Insofar as the powers of the Court with respect to the revisional jurisdiction is concerned, we find that the provisions of Section 397 Cr. P.C. stand impliedly excluded by virtue of the special provisions made in Section 14A. This, we hold also in light of our finding that the word "order" as occurring in sub-section(1) of Section 14A would also include intermediate orders.*

C. Whether the amended provisions of Section 14-A would apply to offences or proceedings initiated or pending prior to 26 January 2016?

We hold that the provisions of Section 14A would be applicable to all judgments, sentences or orders as well as orders granting or refusing bail passed or pronounced after 26 January, 2016. We further clarify that the introduction of this provision would not effect proceedings instituted or pending before this Court

provided they relate to a judgment, sentence or order passed prior to 26 January 2016. The applicability of Section 14A does not depend upon the date of commission of the offence. The determinative factor would be the date of the order of the Special Court or Exclusive Court.

D. Whether upon the expiry of the period of limitation for filing of an appeal as specified in the second proviso to Section 14-A(3), Section 439 Cr. P.C. and the powers conferred on the High Court in terms thereof would stand revived?

We hold that the powers conferred on the High Court under Section 439 Cr. P.C. do not stand revived. We find ourselves unable to sustain the line of reasoning adopted by the learned Judge in Rohit that the provisions of Section 439 Cr. P.C. would remain in suspension during the period of 180 days and thereafter revive on its expiry. The conclusion so arrived at cannot be sustained on any known principle of statutory interpretation. We are therefore, constrained to hold that both Janardan Pandey as well as Rohit do not lay down the correct law and must, as we do, stand overruled.

E. Whether the power to directly take cognizance of offences shall be exercisable by the existing Special Courts other than the Exclusive Special Courts or Special Courts to be specified under the amended Section 14?"

The existing Special Courts do not have the jurisdiction to directly take cognizance of offences under the 1989 Act. This power stands conferred only upon the Exclusive Special Courts to be established or the Special Courts to be specified in terms of the substituted section 14. However it is clarified that the substitution of Section 14 by the Amending Act does not have the effect of denuding the existing Special Courts of the authority to exercise jurisdiction in respect of proceedings under the 1989 Act. They would merely not have the power to directly take cognizance of offences and would be bound by the rigours of Section 193 Cr. P.C. Even if cognizance has been taken by the existing Special Courts directly in light of the uncertainty which prevailed, this would not ipso facto render the proceedings void ab initio. Ultimately it would be for the objector to establish serious prejudice or a miscarriage of justice as held in Rati Ram."

8. In Ghulam Rasool Khan v. State of U.P., 2022 SCC OnLine All 975, another Full Bench of this Court dealt with the following questions:—

(i) Whether a Single Judge of this Court while deciding Criminal Appeal (Defective) No. 523/2017 In re : Rohit v. State of U.P. vide judgment dated 29.08.2017 correctly permitted the conversion of appeal under Section 14 A of the Act, 1989 into a bail application by exercising the inherent powers under Section 482 of the Cr. P.C.?

(ii) Whether keeping in view the judgment of Rohit (supra), an aggrieved person will have two remedies available of preferring an appeal under the provisions of Section 14 A of the Act, 1989 as well as a bail application under the provisions of Section 439 of the Cr. P.C.?

(iii) Whether an aggrieved person who has not availed of the remedy of an

appeal under the provisions of Section 14 A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr. P.C.?

(iv) What would be the remedy available to an aggrieved person who has failed to avail the remedy of appeal under the provision of Act, 1989 and the time period for availing the said remedy has also lapsed?

9. The Full Bench answered the aforesaid questions as follows:—

(i) Question No. (I) is answered in negative as Rohit v. State of U.P., (2017) 6 ALJ 754 has been overruled by Full Bench of this Court in In Re : Provision of section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015, (2018) 6 ALJ 631.

(ii) Question No. (II) is answered in negative holding that an aggrieved person will not have two remedies namely, i.e. filing an appeal under Section 14A of the 1989 Act as well as filing a bail application in terms of Section 439 Cr. P.C.

(iii) Question No. (III) is answered in negative holding that the aggrieved person having remedy of appeal under Section 14A of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court under Section 482 Cr. P.C.

(iv) Question No. (IV) - There will be no limitation to file an appeal against an order under the provisions of 1989 Act. Hence, the remedies can be availed of as provided.

10. The learned A.G.A. has informed the Court that the following questions have been referred by the order dated 20.09.2023 passed in Abhishek Awasthi @ Bholu Awasthi v. State of U.P., Application under Section 482 No. 8635 of 2023 and other connected matters:—

(i) Whether a Single Judge of this Court while deciding Criminal Appeal (Defective) No. 523/2017 In re : Rohit v. State of U.P. vide judgment dated 29.08.2017 correctly permitted the conversion of appeal under Section 14 A of the Act, 1989 into a bail application by exercising the inherent powers under Section 482 of the Cr. P.C.?

(ii) Whether keeping in view the judgment of Rohit (supra), an aggrieved person will have two remedies available of preferring an appeal under the provisions of Section 14 A of the Act, 1989 as well as a bail application under the provisions of Section 439 of the Cr. P.C.?

(iii) ***Whether an aggrieved person who has not availed of the remedy of an appeal under the provisions of Section 14 A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr. P.C.?***

(iv) What would be the remedy available to an aggrieved person who has failed to avail the remedy of appeal under the provision of Act, 1989 and the time period for availing the said remedy has also lapsed?""

11. Although the questions have been referred to a larger Bench by means of an order dated 20.09.2023 passed by a coordinate Bench of this Court at Allahabad in Application under Section 482 No. 8635 of 2023 and other connected matters, the decision in Ghulam Rasool Khan (Supra) will hold good till a decision is taken by a larger Bench. In this regard, a reference to the following passage from judgment of the Hon'ble Supreme Court in Union Territory of Ladakh v. Jammu & Kashmir National Conference, 2023 SCC OnLine SC 1140 will be appropriate:—

"35. We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in National Insurance Company Limited v. Pranay Sethi, (2017) 16 SCC 680. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it."

12. In Union of India v. State of Maharashtra, (2020) 4 SCC 761 relied upon by the learned Counsel for the applicant, the question involved was regarding the bar created under Section 18 of the Act against grant of anticipatory bail in offences under the Act and the question of maintainability of an Application under Section 482 Cr. P.C. was not involved in that case. Therefore, that judgment is no relevant for the decision of the point involved in the present case.

13. Therefore, the mere reference of the aforesaid questions would not affect the binding nature of the law laid down in Ghulam Rasool Khan (Supra).

14. In view of the aforesaid discussion, the law on the point stands clarified by two Full Benches, that inherent powers of this Court under Section 482 Cr. P.C. cannot be invoked in cases and situations where an appeal would lie under Section 14A and aggrieved person having remedy of appeal under Section 14A of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court under Section 482 Cr. P.C."

9. In **Devendra Yadav v. State of U.P.**, 2023 SCC OnLine All 164, which has been relied upon by the learned Counsel for the applicant, a coordinate Bench of this Court distinguished Ghulam Rasool (Supra) for the followins reasons: -

"11. Sri. Mohit Singh, learned counsel for the applicant has cited a judgment of Hon'ble Apex Court in the case of Ramawatar v. State of Madhya Pradesh reported in 2021 SCC OnLine SC 966 decided on 25.10.2021 in Crl. Appeal No. 1393 of 2011, whereby the full Bench of Hon'ble Apex Court decided the issue in

most lucid terms. The relevant paragraph nos. 9 and 16, which are quoted herein below:—

"9. Having heard learned Counsel for the parties at some length, we are of the opinion that two questions fall for our consideration in the present appeal. First, whether the jurisdiction of this Court under Article 142 of the Constitution can be invoked for quashing of criminal proceedings arising out of a 'noncompoundable offence? If yes, then whether the power to quash proceedings can be extended to offences arising out of special statutes such as the SC/ST Act?

16. On the other hand, where it appears to the Court that the offence in question, although covered under the SC/ST Act, is primarily private or civil in nature, or where the alleged offence has not been committed on account of the caste of the victim, or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. On similar lines, when considering a prayer for quashing on the basis of a compromise/settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in question goes unpunished, the mere fact that the offence is covered under a 'special statute' would not refrain this Court or the High Court, from exercising their respective powers under Article 142 of the Constitution or Section 482 Cr. P.C."

*12. Since the case of Gulam Rasool Khan was decided in the year 2022*28.07.2022) whereas Ramawtar case was decided in 2021, thus, it has been contended by the counsel that 482 Cr. P.C. application is maintainable even it relates to SC/ST Act.*

13. Sri. Singh, learned counsel for the applicant submitted that while deciding the case of Gulam Rasool Khan (supra), learned Division Bench of this Court has never relied upon or even considered the ratio laid down in the judgment of Ramawatar v. State of M.P. and thus could be safely be termed as per incuriam.

14. There is yet another judgment of Hon'ble Apex Court cited by learned counsel for the applicants in the case of B. Venkateswaran v. P. Bakthavatchalam reported in 2023 SCC OnLine SC 14 decided on 05.01.2023 in Criminal Appeal No. 1555 of 2022. In so many words the, the Hon'ble Apex Court has opined that:—

"From the aforesaid, it seems that the private civil dispute between the parties is converted into criminal proceedings. Initiation of the criminal proceedings for the offences under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, therefore, is nothing but an abuse of process of law and Court. From the material on record, we are satisfied that no case for the offences under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is made out, even prima facie. None of the ingredients of Sections 3(1)(v) and (va) of the Scheduled Castes and the

Scheduled Tribes (Prevention of Atrocities) Act, 1989 are made out and/or satisfied. Therefore, we are of the firm opinion and view that in the facts and circumstances of the case, the High Court ought to have quashed the criminal proceedings in exercise of powers under Section 482 of the Code of Criminal Procedure. The impugned judgment and order passed by the High Court, therefore, is unsustainable and the same deserves to be quashed and set aside and the criminal proceedings initiated against the appellants deserves to be quashed and set aside."

15. Thus from the aforesaid discussions, it is clear that Hon'ble Apex Court has clearly and time and again have opined that elaborating the aforesaid provision of full bench of this Court as well as Hon'ble Apex Court and taking the help of the aforesaid judgments, the Court is of the considered opinion that 482 Cr. P.C. application could be filed assailing the summoning order."

10. The Hon'ble Single Judge deciding **Devendra Yadav** (Supra) somehow omitted to notice that Section 14-A of the S.C./S.T. Act was not taken into consideration either in **Ramawatar or in B. Venkateswaran v. P. Bakthavatchalam.**

11. 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.

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 AC 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."

12. 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."

13. The Hon'ble Single Judge deciding **Devendra Yadav** (Supra) somehow omitted to notice that Section 14-A of the S.C./S.T. Act was not taken into consideration either in **Ramawatar** or in **B. Venkateswaran v. P. Bakthavatchalam.**

14. The question of effect of Section 14-A of the S.C./S.T. Act on entertainability of a petition under Section 482 Cr.P.C. was neither raised not decided in **Ramawatar** or in **B. Venkateswaran v. P. Bakthavatchalam a**nd, therefore,

those decisions are not relevant for deciding this question. Therefore, those decisions would not affect the binding values of the Full Bench decisions in **In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act and Ghulam Rasool Khan v. State of U.P..**

15. In view of the aforesaid discussion, the application under Section 482 Cr.P.C. filed by the applicant seeking quashing of the charge-sheet, the summoning order and the entire proceedings of Case under Sections 323, 504, 506, 241 IPC & Sections 3 (1)(Da)(Dha) of 14-A of the Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act, 1989 is not entertainable and the same is dismissed, leaving it open to the applicant to avail the statutory remedy under Section 14-A of the 14-A of the Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act, 1989.

(2024) 6 ILRA 77
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.06.2024

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 5493 of 2024

Gayatri Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Punit Kumar Shukla

Counsel for the Respondents:
C.S.C.

A. Civil Law – Cancellation of fair price shop license – Maintainability - Alternative remedy – Petitioner has an alternative and equally efficacious remedy of filing of appeal u/s 13(3) of U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016.

Writ petition disposed of granting liberty to petitioner to approach appellate authority. (E-4)

Present petition challenges the orders dated 24.01.2024 and 12.04.2024.

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

1. Heard learned counsel for petitioner and learned State Counsel for opposite parties.

2. Petition has been filed challenging orders dated 24th January, 2024 and 12th April, 2024 pertaining to cancellation of petitioner's fair price shop license.

3. Learned State Counsel at the very outset has taken a preliminary objection regarding maintainability of this petition since petitioner has an alternative and equally efficacious remedy of filing of appeal under Section 13(3) of the U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order 2016.

4. In view of aforesaid, petition is disposed of granting liberty to petitioner to approach the appellate authority against aforesaid orders, which if entertained shall be decided expeditiously without granting any undue adjournment.

(2024) 6 ILRA 78
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.06.2024

BEFORE

THE HON'BLE J.J. MUNIR, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Misc. Writ Petition No. 9396 of 2024

Smt. Naziya Ansari & Anr. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Manoj Kumar Rajbhar, Surendra Mohan Mishra

Counsel for the Respondents:
G.A., Ravindra Prakash Srivastava

A. Criminal Law – Indian Penal Code – Section 363 – Kidnapping – Right to life – Both the parties to the marriage was adult – Prosecutrix, in her statement u/s 164 Cr.P.C. admitted the marriage with IInd petitioner by her freewill and also stated fearing for her life at the hand of her uncle – Nothing was done by the Magistrate – No action against uncle was taken by the Police authority – How far married couple is needed safeguard – Held, first petitioner's uncle (father's brother) has absolutely no right to lodge the impugned FIR – Further held, honour killing in such matters is not an unknown phenomenon and it is very important to save a human life from extinction on account of misguided emotions or notions of morality. This issue is quite independent of the issue of matrimony that the parties have entered into. – No citizen can kill another for holding a different opinion and it is the foremost duty of the State to preserve human life – The impugned FIR and all proceedings taken pursuant thereto are manifestly illegal and *ultra vires*. (Para 9, 10 and 12)

Writ petition allowed. (E-1)

List of Cases cited:

St. of Har. & ors. Vs Bhajan Lal & ors.; 1992 Supp (1) SCC 335

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

1. Learned counsel for the petitioners is permitted to implead the S.P. Siddharthnagar, as a party respondent, to this petition, during the course of the day.

2. The first petitioner is an adult woman aged about 21 years. It is alleged that the second petitioner is an adult man. They have married according to their freewill and wish. Learned counsel for the petitioners has pointed out that the first petitioner's Secondary School Certificate issued by the Maharashtra State Board is on record, which shows her date of birth as 25.04.2003. She is, therefore, now aged 21 years. Apparently, she has married the second petitioner on 17.04.2024 according to Muslim rites, regarding which there is a marriage certificate issued by the Telangana State Waqf Board dated 25.04.2024. It has been issued by the Chief Executive Officer of the said Board.

3. Learned counsel for the petitioners points out that not only the Police went after the second petitioner to arrest him in connection with the impugned FIR, but also have taken the first petitioner into unlawful custody and handed her over to her uncle, respondent no.3, one Mohd. Jaheer, son of Tahir. The first petitioner was produced before the Magistrate by the Police and her statement under Section 164 Cr.P.C. recorded. In her statement, the prosecutrix has categorically said that she is 21 years

old and passed her Class XII Examination. She has also said that on 08.04.2024, she left home of her own at nine o' clock in the evening and went to a place called Supa. There, at her bidding, one Hidayat was waiting in a white coloured Car and she went along with him of her freewill to Hyderabad. Once in Hyderabad, she had phoned up the second petitioner, Mohd. Umar and called him over. The two stayed in a hotel on 17.04.2024 and contracted a marriage there. It is stated before the Magistrate also that the first petitioner's uncle, Mohd. Jaheer, has implicated the second petitioner in a false case and is extending death threats to her.

4. Mr. Ravindra Prakash Srivastava, learned Counsel who appears on behalf of respondent no.3, when confronted with the statement, stated that he does not want to file a counter affidavit.

5. Mr. Shashi Shekhar Tiwari, learned AGA, who has produced the case diary carrying the statement of the prosecutrix under Section 164 Cr.P.C. also states that he had nothing further to add. The case diary shall be retained on record and made part of it.

6. Admit.

7. Heard forthwith.

8. Heard Mr. Akhilesh Kumar Mishra, Advocate holding brief of Mr. Surendra Mohan Mishra, learned counsel for the petitioners, Mr. Ravindra Prakash Srivastava, learned counsel for respondent no.3 and Mr. Shashi Shekhar Tiwari, learned AGA for the State.

9. Upon hearing learned counsel for the parties, we find that this is a case where the petitioners are adults and have married according to Muslim rites on 17.04.2024, regarding which, there is an authoritative certification by the Telangana State Waqf Board through a certificate dated 25.04.2024. A copy of the same has been annexed at page no.26 of the paper book. The first petitioner's mark-sheet clearly establishes that she is an adult much above 18 years. Even if the petitioners have not married each other, no one can restrain an adult from going anywhere that he/she likes, staying with a person of his/her choice, or solemnizing marriage according to his/her will or wish. This is a right which flows from Article 21 of the Constitution.

10. *Ex facie*, therefore, the impugned FIR and all proceedings taken pursuant thereto are manifestly illegal and ultra vires. The first petitioner's uncle (father's brother) has absolutely no right to lodge the impugned FIR or as petitioner no.1 has said, threaten her in any manner. This matter has a slightly serious angle to it, because petitioner no.1 in her statement under Section 164 Cr.P.C., has expressed an apprehension that she would be done to death. Honour killing in such matters is not an unknown phenomenon and it is very important to save a human life from extinction on account of misguided emotions or notions of morality. This issue is quite independent of the issue of matrimony that the parties have entered into. No citizen can kill another for holding a different opinion and it is the foremost duty of the State to preserve human life.

11. This Court is dismayed to find that after the prosecutrix made a statement before the Magistrate on 07.05.2024 fearing for her life at the hands of respondent no.3, Mohd. Jaheer, the Magistrate has reportedly sent her back

home to Mohd. Jaheer. Even otherwise, an adult cannot be sent into custody of another and forced to stay with him/her.

12. This Court is further constrained to observe that the learned Magistrate before whom the prosecutrix said that she feared for her life because Mohd. Jaheer had threatened to do her death was duty bound to get an FIR registered against Mohd. Jaheer, besides taking adequate measures to secure the safety and life of the first petitioner. The learned Magistrate did nothing. The statement under Section 164 Cr.P.C. is recorded in the case diary. Therefore, the Superintendent of Police, Siddharth Nagar and the Station House Officer, Police Station-Bansi, District-Siddharth Nagar are equally answerable for not taking action against Mohd. Jaheer by registering an appropriate FIR and also safeguarding the life and security of the first petitioner.

13. In the circumstances, therefore, we may notice that in **State of Haryana & Others Vs. Bhajan Lal And Others** reported in **1992 Supp (1) SCC 335**, the seven criteria that were laid down, on foot of which an FIR may be quashed, are mentioned in paragraph no.102 of the report. Paragraph no.102 of the report in Bhajan Lal (supra) reads 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."

(emphasis by Court)

14. The third criteria where an FIR may be quashed is "where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose commission of any offence and make out a case against the accused." The third criteria clearly applies in this case, inasmuch as, the first petitioner, during investigation when produced before the Magistrate said in her statement under Section 164 Cr.P.C. that the allegations in the FIR were absolutely without basis.

16. In the circumstances, we **allow** this writ petition and **quash** the impugned FIR giving rise to Case Crime No.82 of 2024, under Section 363 IPC, Police Station-Bansi, District-Siddharth Nagar.

17. In addition, we issue a *mandamus* to the S.P. Siddharthnagar and the Station House Officer, Police Station-Bansi, District-Siddharthnagar to ensure that the first petitioner goes wherever she likes and stays with whomsoever she wants, without any hinderance from Mohd. Jaheer or any other member of her family. It will also be the duty of the S.P. Siddharthnagar and the Station House Officer, Police Station-Bansi, District-Siddharthnagar, to ensure that Mohd. Jaheer or any other member of the first petitioner's family, do not harm her, in any manner, whatsoever.

18. In the event, any harm or injury comes to the first petitioner then the S.P. Siddharthnagar and the Station House Officer, Police Station-Bansi, Siddharthnagar, would be personally answerable to this Court.

19. The Registrar (Compliance) is directed to communicate this order to the Superintendent of Police, Siddharthnagar and the Station House Officer, Police Station-Bansi, Siddharthnagar through the Chief Judicial Magistrate, Siddharthnagar by Monday.

(2024) 6 ILRA 81
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.06.2024

BEFORE

THE HON'BLE AJAY BHANOT, J.

Crl. Misc. Bail Application No. 16157 of 2024

Tetri Devi ...Applicant

Versus

State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Prabhat Kumar Singh, Sri Rajat Singh

Counsel for the Respondent:
G.A.

(A) Criminal Law - Bail - Indian Penal Code, 1860 - Sections 498-A & 304-B - Dowry Prohibition Act. 1961 - Section 3/4 - Trial Court's Role in Bail Rights - To ensure that the right of bail of the applicant is not frustrated by arbitrary demands of sureties or onerous conditions which are unrelated to the socioeconomic status of the applicant. (Para - 8)

Mother-in-law of deceased did not demand dowry or interfere in her husband's matrimonial life - deceased was temperamental - believed her husband was having an affair, leading to depression - committed suicide by hanging herself - applicant having no criminal history - bail of applicant rejected by trial court. (Para - 4,5)

HELD: - Direction to trial court to fix the sureties after due application of mind following the court's ruling in Arvind Singh v. State of U.P. through the Principal Secretary Home Deptt. (Para -7)

Bail Granted. (E-7)

List of Cases cited:

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

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

1. Matter is taken up in the revised call.

2. By means of the the bail application the applicant has prayed to be enlarged on bail in Case Crime No.68 of 2024 at Police Station-Nagra, District-Ballia, under Sections 498-A, 304-B IPC and Section 3/4 Dowry Prohibition Act. 1961. The applicant is in jail since 15.03.2024

3. The bail application of the applicant was rejected by the learned trial court on 02.04.2024.

4. The following arguments made by Shri Prabhat Kumr Singh, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Shri Rishi Chaddha, learned AGA from the record, entitle the applicant for grant of bail:

1. The applicant is the mother-in-law of the deceased.

2. The applicant never demanded dowry or torture the deceased nor did she interfere in the matrimonial life of the deceased and her husband.

3. The deceased was a temperamental lady. The deceased was led to believe that her husband was having extramarital affair. She became depressed.

4. On the fateful day, the deceased succumbed to depression and took extreme step of ending her life. She committed suicide by hanging herself.

5. The postmortem report opines that;

i. The cause of death as asphyxia due to antemortem hanging.

ii. The hyoid bone was intact.

iii. Ligature marks are reference which are consistent with the hanging.

6. The applicant did not aid or abet the suicide.

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

8. The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to join the trial proceedings. There is no possibility of her influencing witnesses, tampering with the evidence or reoffending.

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

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

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

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

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

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

(2024) 6 ILRA 83
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.06.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Criminal Revision No. 3738 of 2023

Subodh Kumar Nigam ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Sudhakar Shukla

Counsel for the Opposite Parties:
Anant Ram Gupta,G.A., Ram Bahadur Gupta

Criminal Law- Code of Criminal Procedure, 1973-Section 125 (3) - Revision against the order directing the payment of arrears from the month of March 2021 to September 2022 i.e beyond the period of one year-Coercive measure should not be adopted where the wife or any claimant under Section 125 Cr.P.C has not been pursuing recovery of arrears for over a year but that does not mean that the right to recover arrears is lost-Other modes of recovery can be adopted to as may be considered by the court concerned to be justified-Petition disposed of with the direction arrears be deducted from the salary of Applicant from the month of July 2024 till the entire arrears of maintenance is satisfied.(Para 2, 9, 10, 14) (E-15)

List of Cases referred:

1. Poongodi & anr. Vs Thangavel (2013) 10 SCC 618

2. Shahada Khatoon & ors. Vs Amjad Ali & ors., (1995) 5 SCC 672

3. Shantha @ Ushadevi & anr. Vs B.G. Shivananjappa, AIR SC 2410

4. Dr. Chandrashekhar Vs Sau. Jayshree, I (1989) DMC 235

5. Ganga Prasad Vs Smt. Gomti, 2000 Cri.L.J. 3914

6. Lav Kumar Vs St. of U.P. & anr., Application U/S 482 No. 20081 of 2021 (decided on 13.05.2022)

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

1. Heard Sri Dhanesh Kumar Verma, learned Advocate holding brief of Sri Sudhakar Shukla, learned counsel for the petitioner and Sri Anant Ram Gupta, learned counsel for the contesting respondents.

2. In this criminal revision filed before this Court a question has been raised as to the propriety of the court concerned in passing an order for payment of arrears towards maintenance for a sum of Rs. 57,000/- by the Additional Principal Judge, Court No. 3, Kanpur Nagar.

3. Submission advanced is that the arrears that have been directed to be paid to the opposite party no. 2 relate to the period starting from the month of March 2021 to September 2022 and since the application for payment thereof came to be filed only on 21.11.2022, it got hit by sub section (3) of Section 125 of Cr.P.C. It is contended that sub section (3) of Section 125 Cr.P.C. puts a fetter upon the right of opposite party to recover the maintenance amount beyond period of one year and accordingly, as has been argued, the Additional Principal Judge, Family Court has wrongly construed the relevant provision in passing the order.

4. Learned counsel for the revision applicant has also submitted that the very judgment relied upon by the Judge, Family Court helps him out in assailing the order passed by the Judge which very much interprets the provisions.

5. Per contra it is argued by Sri Gupta, learned counsel for the contesting opposite party that the first application for recovery of an earlier amount came to be filed on 14.12.2020 and since the claim for maintenance amount is a recurring cause of action therefore, if the applicant husband has failed to pay any amount of maintenance on month to month basis then such cause of action will continue to be rendered as continuing cause of action month by month as such and will not be hit by Section 125(3) Cr.P.C.

6. Thus, it is argued that the judgment which has been relied upon by the Judge, Family Court correctly interprets the law as it holds that the right to recover the amount as far as regular maintenance is concerned, is not hit by Section 125(3) Cr.P.C.

7. Besides the above, it is submitted by Sri Gupta that taking the provisions as have been incorporated by the legislature the monthly maintenance claim does not become a time barred claim. All that is to be seen, according to Mr. Gupta, as to what mode of the recovery of amount is to be adopted. He submits that a coercive measure by arresting a person may not be a remedy available to the opposite party beyond the prescribed period of one year but a right to claim maintenance or arrears of maintenance pursuant thereto in order to claim maintenance month by month, does not get adversely affected or prejudiced merely for an application being filed beyond prescribed period of one year.

8. Having heard learned counsel for the respective parties and having perused the records, I find that the order of maintenance allowing the application under Section 125 Cr.P.C. which was passed on 09.05.2018 very clearly provided that the application under Section 125 Cr.P.C. was being granted and Rs. 3,000/- shall be paid towards the maintenance to the opposite party-applicant as the opposite party was held entitled to a maintenance from her husband. This thus goes unequally that monthly maintenance was to be paid by the present applicant to the opposite party for rearing up the minor children. However, it transpires further from the record that earlier also some arrears had became due to be paid to the opposite party at the end of the applicant and accordingly she had moved an application on 14.12.2020 to recover the amount of Rs. 24,000/- which was subsequently paid by the applicant to the opposite party. However, later on he again did not pay the amount as far as arrears are concerned and therefore, amount accrued to Rs. 27,000/- between March 2021 and September 2022. It is for the recovery of this amount that the application came to be moved by the opposite party in October 2022 which was claimed to be beyond prescribed period of time.

9. Section 125 Cr.P.C. is an enabling provision in so far as a deserted/ neglected wife claims maintenance from her husband, more so along with her children and this right vests with parents as well. It is kind of summary proceedings to be instituted at the end of application made by wife or the children or by the parents from a person who is the earning member of the family and is under an obligation to maintain them. After inviting objections and meeting the points of contentions a Magistrate has been empowered to pass orders on merit for maintenance. Off-late this power is transferred/ vested with the Judge, Family Court on the constitution of Family Court under the Family Courts Act, 1984. A court when passes a decree or order which is continuing in the nature, it is to be seen as to in what manner a fetter of limitation can be imposed for recovery of such amount of maintenance. For ready reference sub section (3) of Section 125 is reproduced hereunder:

"(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any port of each month's allowance allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made;

Provided** that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year f**rom 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."*

(Emphasis added)

10. From a bare reading of the main provision as contained under sub section (3) of Section 125 Cr.P.C. it is explicit that the Magistrate has been vested with the power to issue warrant for remaining of the amount due in the manner provided for levying fines and may sentence such person for whole or part of each month's allowance for maintenance or if for interim maintenance and expenses of proceedings, as the case may be. This is a coercive measure contemplated under sub section (3) of Section 125 Cr.P.C. The legislature has been conscious enough to provide for a proviso, where a wife may be not vigilant to her rights in recovering the amount in time and therefore, no such coercive measure for issuing warrant of arrest etc. will be issued. This is what is contemplated in the first proviso to sub section (3) of Section 125 Cr.P.C. The Courts have been interpreting the provision to mean that such coercive measure should not be adopted where the wife or any claimant under Section 125 Cr.P.C. has not been pursuing for recovery of arrears for over a year but that does not mean that the right to recover arrears is lost. This could not be the intendment of the legislature in incorporating the first proviso, otherwise the language of the first proviso could have been conched in a manner that no recovery would be made in respect of the arrears beyond the period of one year. All that is provided is that no warrant will be issued. Thus, it is very much clear that fetter has been placed upon the mode of recovery in a sense that a person who is liable to pay such dues will not be arrested. However, other modes of recovery can be adopted to as may be considered by the court concerned to be justified.

11. In my above view, I find support from the judgment of Supreme Court in the case of **Poongodi & Another v. Thangavel (2013) 10 SCC 618** in which vide paragraph nos. 4 & 5 the Court has held thus:

"4. A reading of the order dated 21.4.2004 passed by the High Court would go to show that the proviso to Section 125(3) CrPC has been construed by the High Court to be a fetter on the entitlement of the claimants to receive arrears of maintenance beyond a period of one year preceding the date of filing of the application under Section 125(3) CrPC. Having considered the said provision of the Code we do not find that the same creates a bar or in any way effects the entitlement of a claimant to arrears of maintenance. What the proviso contemplates is that the procedure for recovery of maintenance under ***Section 125(3) CrPC, namely, by construing the same to be a levy of a fine and the detention of the defaulter in custody would not be available to a claimant who had slept over his/her rights and has not approached the Court within a period of one year commencing from the date on which the entitlement to receive maintenance has accrued. However, in such a situation the ordinary remedy to recover the amount of maintenance, namely, a civil action would still be available.***

5. The decision of this Court in Kuldip Kaur v. Surinder Singh and Anr.[1] may be usefully recalled wherein this Court has held the provision of sentencing under Section 125 (3) to be a "mode of enforcement" as distinguished from the "mode of satisfaction" of the liability which can only be by means of actual payment. Paragraph 6 of the report to the above effect, namely, that the mode of enforcement i.e. sentencing to custody does

not extinguish the liability may be extracted below:

"6. A distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to jail is a "mode of enforcement". It is not a "mode of satisfaction" of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. Be it also realised that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance "without sufficient cause" to comply with the order. It would indeed be strange to hold that a person who "without reasonable cause" refuses to comply with the order of the court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail. A sentence of jail is no substitute for the recovery of the amount of monthly allowance which has fallen in arrears. Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to enable them to live. Instead of providing them with the funds, no useful purpose would be served by sending the husband to jail. Sentencing to jail is the means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability. The section does not say so. Parliament in its wisdom has not said so. Commonsense does not support such a construction. From where does the court draw inspiration for persuading itself that the liability arising under the order for maintenance would stand discharged upon an effort being made to recover it? The order for monthly allowance can be discharged only upon the monthly allowance being recovered. The liability cannot be taken to have been discharged by sending the person liable to pay the monthly allowance, to jail. At the cost of repetition it may be stated that it is only a mode or method of recovery and not a substitute for recovery. No other view is possible. That is the reason why we set aside the order under appeal and passed an order in the following terms:

???. ?."

(Emphasis added)

12. The Court has also gone on to hold that the maintenance is in the nature of continuing liability. The nature of the right to receive maintenance and concomitant liability to pay was also noticed earlier by the Supreme Court in the case of **Shahada Khatoon & others v. Amjad Ali and others, (1995) 5 SCC 67**2 vide paras 6 & 7 but the Court held that husband cannot be kept in jail till payment is made. The court in its operative part of order has observed thus:

"The language of sub-section (3) of Section 125 is quite clear and it circumscribes the power of the Magistrate to impose imprisonment for a term which may extend to one month or until the payment, if sooner made. This power of the

Magistrate cannot be enlarged and therefore the only remedy would be after expiry of one month. For breach or non-compliance with the order of the Magistrate the wife can approach the Magistrate again for similar relief."

13. The Supreme Court, therefore, in the said case set aside the order of High Court where the High court had declined arrears of maintenance to the wife from the husband as it was claimed beyond the period of one year and Supreme Court directed the husband to make payment of arrears.

14. In such above view of the matter, therefore, I do not see that the Judge, Family Court in any manner has wrongfully exercised jurisdiction in granting the application for recovery of the maintenance holding the opposite party to be entitled to the same. Similar view was taken by Supreme Court in another judgment of **Shantha @ Ushadevi and another v. B.G. Shivananjappa, AIR SC 2410** the Court has observed thus:

"It must be borne in mind that Section 125 CrPC is a measure of social legislation and it has to be construed liberally for the welfare and benefit of the wife and daughter. It is unreasonable to insist on filing successive applications when the liability to pay the maintenance as per the order passed under Section125(1) is a continuing liability."

15. In so far as the judgment relied upon by the learned counsel for the respondents of the Bombay High Court in the case of **Dr. Chandrashekhar v. Sau. Jayshree, I (1989) DMC 235** and the judgment of coordinate bench of this Court in **Ganga Prasad v. Smt. Gomti, 2000 Cri.L.J. 3914**, are concerned they are no more a good law in the light of judgments of Supreme Court (supra). In these two judgments cited before me, the High Court declines the claim of wife to recover the maintenance beyond a period of one year or if there was a complete bar to recover the amount. These judgments including the judgment in the case of **Lav Kumar v. State of U.P. & Another, Application U/S 482 No. 20081 of 2021** (decided on 13.05.2022) being contrary to the view taken are no more binding precedent for this Court.

16. At this stage, before the court proceeds to decide the matter on merits, learned counsel for the petitioner submits that given a respite in terms of payment of the arrears of amount, he would have no objection if Rs. 3,000/- is additionally directed to be deducted from the salary of the petitioner till the arrears of Rs. 57,000/- is satisfied.

17. Now, since learned counsel for the revision applicant is ready to pay the amount of Rs. 3,000/- per month and submits that, that may also be directed to be deducted from the salary of the applicant, it is hereby provided that Rs. 3,000/- in addition to already Rs. 3,000/- being deducted from the salary of the applicant, shall be deducted from the salary from the month of July 2024 till the entire arrears of maintenance of Rs. 57,000/- is satisfied. Learned counsel for the applicant shall place this order before his employer as well as the Judge, Family Court and so also the opposite party shall place this order before the Family court for appropriate orders.

18. With these observations and directions, this petition stands **disposed of**.

(2024) 6 ILRA 89
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.06.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application u/s 482 No. 9536 of 2024

Smt. Archana Singh Gautam ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Diwakar Tiwari, Gyanendra Singh

Counsel for the Opp. Parties:
Ashish Pandey,G.A., Vivek Kumar Singh

A. Criminal Law – Negotiable Instrument Act, 1881 – Section 138, Proviso (a) – Dishonour of cheque – Merger of Allahabad Bank into Indian Bank – Issuance of cheque after merger – How far bear valid cheque – Circular was issued mentioning the fact that all the cheques issued by Allahabad Bank can be exchanged with the cheques of Indian Bank by 30.09.2021 – Effect – Cheque dated 02.06.2023 of erstwhile Allahabad Bank presented to the Indian Bank on 21.08.2023 was returned on 25.08.2023 with the endorsement "wrongly delivered not drawn on us" – Liability u/s 138 NI Act was alleged – Held, the cheque in question, which was issued from the account maintained in erstwhile Allahabad Bank after its merger with Indian Bank, was not the valid cheque on the date of presentation – If any invalid cheque is presented before the Bank and the same was dishonoured, then no liability under Section 138 N.I. Act would be attracted – Dishonouring the invalid cheques after 30.09.2021 will not attract liability u/s 138 N.I. Act – High Court quashed the proceeding of complaint. (Para 6, 7, 9, 11 and 13)

Application allowed. (E-1)

List of Cases cited:

1. NEPC Micon Ltd. Vs Magma Leasing Ltd; (1999) 4 SCC 253

2. Crl. M.C. No. 1566 of 2023; Sri Premanand Prusty Vs Smt. Sita Devi (Delhi High Court)

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

1. Heard learned counsel for the applicant, learned counsel for the opposite party no. 2 and Sri Brijesh Kumar Dwivedi, learned AGA for the State.

2. The present application has been filed for quashing the entire criminal proceeding, including the impugned summoning order dated 15.02.2024 passed by the learned Special Judicial Magistrate-II, Banda in Complaint Case No. 712 of 2023 (Brajesh Kumar Singh Vs. Smt. Archana Singh Gautam and others), under Section 138 N.I. Act, 1881, P.S. Kotwali Nagar, District Banda, pending in the Court of learned Special Judicial Magistrate-II, Banda.

3. The counsel for the applicant contends that the Bank returned the cheque in question because the cheque was invalid as the cheque in question was issued from the account maintained in Allahabad Bank on 02.06.2023, though the Allahabad Bank had already merged into the Indian Bank on 01.04.2020, and the cheque of the Allahabad Bank was valid till 30.09.2021; therefore, on the date of issuance as well as presentation of the cheque, it was invalid. Therefore, bouncing, of such the invalid cheque will not attract the liability u/s 138 N.I. Act.

4. Per contra, learned counsel for the opposite party no. 2 has relied upon the judgment of Hon'ble Apex Court in the case of **NEPC Micon Ltd. V. Magma Leasing Ltd (1999) 4 SCC 253** in the judgment the Apex Court observed in paragraph no. 7 that the expression "insufficient to honour the cheque is a genus of which the expression" that account being" is species and paragraph no. 9 of the above judgment the Hon'ble Apex Court has observed that "the interpretation which sought for, were given, then it would only encourage dishonest persons" should be avoided. On relying on the above judgment, the counsel for the opposite party no. 2 has submitted that the invalid cheque issued by a person is also covered u/s 138 N.I. Act. He also relied upon the judgment of Delhi High Court in the case of **Sri Premanand Prusty Vs. Smt. Sita Devi** passed in **CRL.M.C. No. 1566 of 2023**, in that case the Delhi High Court had observed that once the signature on the cheque is not disputed then the cheque if returned on the ground of its validity then the prima facie the offence u/s 138 N.I. Act will be attracted.

5. Learned AGA has also adopted the argument of counsel for the opposite party no. 2 and submitted that if the applicant was aware that the cheque in question has been declared invalid as the Allahabad Bank has already been merged into Indian Bank then just to cheat the opposite party no. 2, he had issued this cheque; therefore, the offence u/s 138 N.I. Act, will be attracted.

6. After hearing the rival submission of the counsel for the parties and perused the record, it is clear that the Allahabad Bank had merged into the Indian Bank on 01.04.2020. Thereafter, a wide circular was made by the Indian Bank in newspapers mentioning the fact that all the cheques issued by Allahabad Bank can be exchanged with the cheques of Indian Bank by 30.09.2021, and the cheque from Allahabad Bank will be honoured by 30.09.2021. Therefore, the cheque issued by the Allahabad Bank was valid till 30.09.2021, and all the cheques of Allahabad Bank which were presented before the Indian Bank till 30.09.2021, were honoured by the Indian Bank, and after 30.09.2021, cheques issued from the account maintained by the erstwhile Allahabad Bank were declared invalid for honouring. Section 138 N.I. Act prescribes the condition for initiation of proceeding on bouncing the cheque in the proviso (a) of Section 138 N.I. Act. As per the proviso (a) of Section 138 N.I. Act, cheque must be presented to the Bank during its validity. Section 138 N.I. Act is being quoted 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."

7. From the perusal of Section 138 N.I. Act, it is clear that if any invalid cheque is presented before the Bank and the same was dishonoured, then there is no liability under Section 138 N.I. Act would be attracted, and the cheque of Allahabad Bank is invalid after 30.09.2021 after merging the Allahabad Bank into the Indian Bank on 01.04.2020. Therefore, dishonouring such cheques after 30.09.2021 will not attract liability u/s 138 N.I. Act.

8. It is also relevant to mention here that as per Section 118 (b) of N.I. Act a cheque shall be deemed to be drawn on the date which is mentioned in the cheque even if same may post dated.

9. In the present case, a cheque dated 02.06.2023 of erstwhile Allahabad Bank was presented to the Indian Bank on 21.08.2023, and the same was returned on 25.08.2023 with the endorsement "wrongly delivered not drawn on us". Therefore, the cheque in question was invalid on the date of presentation before the Indian Bank.

10. So far as the judgment of **NEPC Micon Ltd. (Supr**a) relied upon by the counsel for the opposite party No. 2 is concerned, that judgment relates to the different kinds of reasons for dishonouring the cheque that would come under the category of insufficient funds, but in the present case, the question is not simply the reason for dishonouring the cheque, but the question is validity of the cheque as mentioned in proviso (a) of Section 138 of N.I. Act because if the cheque itself is invalid, then the Bank is bound to dishonour the same. So far as the judgment of the Delhi High Court in **Sri Premanand Prusty (Supra)** relied upon the counsel for the opposite party no. 2 is concerned, this Court is of the view that this judgment has not been correctly decided.

11. In view of the above analysis, the cheque in question, which was issued from the account maintained in erstwhile Allahabad Bank after its merger with Indian Bank, was not the valid cheque on the date of presentation before the Indian Bank as required by proviso (a) of Section 138 of N.I. Act; therefore, dishonouring the same will not attract the liability u/s 138 N.I. Act.

12. This Court is also of the view that the above analogy will also be applicable to the cheques of all banks which had merged with other banks.

13. Therefore, the present application is **allowed** and the proceeding of Complaint Case No. 712 of 2023 (Brajesh Kumar Singh Vs. Smt. Archana Singh Gautam and others), under section 138 N.I. Act, pending in the Court of Learned Special Judicial Magistrate-II, Banda, is hereby **quashed.**

(2024) 6 ILRA 92
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.06.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Bail Application No. 3604 of 2024

Vimal Rajput ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sumeet Tahilramani

Counsel for the Respondent:
G.A.

A. Criminal Law – Criminal Procedure Code,1973 – Section 439 – Bail – High Court's' power – Narcotic Drugs and Psychotropic Substances Act, 1985 – Ss. 36-A and 37 – S. 37 of the NDPS Act, does not contain any provision saving the special powers to grant bail conferred upon the High Courts by Section 439 Cr. P.C. – How far effect High Court's power to grant bail – Held, the restrictions contained in Section 37 of the NDPS Act were meant to be applicable to Courts other than the Constitutional Courts and in view of the provision contained in Section 36-A (3) of NDPS Act, those restrictions do not apply to the Constitutional Courts. (Para 12 and 30)

B. Criminal Law – Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 52-A – Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal), Rules, 2022 – Rules 3(2) and 10 – Samples were not drawn in presence of a Magistrate – Non serial numbering of packets for the purposes of identification – Though 14 packets were claimed to be seized, but sample has been drawn from only one packet – Effect – Held, the authorities themselves have violated the mandatory provisions contained in Rules of 2022 – High Court found case for enlargement of applicant on bail. (Para 38, 39, 41 and 42)

C. Interpretation of Statute – Harmonious construction – Defect in the statutory provision – Possibility of correction to be done by the court – Held, if the makers of the Act had themselves come across this jumbling of the provisions in Sections 36-A and 37 due to a copy-paste error, they have surely have straightened it out by reading Section 36-A(3) and Section 37 in conjunction with each other – Therefore, in order to correct the defect without altering the provisions of the Statute, the provisions of Sections 36-A and 37 have to be read together and interpreted harmoniously so that Section 36-A(3) does not become redundant or otiose. (Para 28)

Bail Application allowed. (E-1)

List of Cases cited:

1. S.L.P. Crl. No. 8137 of 2022; State by the Inspector of Police Vs B. Ramu; 2024 INSC 114 decided on 12.02.2024

2. U.O.I. Vs Ajay Kumar Singh, 2023 SCC OnLine SC 346

3. Mohd. Muslim Vs State (NCT of Delhi); 2023 SCC OnLine SC 352

4. Ramji Singh Vs Enforcement Directorate; 2023 SCC OnLine All 831

5. Vijay Madanlal Choudhary Vs U.O.I.; 2022 SCC OnLine SC 929

6. Rajendra Prasad Yadav Vs St. of M.P.; (1997) 6 SCC 678

7. St. of Pun. Vs Baldev Singh; (1999) 6 SCC 172

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

1. Heard Sri Sumeet Tahilramani, learned counsel for the applicant, Sri Ranvijay Singh, learned A.G.A. for the State and perused the records.

2. The instant application has been filed seeking release of the applicant on bail in Case Crime No. 0029 of 2024, under Sections 8/20/23/29/68 of Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'the NDPS Act'), registered at Police Station Purakalandar, District Ayodhya.

3. The aforesaid case has been registered on the basis of an F.I.R. lodged on 28.01.2024 by the Station House Officer against five persons, including the applicant, stating that on the basis of information received from a mukhbir a team of police officers had intercepted a four wheeler vehicle in which four persons, including the applicant were travelling. Different quantities of charas were being carried by all the accused persons and 7 kgs. charas packed in 14 bags containing 500 grams each was recovered from a bag being carried by the applicant.

4. The recovery memo states that a single sample weighing 166 grams was taken out from the 14 packets of charas recovered from the possession of the applicant.

5. In the affidavit filed in support of bail application it has been stated that the applicant is innocent, he has been falsely implicated in the present case and he has no criminal history.

6. The State has filed a counter affidavit stating that samples have been sent to the Forensic Science Laboratories for being examined and as per the averment made in the counter affidavit also a single sample has been sent for examination.

7. The learned A.G.A. I has drawn attention of the Court to the provisions contained in Section 37 of the NDPS Act, which is as follows: -

37. Offences to be cognizable and non-bailable.—*(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—*

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section

(1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.

8. The learned A.G.A.-I has relied upon the judgments in the cases of **State by the Inspector of Police versus B. Ramu,** 2024 INSC 114, S.L.P. Crl. No. 8137 of 2022, decided on 12.02.2024, **Union of India v. Ajay Kumar Singh,** 2023 SCC OnLine SC 346 and **Mohd. Muslim v. State (NCT of Delhi)**, 2023 SCC OnLine SC 352.

9. In **B. Ramu and Ajay Kumar Singh (Supra), the Hon'ble Supreme Court has reiterated that for entertaining a prayer for bail i**n a case involving recovery of commercial quantity of narcotic drug or psychotropic substance, the Court would mandatorily record the satisfaction in terms of the rider contained in Section 37 of the NDPS Act.

10. In **Mohd. Muslim (**Supra), the Hon'ble Supreme Court held that: -

"*20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.*

21. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik19). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail."

11. However, none of the cases referred to above takes note of the provision contained in Section 36-A of the NDPS Act, which is as follows: -

"36-A. Offences triable by Special Courts.—*(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973—*

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there

are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2-A) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that in cases which are triable by the Special Court where such Magistrate considers—

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him;

that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) ***Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under Section 36.***

(4) In respect of persons accused of an offence punishable under Section 19 or Section 24 or Section 27-A or for offences involving commercial quantity the references in sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the

said period of one hundred and eighty days.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily."

12. Surprisingly, Section 37 of the NDPS Act, which contains certain restrictions on the Courts' power to grant bail, does not contain any provision saving the special powers to grant bail conferred upon the High Courts by Section 439 Cr. P.C., whereas Section 36-A of the NDPS Act, which confers jurisdiction for trial of offences under the Act upon Special Courts and which does not contain any provision which may affect the powers of any Court regarding grant of bail, provides that nothing contained in Section 36-A shall affect the High Court's special powers regarding bail under Section 439 Cr. P.C. It appears that the provision contained in Section 36-A (3) of NDPS Act saving special powers of the High Courts regarding grant of bail was meant to be incorporated in Section 37 of the Act, but it has erroneously been placed in the Section preceding Section 37. This conclusion is supported by a study of similar provisions contained in other Statutes which are being referred to in the following paragraphs.

13. Section 12(1) and 12(2) of the **Anti-Hijacking Act, 2016** contain a provision similar to Section 45(1) and 45(2) of PMLA, but a provision similar to Section 44(2) of PMLA is also contained Section 12(3) of th**e Anti-Hijacking Act.** The aforesaid section reads thus:—

*"**12. Provision as to bail.**—(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974), no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless,—*

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(b) where Public Prosecutor opposes the application, the Designated Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail as specified in sub-section (1) are in addition to the limitation under the Criminal Procedure Code, 1973 (2 of 1974), or any other law for the time being in force, on granting bail.

*(3) **Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Criminal Procedure Code, 1973 (2 of 1974)."***

(Emphasis added)

14. The High Courts' special powers for grant of bail under Section 439 Cr. P.C. have been saved even when the punishment for the offence of hijacking provided in Section 4 is upto death.

15. Similarly, the offences under the **Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982** carry a punishment of imprisonment for life and Section 6A of the Act provides that:—

***"6-A. Provision as to bail.**—(1) Notwithstanding anything contained in*

the Criminal Procedure Code, 1973 (2 of 1974), no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless—

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in sub-section (1) are in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.

(3) ***Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Criminal Procedure Code, 1973 (2 of 1974)."*** (Emphasis added)

24. Section 3 of the **Maritime Anti-Piracy Act, 2022** provides that the offence of piracy will carry a maximum punishment of imprisonment upto life and in case the person committing piracy cause death of any person or attempts to cause death, he may be punished with death. Section 12 of the aforesaid Act provides that:—

"12. Provisions as to bail.*—(1) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless—*

(a) the Public Prosecutor has been given a reasonable opportunity to oppose the application for such release; and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding grant of bail under section 439 of the Code."

(Emphasis added)

25. Offences under **Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002** carry punishment upto death and Section 8 of the aforesaid Act provides that:—

"8. Provision as to bail.—*(1) Notwithstanding anything in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless —*

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(b) where the Public Prosecutor opposes the application, the court is

satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in sub-section (1) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail.

*(3) N**othing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code.**"*

(Emphasis added)

26. Offences under the Drugs and Cosmetics Act, 1940 carry a punishment of imprisonment upto life and Section 36-AC of the **Drugs and Cosmetics Act, 1940** provides that:—

***"36-AC. Offences to be cognizable and non-bailable in certain cases**.—(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974),—*

(a) every offence, relating to adulterated or spurious drug and punishable under clauses (a) and (c) of sub-section (1) of Section 13, clause (a) of sub-section (2) of Section 13, sub-section (3) of Section 22, clauses (a) and (c) of Section 27, Section 28, Section 28-A, Section 28-B and sub-sections (1) and (2) of Section 30 and other offences relating to adulterated drugs or spurious drugs, shall be cognizable.

(b) no person accused, of an offence punishable under clauses (a) and (c) of sub-section (1) of Section 13, clause (a) of sub-section (2) of Section 13, sub-section (3) of Section 22, clauses (a) and (c) of Section 27, Section 28, Section 28-A, Section 28-B and sub-sections (1) and (2) of Section 30 and other offences relating to adulterated drugs or spurious drugs, shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.

(2) The limitation on granting of bail specified in clause (b) of subsection (1) is in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

*(3) **Nothing contained in this section shall be deemed to affect the special powers of the High C**ourt regarding bail under Section 439 of the Criminal Procedure Code, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under Section 36-AB."*

(Emphasis added)

27. The aforesaid Acts deal with heinous offences like hijacking of aero planes, unlawful acts against safety of civil aviation, maritime piracy, unlawful acts against safety of maritime navigation and fixed platforms on continental shelf, and offences relating to manufacture and sale of adulterated or spurious drugs, which would affect a very large number of population, and the offences carry punishment upto death. All the Acts contain restrictions of Courts' power to grant bail to an accused person, which are similar to the restriction provided in Section 37 of NDPS Act.

28. Section 45 of Prevention of Money Laundering Act (PMLA) also contains restrictions for grant of bail, which are similar to Section 37 of NDPS Act and it reads as follows:—

"45. Offences to be cognizable and non-bailable.—

(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974), no person accused of an offence under this Act shall be released on bail or on his own bond unless—
(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

*(ii) where the Public Prosecutor opposes t**he application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:***

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs:

Provided further that ...

* * *

(2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

* * *"

(Emphasis supplied)

29. It is relevant to note that Section 44 of the PMLA contains the following provision:—

***"44. Offences triable by Special Courts.**—(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974),—*

(a) an offence punishable under Section 4 and any scheduled offence connected to the offence under that section shall be triabl

Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or

(b) a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under Section 3,

without the accused being committed to it for trial.

Provided that after conclusion of investigation, if no offence of money-laundering is made out requiring filing of such complaint, the said authority shall submit a closure report before the Special Court; or

(c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

(d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Criminal Procedure Code, 1973 (2 of 1974), as it applies to a trial before a Court of Session.

Explanation.—For the removal of doubts, it is clarified that,—

(i) the jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial;

(ii) the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not.]

(2) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Criminal Procedure Code, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under Section 43."

(Emphasis supplied)

30. In **Ramji Singh v. Enforcement Directorate,** 2023 SCC OnLine All 831, this Court took into consideration the aforesaid provisions of various Statutes and held that: -

"45. From the aforesaid study of pari materia provisions contained in several Statutes dealing with heinous offences carrying punishment upto death, the only irresistible conclusion that can be drawn is that the provision contained in Section 44 (2) of PMLA saving special powers of the High Courts regarding grant of bail was meant to be incorporated in Section 45 of the Act, but it has erroneously been placed just above Section 45. In present times of use of computers, such errors are commonly referred to as the "copy-paste errors".

31. In paragraph 274 of the judgment in the case of V**ijay Madanlal Choudhary versus Union of India**: 2022 SCC OnLine SC 929, the Hon'ble Supreme Court referred to a King's Bench judgment in the case of Seaford Court Estates ld., which is as follows:—

"274. We may profitably advert to the judgment in Seaford Court Estates ld. [1949] 2 K.B. 481, which states:

*"**…A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature.** That was clearly laid down by the resolution of the judges in Heydon's case, (1584) 3 Co. Rep. 7a, and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden in his second volume Eyston v. Studd (1574) 2 Plowden 465. **Put into homely metaphor it is this : A judge should ask himself the question : If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."***

(Emphasis added)

32. In **Rajendra Prasad Yadav v. State of M.P.**: (1997) 6 SCC 678, the Hon'ble Supreme Court reiterated the well established principle of interpretation of Statutes that "all the provisions should be harmoniously interpreted to give effect to all the provisions and no part thereof rendered surplusage or otiose."

33. After referring to the aforesaid cases, this Court held in **Ramji Singh** (Supra) that: -

"48. In case we look at the bare language of Sections 44 and 45 of PMLA, the defect of misplacement of the provision contained in Section 44(2) becomes manifest. Section 44 does not contain any restriction on the powers of any Court regarding grant of bail, yet Section 44(2) provides that nothing contained in this section shall affect the Special powers of the High Courts under Section 439 Cr.P.C. reading Section 44(2) with Section 44(1) only would render Section 44(2) of PMLA redundant and otiose, but this Court cannot chose an interpretation which will render the provision contained in Section 44 (2) of the PMLA redundant or otiose.

49. Apparently, Section 44(2) was inserted by the Parliament with the intention to save the special power of the High Courts under Section 439 Cr. P.C., which intention cannot be fulfilled due to an erroneous placement of the provision as pointed above. This Court has to interpret

the provisions contained in Sections 44 and 45 of PMLA collectively so as to give "force and life" to the intention of the legislature behind inserting Section 44(2) in the Act. Undoubtedly, if the makers of the Act had themselves come across this jumbling of the provisions in Sections 44 and 45 due to a copy-paste error, they have surely have straightened it out by reading Section 44(2) and Section 45 in conjunction with each other. Therefore, in order to correct the defect without altering the provisions of the Statute, the provisions of Sections 44 and 45 have to be read together and interpreted harmoniously so that Section 44(2) does not become redundant or otiose.

50. The only irresistible conclusion that can be drawn from the foregoing discussion, is that the intention of the Legislature was clear and unambiguous while making the provisions contained in Sections 44 and 45 of PMLA and it was that the Special Courts will have jurisdiction to try the offences under the Act and no Court shall grant bail to an accused person unless:—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, ***the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:***

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs:

(2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

Nothing contained in sections 44 or 45 shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Criminal Procedure Code, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under Section 43.

51. In view of the aforesaid discussion, I am of the considered view that the restrictions contained in Section 45 of the PMLA were meant to be applicable to Courts other than the Constitutional Courts and in view of the provision contained in Section 44 (2) of PMLA, those restrictions do not apply to the Constitutional Courts."

(Emphasis added)

34. As Sections 36-A (3) and 37 of NDPS Act contain provisions which are pari materia to the provisions contained in Sections 44 and 45 of the PMLA, the aforesaid principles of interpretation applied by this Court while interpreting Sections 44 and 45 of the PMLA would apply to interpretation of the provisions of Section 36-A(3) and 37 of the NDPS Act also.

35. In case we look at the bare language of Sections 36-A and 37 of NDPS Act, the defect of misplacement of the

provision contained in Section 36-A(3) becomes manifest. Section 36-A does not contain any restriction on the powers of any Court regarding grant of bail, yet Section 36-A(3) provides that nothing contained in this Section shall affect the Special powers of the High Courts under Section 439 Cr.P.C. reading Section 36-A(3) with the other parts of Section 36-A only would render Section 36-A(3) of NDPS Act redundant and otiose, but this Court cannot choose an interpretation which will render the provision contained in Section 36-A (3) of the NDPS Act redundant or otiose.

36. Apparently, Section 36-A(3) was inserted by the Parliament with the intention to save the special power of the High Courts under Section 439 Cr. P.C., which intention cannot be fulfilled due to an erroneous placement of the provision as pointed above. This Court has to interpret the provisions contained in Sections 36-A and 37 of NDPS Act collectively so as to give "force and life" to the intention of the legislature behind inserting Section 36-A(3) in the Act. Undoubtedly, if the makers of the Act had themselves come across this jumbling of the provisions in Sections 36-A and 37 due to a copy-paste error, they have surely have straightened it out by reading Section 36-A(3) and Section 37 in conjunction with each other. Therefore, in order to correct the defect without altering the provisions of the Statute, the provisions of Sections 36-A and 37 have to be read together and interpreted harmoniously so that Section 36-A(3) does not become redundant or otiose.

37. The only irresistible conclusion that can be drawn from the foregoing discussion, is that the intention of the Legislature was clear and unambiguous while making the provisions contained in Sections 36-A and 37 of NDPS Act and it was that the Special Courts will have jurisdiction to try the offences under the Act and:—

(1) No person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.

(3) ***Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under Section 36."***

38. In view of the aforesaid discussion, I am of the considered view that

the restrictions contained in Section 37 of the NDPS Act were meant to be applicable to Courts other than the Constitutional Courts and in view of the provision contained in Section 36-A (3) of NDPS Act, those restrictions do not apply to the Constitutional Courts

39. Now I proceed to examine the provision for collection of samples etc. has been laid down in Section 52 A of the NDPS Act, which provides as follows: -

"52-A. Disposal of seized narcotic drugs and psychotropic substances.--

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs 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, substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 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."

40. In exercise of powers conferred by Section 76 read with Section 52-A of

NDPS Act, the Central Government has framed Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal), Rules, 2022 (which shall hereinafter be referred to as 'the 2022 Rules').

41. Chapter II of the 2022 Rules deals with seizure and storage of seized material. Rule 3 falling in Chapter II of the aforesaid Rules provide as follows: -

"3. Classification of seized material. *–*

(1) The narcotic drugs, psychotropic substances and controlled substances seized under the Act shall be classified based on physical properties and results of the drug detection kit, if any, and shall be weighed separately.

(2) If the narcotic drugs, psychotropic substances and controlled substances are found in packages or containers, such packages and containers shall be weighed separately and serially numbered for the purpose of identification.

(3) All narcotic drugs, psychotropic substances and controlled substances found in loose form shall be packed in tamper proof bag or in container, which shall be serially numbered and weighed and the particular of drugs and the date of seizure shall also be mentioned on such bag or container: Provided that bulk quantities of ganja, poppy straw may be packed in gunny bags and sealed in such way that it cannot be tempered with: Provided further that seized concealing material such as trolley bags, backpack and other seized articles shall be sealed separately.

(4) The classification, weighing, packaging and numbering referred to in this sub-rule shall be done in the presence of search witnesses (Panchas) and the person from whose possession the drugs and substances was recovered and a mention to this effect shall invariably be made in the panchnama drawn on the spot of seizure.

(5) The detailed inventory of the packages, containers, conveyances and other seized articles shall be prepared and attached to the panchnama."

42. Chapter III of the aforesaid Rule deals with sampling and Rules 9, 10, and 11 falling within the aforesaid Chapter provide as follows: -

"9. Samples to be drawn in the presence of Magistrate. *– After application to the Magistrate under sub-section (2) of section 52A of the Act is made, the Investigating Officer shall ensure that samples of the seized material are drawn in the presence of the Magistrate and the same is certified by the magistrate in accordance with the provisions of the said-sub-section.*

10. Drawing the samples. *– (1) One sample, in duplicate, shall be drawn from each package and container seized.*

(2) When the packages and containers seized together are of identical size and weight bearing identical marking and the contents of each package give identical results on colour test by the drugs identification kit, conclusively indicating that the packages are identical in all respects, the packages and containers may carefully be bunched in lots of not more than ten packages or containers, and for

each such lot of packages and containers, one sample, in duplicate, shall be drawn:

Provided that in the case of ganja, poppy straw and hashish (charas) it may be bunched in lots of not more than fourty packages or containers.

(3) In case of drawing sample from a particular lot, it shall be ensured that representative sample in equal quantity is taken from each package or container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

11. Quantity to be drawn for sampling. *– (1) Except in cases of opium, ganja and charas (hashish), where a quantity of not less than twenty-four grams shall be drawn for each sample, in all other cases not less than five grams shall be drawn for each sample and the same quantity shall be taken for the duplicate sample.*

(2) The seized substances in the packages or containers shall be well mixed to make it homogeneous and representative before the sample, in duplicate, is drawn.

(3) In case where seized quantities is less than that required for sampling, the whole of the seized quantity may be sent."

43. The Recovery Memo/F.I.R. states that upon being apprehended, the accused persons confessed that they were having charas in bags in the vehicle and they brought the same from Nepal and sell it in Kanpur. The persons were told that as per Rules, they would be searched in presence of some Gazetted Officer, but all of them stated that they should be searched by the informant. Thereafter the Circle Officer was given telephonic information about the matter and he reached on the spot. The accused persons were searched in his presence. All the four persons were carrying back-packs containing different number of packets of Charas – each weighing 500 gms. The applicant is said to be carrying 7 Kg. charas packed in 14 packets - each weighing 500 gms. 03 currency notes of Rs.500/- each were recovered from the applicant.

44. Similarly, 6 packets charas and 2 currency notes of Rs.500/- were recovered from co-accused Asheesh Yadav, 5 packets charas and 2 currency notes of Rs.500/- were recovered from co-accused Yogendra Singh and 8 packets charas and two currency notes of Rs.500/- were recovered from co-accused Jitendra Singh. The persons arrested stated that they transport charas under instructions from the other accused person Manoj Tiwari. The recovery memo further states that a single sample weighing 100 gms. was taken out from 3 kg. charas recovered from Ashish Yadav, a single sample weighing 166 gms. was taken out from 7 k.g. charas recovered from the applicant, a single sample weighing 100 gms. was taken out from 2.5 k.g. charas recovered from Yogendra Singh Yadav and a single sample weighing 100 gms. was taken out from 4 k.g. charas recovered from Jitendra Singh. A request was made to the passersby to witness the recovery but nobody acceded to the request.

45. The recovery memo has been signed by members of the search team and the accused persons and the Circle Officer has written 'Seen' on the margin of the memo and he has signed it. The recovery

memo further states that a copy of the memo was given to the applicant only with the consent of all the accused persons.

46. From a perusal of the averments made in the recovery memo, it appears that the packets recovered were not numbered serially for the purpose of identification, as provided in Rule 3 (2) of the 2022 Rules.

47. The samples were not drawn in presence of a Magistrate, as provided in Section 52-A of the NDPS Act and Rule 9 of the 2022 Rules. Although 14 packages are claimed to have been seized from the applicant, samples have not been drawn from all the packets and a single sample has been drawn, that too not in duplicate and thus the authorities have violated Rule 10 of the 2022 Rules.

48. In **State of Punjab v. Baldev Singh**: (1999) 6 SCC 172, the Hon'ble Supreme Court held that:—

"Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused."

24. In Makhan Singh v. State of Haryana, (2015) 12 SCC 247 while dealing with a case under the Narcotic Drugs and Psychotropic Substances Act, the Supreme Court reiterated that "...It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence."

25. In Tofan Singh v. State of T.N., (2021) 4 SCC 1, the Hon'ble Supreme Court reiterated that:—

"55. Given the stringent provisions of the NDPS Act, together with the safeguards mentioned in the provisions discussed above, it is important to note that statutes like the NDPS Act have to be construed bearing in mind the fact that the severer the punishment, the greater the care taken to see that the safeguards provided in the statute are scrupulously followed."

26. The principle that where the law prescribes a manner for doing a thing, the thing has to be done in that manner or not at all, was propounded in Taylor v. Taylor, [L.R.] 1 Ch. 426 and it was followed by the Privy Council in Nazir Ahmad v. King Emperor, AIR 1936 PC 253 and it has consistently been followed since then. What prima facie appears at this stage is that the procedure prescribed by Section 52 A of the Act and by the Standing Order No. 1 of 1989 issued by the Central Government and the guidelines issued by the Hon'ble Supreme Court in Mohanlal (Supra) have not been followed in the present case, which vitiates the prosecution.

27. It has further been held in Tofan Singh (Supra) that:—

"158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are "police officers" within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

49. In the present case, it is evident that the authorities themselves have violated the mandatory provisions contained in Rules of 2022 in the manner detailed in preceeding paragraphs and prima facie it appears that the aforesaid violations of the Rules of 2022 will be a strong factor against the accused persons being held guilty.

50. Keeping in view the aforesaid facts, coupled with the fact that the applicant has no previous criminal history and he is languishing in jail since 28.01.2024 and no material has been placed with the counter affidavit to establish that there is a reason to apprehend that in case the applicant is released on bail, he would again indulge in commission of similar offence again and without making any observation, which may affect the merits of the case, I am of the view that the aforesaid facts are sufficient for making out a case for enlargement of the applicant on bail in the aforesaid crime.

51. Accordingly, this bail application stands ***allowed.***

52. **Let the applicant- Vimal Rajput** be released on bail in the aforesaid case on furnishing a personal bond and two sureties each in the like amount to the satisfaction of magistrate/court concerned, subject to following conditions:-

(i) the applicant shall not tamper with the prosecution evidence;

(ii) the applicant shall not pressurize the prosecution witnesses;

(iii) the applicant shall appear on each and every date fixed by the trial court, unless his appearance is exempted by the learned trial court.

(2024) 6 ILRA 108
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.06.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 135 of 1998

Raja Ram **...Appellant**

Versus

Ram Asrey **...Respondent**

Counsel for the Appellant:
Nirmal Tewari, Ambika Prasad, Deepak Tewari, Deepak Tiwari

Counsel for the Respondent:
P.C. Agarwal, R.C. Gupta

(A) Civil Law - The Code of Civil Procedure, 1908 - Order 18, Rule 3(A) - Party to appear before other witnesses, Order - 41 , Rule -27 - Production of additional evidence in Appellate court - Applicant's application must be considered during appeal hearing to determine relevance of documents and evidence -

Additional evidence admissibility depends on the appellate court's need for the evidence to pronounce judgment or for other substantial cause - true test is whether the appellate court can pronounce judgment without considering additional evidence. (Para -25)

(B) Civil law - The Code of civil procedure ,1908 - Order-6, Rule-2 - pleadings to state material facts and not evidence, Order-6, Rule 3 - forms of pleadings , Order-6 , Rule-4 - particulars to be given where necessary - No set form of pleadings - they should be precise, concise and in accordance with Order-6, Rule-2 CPC - evidence can be adduced to prove the Pleadings , but it cannot be adduced without pleadings - nature of pleading and evidence to prove it depends on the facts and circumstances of the case. (Para - 35)

(C) Evidence law - The Evidence Act ,1872 - Section 90-A – Presumption as to electronic records five years old - registration of the earlier two sale deeds has drawn a presumption of execution of those sale deeds by the persons, who have executed the said sale deeds and in accordance with law -held – no illegality or error in it. (Para – 28)

Suit for mandatory injunction - claiming title on the basis of the registered sale deed - not to interfere in his possession and raising construction on plot in question – correction deed executed - got registered during pendency of the first appeal - First Appellate Court's Decision - No perversity, illegality, or error in recording correction deed - Granted time for rebuttal - No rebuttal filed, allowing legal consideration - maintainability of suit. **(Para - 10,24,26,27)**

HELD: - Court does not find any perversity, illegality or error in the findings recorded by the first appellate court based on pleadings of the parties, evidence and material on record. The second appeal has been filed on misconceived and baseless grounds. **(Para -46)**

Second appeal dismissed. (E-7)

List of Cases cited:

1. Kalyan Singh Chouhan Vs C.P. Joshi, (2011) 11 SCC 786

2. Biraji @Brijraji & anr. Vs Surya Pratap & ors.,(2020) 10 SCC 729,

3. Khudawand Haiyal Qaiyoom Vs Sabir, 2007 68 ALR 210

4. Ayyasami Gounder & ors. Vs T.S. Palanisami Gounder, AIR 1996 Madras 237

5. Marappa Gounder & ors.. Vs Sellappa Gounder & ors.; AIR 1985 Madras 183

6. A. Andisamy Chettiar Vs A. Subburaj Chettiar, (2015) 17 SCC 713

7. Srinivas Raghavendrarao Desai (D) by LRS. Vs V. Kumar Vamanrao @ Alok & ors., 2024 SCC OnLine SC 226

8. Ram Jas & ors. Vs Surendra Nath & anr., AIR 1980 All 385

9. Smt. Sushila Devi Vs Smt. Jasoda Bai & ors., 1981 All L.J.263

10. Ved Prakash Rastogi Vs Nagar Palika Badaun, AIR 2008 All 27

11. Arulmigu Velukkai Sri Azhagiya Singaperumal Devasthanam represented by its Trustees & ors. Vs G.K. Kannan & Ors., 2020 SCC OnLine Mad 28257

12. K. Mahalakshmi Vs B. Yamuna, Second Appeal No.232 of 2013

13. C. Sesha Reddy Vs T. Basavana Goud, AIR 2003 Karnataka 335,

14. Vivek Kumar Vs Dinesh Chandra Azad, Civil Misc. Jurisdiction No.597 of 2016

15. Pravesh Kumari & ors. Vs Rishi Prasad & ors., AIR 1986 Patna 315,

16. Swami Hari Harananda Giri Vs Yogoda Satsangha Society of India & ors.; AIR 1991 Orissa 75

17. Maguni Dei Vs Gouranga Sahu & ors.; AIR 1978 Orissa 228

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

1. Heard, Sri Ambika Prasad, learned counsel for the defendant-appellant and Sri Rajesh Tiwari, Advocate holding brief of Sri P.C. Agarwal, learned counsel for the plaintiff-respondents.

2. This second appeal has been filed for setting aside the judgment and decree dated 15.12.1997 passed by Judge, Small Causes, Sitapur in Civil Appeal No.186 of 1988; Jagdeo Singh and Others Vs. Raja Ram dismissing the Regular Suit No.174 of 1984; Ram Asrey and Others Vs. Raja Ram and for maintaining the judgment and decree of the trial court dated 31.10.1988.

3. The following substantial question of law has been formulated in this second appeal.

"*Whether the judgment passed by the first appellate court is perverse and illegal."*

4. Learned counsel for the defendant-appellant submitted that no evidence could have been adduced in regard to the correction deed made during pendency of appeal and sale deed executed by Manno Devi in favour of Ram Chandra, minor son of Babu Lal and sale deed executed by him to Chhote Lal and Smt. Lalti Devi without amendment in the plaint and the same could not have been considered and no presumption also could have been drawn in regard to registered sale deed executed by Smt. Manno Devi and Ram Sundar in the years 1970 and 1973. He also submitted that the sale deed by Chhote Lal was not executed by him on his behalf and the correction deed executed by him could not have been considered in absence of pleadings. He further submitted that plaintiff-respondents appeared in evidence as PW-2 in place of PW-1 in violation of Order-18, Rule-3 (A) of Civil Procedure Code, 1908 (here-in-after referred as CPC) but the first appellate court has failed to consider it. He further submitted that the possession of defendant-appellant was proved and the evidence of PW-1 and PW-2 was contradictory in regard to plinth and wall, which is against the plaintiff-respondents, whose possession was not proved on account of thatch of Raja Ram in east and west of his house and the land in dispute after his thatch on the east. He further submitted that the suit for injunction without prayer for declaration was not maintainable but the first appellate court has failed to consider the same and allowed the appeal without considering the pleadings, evidence and material on record, therefore the pleadings recorded by the first appellate court are perverse and illegal, thus not sustainable in the eyes of law and liable to be set-aside.

5. Learned counsel for the defendant-appellant relied on **Kalyan Singh Chouhan Vs. C.P. Joshi; (2011) 11 SCC 786, Biraji @ Brijraji and Another and Another Vs. Surya Pratap and Others; (2020) 10 SCC 729, Khudawand Haiyal Qaiyoom Vs. Sabir; 2007 68 ALR 210, Ayyasami Gounder and Others Vs. T.S. Palanisami Gounder; AIR 1996 Madras 237, Marappa Gounder and Others. Vs. Sellappa Gounder And Others; AIR 1985 Madras 183, A. Andisamy Chettiar Vs. A. Subburaj Chettiar; (2015) 17 SCC 713 and Srinivas Raghavendrarao Desai (D) by LRS. Vs. V. Kumar Vamanrao @ Alok and Others; 2024 SCC OnLine SC 226.**

6. Learned counsel for the plaintiff-respondents submitted that the suit for permanent injunction was rightly and in accordance with law was filed and there was no need of prayer for declaration. There was no substantial denial of title and there was only a colourable denial of title. The objection in regard to prayer for declaration had not been taken before the court's below. The sale deed in question on the basis of which the plaintiff-respondents are owner have also not been challenged and all the sale deeds are intact. Even otherwise the earlier sale deeds of the land in dispute have also not been challenged. He further submitted that no perversity or illegality in appellate court's order could be shown. He further submitted that when the aforesaid two sale deeds were filed, the opportunity was granted on 26.08.1986 for rebuttal but there was no rebuttal, therefore the objection in this regard is not sustainable in the eyes of law. He further submitted that the evidence was rightly adduced in accordance with law because the case was being got adjourned repeatedly by the defendant-appellant and on account of repeated adjournments witnesses had to return, therefore the objection of violation of Order-18, Rule 3 (A) is not sustainable. Even otherwise no prejudice could be shown. The executor of the sale deed appeared as PW-1 and stated that the sale deed was executed by him on his behalf and as power of attorney holder of Smt. Lalti Devi. He further submitted that the correction deed was executed at the appellate stage and the same was filed, which was taken on record with cost, which was accepted but there was no rebuttal despite opportunity and time granted or challenge to the same. He further submitted that the evidence of the plaintiff-respondents was declined to be considered on the ground of their age, whereas the evidence of defendant-appellant was considered in similar circumstances by the trial court which could not have been done and the same has rightly been considered by the first appellate court in accordance with law.

7. On the basis of above, submission of learned counsel for the plaintiff-respondents is that the first appellate court has rightly and in accordance with law allowed the appeal and set-aside the judgment and decree passed by the trial court and decreed the suit filed by the plaintiff-respondents of permanent injunction by means of the impugned judgment and decree, which does not suffer from any perversity, illegality or error. The appeal has been filed on misconceived and baseless grounds. The substantial question of law formulated in the appeal does not arise, therefore the appeal is liable to be dismissed with cost.

8. Learned counsel for the plaintiff-respondents relied on **Ram Jas And Others Vs. Surendra Nath and Another; AIR 1980 All 385, Smt. Sushila Devi Vs. Smt. Jasoda Bai and Others; 1981 All L.J. 263, Ved Prakash Rastogi Vs. Nagar Palika Badaun; AIR 2008 All 27, Arulmigu Velukkai Sri Azhagiya Singaperumal Devasthanam represented by its Trustees and Others Vs. G.K. Kannan and Others; 2020 SCC OnLine Mad 28257, Judgement and Order dated 23.05.2019 passed in K. Mahalakshmi Vs. B. Yamuna; Second Appeal No.232 of 2013 and M.P. Nos.1 of 2013 by High Court of Madras, C. Sesha Reddy Vs. T. Basavana Goud; AIR 2003 Karnataka 335, Judgment and Order dated 18.08.2016 passed in Vivek Kumar Vs. Dinesh Chandra Azad; Civil Misc. Jurisdiction No.597 of 2016 by High**

Court of Judicature at Patna, Pravesh Kumari and Others Vs. Rishi Prasad And Others; AIR 1986 Patna 315, Swami Hari Harananda Giri Vs. Yogoda Satsangha Society of India and Others; AIR 1991 Orissa 75 and Maguni Dei Vs. Gouranga Sahu And Others; AIR 1978 Orissa 228.

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

10. The plaintiff-respondents filed suit for mandatory injunction for a direction to the defendant-appellant not to interfere in his possession and raising construction on plot in question. The suit was filed alleging therein that the plaintiff-respondents are owner and in possession of the plot which is 25 ft. east to west and 45 ft. north to south. The said plot was purchased by the plaintiff-respondents from the general power of attorney holder of Smt. Lalti Devi namely Chhote Lal through registered sale deed dated 31.10.1979 and since then they are in possession. The defendant- appellant has no concern with the land in dispute. The defendant-appellant was not permitting the plaintiff-respondents to raise construction and adamant to quarrel.

11. The suit was contested by the defendant-appellant by filing written statement denying the allegations made in the plaint. It was specifically stated in the written statement that the plaintiff-respondents are not in possession of the land in dispute since the statutory period of limitation, as such suit for permanent injunction is not maintainable and liable to be dismissed. It was further averred that the defendant-appellant is the owner of the plot in dispute as well as in possession over it since the time of his ancestors. It was further alleged that Smt. Lalti Devi was neither owner of the plot in question nor has any concern with it and Chhote Lal is not his power of attorney holder. It has further been alleged that the land in dispute is being used as courtyard and Sahan by the defendant-appellant and the opening of the house of the defendant-appellant and his brothers is on it and there are masonry wall and foundation made by the defendant-appellant and masonry construction is in existence. It has further been alleged that since the defendant-appellant is in possession, therefore the suit for injunction is not maintainable. Smt. Lalti Devi was neither the owner as alleged by the plaintiff-respondents nor Chhote Lal his agent and attorney and the owner of the land in dispute was Devi Deen; real uncle of the defendant-appellant, who was in possession over it during his life time and after his death defendant-appellant is continuing to be in possession. Hence the suit is not maintainable and liable to be dismissed.

12. On the basis of pleadings of the parties, five issues were framed by the trial court. The issue no.1 was as to whether the plaintiffs are owner and in possession of the land in dispute described in the plaint. Issue no.2 was regarding insufficiency of valuation and court fees. Issue no.3 was as to whether the suit is bad for non joinder of necessary parties and liable to be dismissed. Issue no.4 was as to whether the suit was time barred and the last and the fifth issue was as to whether entitled for any relief. The plaintiff-respondents filed a copy of the sale deed dated 31.10.1979 and the correction deed executed by Chhote Lal during pendency of appeal before appellate court and taken on record under Order-41, Rule-27 and also certified copies of two

sale deeds to establish the title of Smt. Lalti Devi and Chhote Lal, who executed sale deed in favour of plaintiff-respondents. In oral evidence Chhote Lal appeared as PW-1, Ram Asrey as PW-2, Changa as PW-3 and Jarakhan as PW-4. The defendant-appellant, in support of his claim filed seven documents. The defendant-appellant appeared himself as DW-1 and produced Radhey Lal as DW-2 in oral evidence. After evidence and considering the same, suit was dismissed by the sixth Additional Munsif, Sitapur by means of the judgment and decree dated 31.10.1988. Being aggrieved by the said judgment and decree, the plaintiff-respondents preferred civil appeal, which has been allowed by means of the impugned judgment and decree dated 17.12.1997 passed by the Judge, Small Causes, Sitapur. Hence the instant second appeal has been filed.

13. A plea has been raised that the plaintiff-respondent no.1 had appeared as PW-2 in place of PW-1 in violation of Order-18, Rule-3(A). The Order-18, Rule-3(A) provides that where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage. Therefore, if a party wishes to appear as a witness he may appear before any other witness is examined on his behalf and if he, for any reason does not appear before any other witness is examined on his behalf, he may seek permission of the court to appear at a later stage, which can be allowed by the court for the reasons to be recorded. The provision does not provide any consequence of violation of rule. Even otherwise if the party wishes to appear subsequently or does not appear before other witnesses on his behalf are examined, he can be examined and the concerned court can permit him, Therefore it can not be said that the party, if chooses to appear in evidence, has to appear mandatorily before other witnesses on his behalf are examined.

14. The High Court of Madras, in the case of **Ayyasami Gounder and Others Vs. T.S. Palanisami Gounder (Supra),** has held that the object behind the introduction of Order-XVIII, R.3-A of the Code is to put an end to the mal-practices indulged in by the litigants in examining other witnesses first and later covering up the gaps and lacunae in such evidence, by the examination of the parties themselves later, to substantiate the case. Therefore, in cases where the party desires to examine himself at a later stage, he should prior to the commencement of the evidence on his side, make an application in that behalf before the court for such later examination. Otherwise, Order-XVIII. R.3-A of the Code will be honoured more in its breach, rather than in its observance.

15. The High Court of Madras, in the case of **Marappa Gounder and Others. Vs. Sellappa Gounder And Others (Supra),** held that when the rule contemplates permission to be granted by Court for a party to a proceeding to be examined at a later stage, it is indicative that there is no total ban against parties being examined after their witnesses are put in the witness box. It has further been held that in such of those cases wherein without prior permission witnesses of the party had been examined, and later on the party wishes to appear as a witness, the Court is duty bound to find out, whether on the party being examined at that stage, it would result in filling up any blanks or lacunae left out in the evidence already

given, and whether wantonly he avoided the witness box with ulterior motives, and whether he was placed in such a situation or circumstances which had disabled him from being examined earlier etc. Unless compelling strong circumstances which are relevant germane had existed, permission to a party to a proceeding to examine himself after his witnesses had been examined, ought not to be granted.

16. The High Court of Madras, in the case of **K. Mahalakshmi Vs. B.Yamuna (Supra)**, has held that if the objection in regard to Order-XVIII, Rule-3(A) of C.P.C. had not been taken, it can not be taken for the first time in the second appeal.

17. The Karnataka High Court, in the case of **C. Sesha Reddy Vs. T. Basavana Goud (Supra)**, has held that a close reading of the provisions of Rule 3A indicates that the insistence of examination of a party as a first witness is not an inviolable rule and the rule itself provided an exception.

18. The High Court of Patna, relying on a Division Bench case of **Pravesh Kumari and others Vs. Rishi Prasad and Others, A.I.R. 1986 Patna 315 (Supra)** in the case of **Vivek Kumar Vs. Dinesh Chandra Azad (Supra)**, has held that Order 18 Rule 3A is directory and not mandatory. But that does not mean that Rule 3A need not be observed. It must be observed. But its non-observance in all cases should not lead to the extreme penalty of expunging the evidence which had already been recorded. Therefore, where the plaintiff without obtaining leave of the court under Rule 3A was examined as a witness at a later stage after the witnesses on his behalf had already been examined and deposed in support of his case and proved number of documents, his evidence along with the exhibits which he had proved should not be expunged for non-observance.

19. A Division Bench of Orisa High Court, in the case of **Maguni Dei Vs. Gouranga Sahu (Supra),** has held that the provisions of Order 18, Rule 3-A is couched in affirmative terms. It prescribes a certain procedure but imposes no penalty for its non-observance and the rule itself provides an exception and gives discretion to the court to permit the examination of a party at the later stage for reasons to be recorded by it. It has further been held that in interpreting a Code of Procedure, it would be useful to keep in mind that the rules of procedure are intended to aid the administration of justice and not to hamper it. They should be used as aids rather than as obstacles. The relevant paragraph 10 to 12 are extracted here-in-below:-

"10. A directory provision is generally affirmative in its terms. But negative words are ordinarily used as a legislative device to make a statute imperative. If the requirements of a statute which prescribes the manner in which something has to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in a particular and specified manner and in no other, then those requirements are in all cases absolute and the neglect to obey or fulfil them exactly will invalidate the whole proceedings, (See Craies on Statute Law, Fifth Edition at p. 243). The provision of Order 18, Rule 3-A is couched in affirmative terms. It prescribes a certain procedure but imposes no penalty for its non-observance. The rule itself provides an exception and gives discretion to the court to permit the examination of a party at a

later stage for reasons to be recorded by it. That indicates the anxiety of Parliament to ensure that the subordinate courts should not shut out evidence of a party which is necessary for a just decision of the case. It could not have been the intention of the legislature to debar the court from permitting examination of a party even though the just decision of the case demands it. The paramount consideration of the judicial process being the doing of justice to the parties, the Court can examine a party at a later stage if it considers the evidence essential despite some negligence on the part of a party.

11. In interpreting a Code of Procedure, it would be useful to keep in mind that the rules of procedure are intended to aid the administration of justice and not to hamper it. They should be used as aids rather than as obstacles. Lord Buckmaster once pointed out:

"All rules of court are nothing but provisions intended to secure proper administration of justice. It is, therefore, essential that they should be made to serve and be subordinate to that purpose."

The Supreme Court in State of Gujarat v. Ramprakash P. Puri, (1970) 2 SCR 875 indicated:

"Procedure has been described to be a hand-maid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Like all rules of procedure, this rule demands a construction which would promote this cause."

As a general rule, evidence should never he shut out. Parties should be given full opportunity to give evidence if the justice of the case demands it, However negligent or careless may have been the omission of the litigant to examine himself at the commencement of the evidence of his side, the same should be allowed if that can be done without violence to the statute or irreparable prejudice to the adversary. There is no injustice if the other side can be compensated in terms of costs.

The following passages from the judgment of Bose, J. in the case of Sangram Singh v. Election Tribunal, Kotah, AIR 1955 ,SC 425 (426) are very apposite and may aptly be read here:

"Now a code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to, But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever

that is reasonably possible in the light of that principle."

It is useful to quote the oft quoted passage of Lord Penzance in 4 AC 404 in this connection:

"Procedure is but the machinery of the law after all the channel and means whereby law is administered and justice reached. It strongly departs from its office when in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern when it ought to subserve."

(Quoted from Aiyers Manual of Law Terms and Phrases, 7th Edn. at page 644).

12. The harm and inconvenience that will result from holding a provision to be mandatory should be weighed against the harm and inconvenience that will result from holding the provision as directory. The conclusion which results in greater harm should be avoided as that could not have been the intention of the legislature. Courts have been set up to administer justice and wide discretion has been vested in them so that the paramount purpose doing of justice to the litigating parties -- may not be frustrated. It is, therefore, a cardinal rule not to interpret a provision in a statute in a manner which abrogates judicial discretion unless Parliament has explicitly or by necessary intendment curtailed or withheld the same. If the provisions of the rule are held to be mandatory, grave hardship and injustice will be caused to the litigants. Without the evidence of the party himself justice cannot be done in most cases. If, however, the rule is held to be directory, a party, no doubt, will be put to some inconvenience but he will not go without any remedy. If the party examining himself at a later stage introduces new facts it will be open to the opposite party to ask the court to recall the witnesses for further cross-examination under Rule 17 of Order 18, C.P.C. and he can be compensated by costs."

20. The Orisa High Court, in the case of **Swami Hari Harananda Giri Vs. Yogoda Satsangha Society of India and Others (Supra),** followed the aforesaid Division Bench judgment of the said court in the case of **Maguni Dei v. Gouranga Sahu; AIR 1978 Orissa 228.**

21. Adverting to the facts of the present case and perusal of the order sheet indicates that the case was being got adjourned by the defendant-appellant repeatedly and on 08.07.1987, when the examination-in-chief of PW-1 Chhote Lal was recorded, non was present for the side of defendant-appellant for cross-examination. However later on learned counsel for the defendant-appellant appeared and without any objection or protest requested for cross-examination, which was allowed but since the time was over, the case was fixed on 10.08.1987 for cross-examination. The cross-examination of PW-1 and the evidence of PW-2 was recorded on 25.04.1988, who were cross-examined by the counsel of defendant-appellant without any objection. However, it appears that evidence of the PW-2 Ram Asrey was recorded and cross-examined again on 09.05.1988 and nothing has been shown that any objection was raised in this regard by the defendant-appellant at any stage. Even otherwise learned counself or the defendant-appellant has failed to show as to what prejudice has been caused to the defendant-appellant by recording the evidence of the plaintiff-respondents no.1

as PW-2 and evidence of Radhey Lal as PW-1, and before recording the evidence of other witnesses on behalf of the plaintiff-respondents, therefore this Court is of the view that the judgment and decree passed by the court's below can not be said to be vitiated and set-aside on this ground. Thus, the contention of learned counsel for the defendant-appellant in this regard is liable to be repelled and repelled accordingly.

22. One of the pleas of learned counsel for the appellant is that correction deed was made during pendency of appeal and without amendment, the evidence could not have been adduced in regard to the same and considered. The plaintiff-respondents are claiming their title on the basis of registered sale deed executed on 31.10.1979 by Shri Chhote Lal as power of attorney holder of Smt. Lalti Devi, whereas the Chhote Lal and Smt. Lalti Devi were the owner of the property in dispute but it was not disclosed in the sale deed that it has been executed by Chhote Lal on his own behalf also. He appeared as PW-1 in the witnesses box and stated that he and Lalti Devi had sold the land in dispute to the plaintiff-respondents and they also handed over the possession of the land in dispute to them. Smt. Lalti Devi was the sister-in-law (Bhabhi) of Chhote Lal. The evidence of PW-1 Chhote Lal indicates that neither any question was put in the cross-examination in regard to non sale of the land in dispute on behalf of Chhote Lal nor anything could be extracted to show that he had not executed the sale deed on his behalf. However during pendency of the appeal a correction deed dated 30.08.1989 was executed by Chhote Lal to the effect that inadvertently in the sale deed executed on 31.10.1979 on his own behalf was left to be incorporated, whereas the said sale deed was executed by him on his own behalf and as power of attorney holder of Smt. Lalti Devi and accordingly the stamp duty and the registration fees were paid, therefore the correction deed is being executed and got registered. Once the correction deed was executed and got registered, the original deed would stand corrected from the date of its execution and registration.

23. The correction deed dated 30.08.1989 was filed before the appellate court through application Paper No.15-C/2 for admitting a document filed as per list 16-C/1. The objection to the application was filed as Paper No.24-C/2. The appellate court, after considering the application and the objection, allowed the same by means of the order dated 16.09.1993 and took the correction deed on record under Order-41, Rule-27 CPC and by the same order, the first appellate court granted time to file rebuttal, if any, but admittedly no rebuttal was filed by the defendant- appellant, therefore now, at this stage, no objection can be raised by the appellant in this regard. The said correction deed was taken on record on the ground that the document itself came into existence after the appeal was filed and not earlier. While admitting the document, it was also observed that the admissibility of a document does not mean necessarily that its effects will be accepted down the throat in all circumstances and points are still to be threshed out finally at the time of arguments.

24. Order-41, Rule-27 CPC provides production of additional evidence in appellate court in three contingencies. Firstly, if the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted. Secondly, 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. Thirdly, 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. In the present case the correction deed was executed and got registered during pendency of the first appeal, therefore, it could not have been available and produced before the trial court before passing of the judgment and decree by the trial court, therefore it can not be said that the first appellate court had erred or done any illegality or perversity in taking the same on record. However while taking on record the opportunity of rebuttal was afforded to the defendant-appellant but neither any rebuttal was filed nor the said order was challenged, therefore now he can not raise any objection in this regard. Even otherwise, learned counsel for the defendant- appellant has failed to show any illegality, error or perversity in the order passed by the first appellate court under Order-41, Rule-27 CPC.

25. The Hon'ble Supreme Court, in the case of **A. Andisamy Chettiar Vs. A. Subburaj Chettiar (Supra)**, has considered the provisions of Order-41, Rule 27 and held as under:-

11. Under the scheme of the Code of Civil Procedure, 1908 (for short "the Code") whether oral or documentary, it is the trial court before whom parties are required to adduce their evidence. But in three exceptional circumstances additional evidence can be adduced before the appellate court, as provided under Section 107(1)(d) read with Rule 27 of Order 41 of the Code. Rule 27 of Order 41 reads as under:

"27.Production of additional evidence in appellate court.—(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if—

(a) The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) The appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the appellate court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission." (emphasis supplied)

12. From the opening words of sub-rule (1) of Rule 27, quoted above, it is clear that the parties are not entitled to produce additional evidence whether oral or documentary in the appellate court, but for the three situations mentioned above.

The parties are not allowed to fill the lacunae at the appellate stage. It is against the spirit of the Code to allow a party to adduce additional evidence without fulfilment of either of the three conditions mentioned in Rule 27. In the case at hand, no application was moved before the trial court seeking scientific examination of the document (Ext. A-4), nor can it be said that the plaintiff with due diligence could not have moved such an application to get proved the documents relied upon by him. Now it is to be seen whether the third condition i.e. one contained in clause (b) of sub-rule (1) of Rule 27 is fulfilled or not.

13. In K.R. Mohan Reddy v. Net Work Inc. [K.R. Mohan Reddy v. Net Work Inc., (2007) 14 SCC 257] this Court has held as under: (SCC p. 261, para 19)

"19. The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction."

14. In North Eastern Railway Admn. v. Bhagwan Das [North Eastern Railway Admn. v. Bhagwan Das, (2008) 8 SCC 511] this Court observed thus: (SCC pp. 515-16, para 13)

"13. Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 CPC, which carves out an exception to the general rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 CPC. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said Rule are found to exist."

15. In N. Kamalam v. Ayyasamy [N. Kamalam v. Ayyasamy, (2001) 7 SCC 503] this Court, interpreting Rule 27 of Order 41 of the Code, has observed in para 19 as under: (SCC p. 514)

"19. ... the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal— it does not authorise any lacunae or gaps in the evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way."

16. In Union of India v. Ibrahim Uddin [Union of India v. Ibrahim Uddin, (2012) 8 SCC 148 : (2012) 4 SCC (Civ) 362] this Court has held as under: (SCC p. 171, para 49)

"49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing

such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced." (emphasis in original)

26. In view of above, the first appellate court has not committed any perversity, illegality or error in taking the correction deed on record and granting time for rebuttal. However since no rebuttal was filed, the same could have been considered in accordance with law and rightly considered.

27. One of the contentions of the learned counsel for the appellant is that any evidence adduced in absence of pleading can not be considered and since the pleadings in regard to the sale deed executed by Manno Devi in favour of Ram Chandra, minor son of Babu Lal and the sale deed executed by him in favour of Chhote Lal and Lalti Devi and correction deed were not made, the same could not have been considered in evidence. The suit for permanent injunction was filed claiming title on the basis of the registered sale deed executed on 31.10.1979, which is the basis of the suit and it has not been challenged by the defendant-appellant or anybody else and the same has been got corrected through correction deed dated 30.08.1989. The other two sale deeds executed by Manno Devi and Ram Chandra are not the basis of the suit. They only show the chain of title to the plaintiff-respondents. Even otherwise, the said registered sale deeds have also not been challenged or set-aside by any competent court.

28. The appellate court in view of the registration of the earlier two sale deeds has drawn a presumption of execution of those sale deeds by the persons, who have executed the said sale deeds and in accordance with law. This Court does not find any illegality or error in it because as per Section 90-A of the Evidence Act, 1872, the said presumption could have been drawn. However, if the sale deed dated 31.10.1979 could not have been proved, the position may have been different.

29. Order-6, Rule-2 CPC provides that the pleadings to state material facts and not evidence. Sub-Rule (1) provides that 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. Rule 3 of Order-6 provides forms of pleadings and the forms in Appendix 'A' can be used where they are applicable and in absence, forms of the like character, as nearly as may be, shall be used. Rule-4 of Order-6 provides that particulars to be given where necessary. It provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading. Thus, the pleadings required only a statement in a concise form or material facts on which the party pleading relies for his claim or defence but not the evidence by which they are to be proved.

30. The Hon'ble Supreme Court, in the case of **Kalyan Singh Chouhan Vs. C.P. Joshi (Supra)**, has observed that it is settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties and pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. The relevant paragraph-19 is extracted here-in-below:-

19. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide : Sri Mahant Govind Rao v. Sita Ram Kesho, (1898) 25 Ind. App. 195; M/s. Trojan & Co. v. RM. N.N. Nagappa Chettiar, AIR 1953 SC 235; Raruha Singh v. Achal Singh & Ors.; AIR 1961 SC 1097; Om Prakash Gupta v. Ranbir B. Goyal, AIR 2002 SC 665; Ishwar Dutt v. Land Acquisition Collector & Anr., AIR 2005 SC 3165; and State of Maharashtra v. Hindustan Construction Company Ltd., (2010) 4 SCC 518.)

31. The Hon'ble Supreme Court, in the case of **Biraji @ Brijraji Vs. Surya Pratap and Others (Supra),** has held that it is fairly well settled that in absence of pleading, any amount of evidence will not help the party.

32. The Hon'ble Supreme Court, in the case of **Srinivas Raghavendrarao Desai (D) by LRS. Vs. V. Kumar Vamanrao @ Alok (Supra) and Others**, has observed that there is no quarrel with the proposition of law that no evidence can be let beyond pleadings.

33. A coordinate Bench of this Court, in the case of **Smt. Sushila Devi Vs. Smt. Jasoda Bai and Others (Supra)**, has observed that Order 6 of the Civil PC deals with pleadings generally. Rule 2 of the said Order lays down that every pleading shall contain and contain only, a statement in 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. Rule 3 of the said Order further lays down that the forms prescribed in Appendix A to the Civil P.C. shall as far as possible, be adhered to. The sale deed dated Nov. 30, 1955, referred to above, was in the nature of evidence and it should not have been pleaded by the plaintiff. The alleged shortcoming in the plaint pointed out by the court of appeal was actually not a defect and no presump- tion could have been drawn against the plaintiff on that account.

34. A coordinate Bench of this Court, in the case of V**ed Prakash Rastogi Vs. Nagar Palika Badaun (Supra),** has considered the provisions of Order-6, Rule-

2 CPC and observed that the plaintiff in paragraph-5 of the plaint has pleaded that " The plaintiff is the bhumidhar and owner in possession over the property in suit for more than 12 years.", which is precise, concise and in accordance with the provisions of Order-6, Rule-2 C.P.C. These are the crucial facts, which are essential for his ownership and possession. How the plaintiff is the owner or in possession is required to be proved by the plaintiff by way of evidence. So far as the ownership is concerned, the plaintiff had proved by way of filing a certified copy of the sale deed executed in his favour. It was not necessary for the plaintiff to state in his plaint that he was the owner on the basis of a sale deed. It was sufficient for the plaintiff to allege in his Plaint that he was the owner. The relevant paragraphs no.17 to 22 are extracted here-in-below:-

"17. On the question of ownership, the lower appellate court had ousted the plaintiff on the ground that the plaintiff did not plead in his plaint specifically about the source of his ownership nor pleaded about the execution of the sale deed in his favour. The lower appellate court, also held that the certified copies of the sale deed could not be relied upon nor was it admissible in evidence, since specific pleadings had not been made by the plaintiff in his plaint.

18. In my view, the approach adopted by the lower appellate court, is patently perverse and is against the provisions of Order VI, Rule 2, C.P.C. which is quoted hereunder: Order VI, Rule 2. Pleading to state material facts and not evidence.--(1) 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 powered.

(2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

19. A perusal of Order VI, Rule 2, C.P.C. indicates that the pleadings should contain only a statement in a concise form of the material facts on which a party relies for his claim. In the present case, the plaintiff in paragraph-5 of the plaint has pleaded the following:

The plaintiff is the bhumidhar and owner in possession over the property in suit for more than 12 years.

20. In my opinion, this pleading is precise, concise and is in accordance with the provisions of Order VI, Rule 2, C.P.C. The plaintiff alleges that he is the bhumidhar, owner and in possession for more than 12 years. These are the crucial facts, which are essential for his ownership and possession. How the plaintiff is the owner or in possession is required to be proved by the plaintiff by way of evidence. So far as the ownership is concerned, the plaintiff had proved by way of filing a certified copy of the sale deed executed in his favour. It was not necessary for the plaintiff to state in his plaint that he was the owner on the basis of a sale deed. It was sufficient for the plaintiff to allege in his Plaint that he was the owner.

21. In Smt. Sushila Devi v. Smt. Jasoda Bai and Ors. 1981 ALJ 263, in a suit for possession involving a dispute with regard to the ownership of a platform in a house, the Court held that it was sufficient for the plaintiff to plead that he was the owner and was in possession of the platform in his plaint which was in accordance with the provisions of Order VI, Rule 2, C.P.C. The Court held:

In order to substantiate her claim, the plaintiff relied on the sale deed dated November 30, 1955 executed by Pooran Chand jointly in her favour and in favour of Shanti Devi. It has been observed by the Court of appeal that the said sale deed had not been specifically pleaded in the plaint, and, as such it was not open to the plaintiff to rely on the same. This observation of the Court of appeal is not sustainable in law. Order VI of the Civil Procedure Code deal with pleadings generally. Rule 2 of the said Order lays down that every pleading shall contain and contain only, a statement in concise form of the material facts on which the party pleading relied for his claim or defence, as the case may be, but not the evidence by which they are to be proved. Rule 3 of the said order further lays down that the forms prescribed in Appendix A to the Civil Procedure Code shall as far as possible, be adhered to. The sale deed dated November 30, 1955, referred to above, was in the nature of evidence and it should not have been pleaded by the plaintiff. The alleged shortcoming in the plaint pointed out by the court of appeal was actually not a defect and no presumption could have been drawn against the plaintiff on that account.

20. The aforesaid judgment is squarely applicable to the present case and fortifies the view taken by me. Consequently, the lower appellate court was not justified in holding that the plaintiff was unable to prove his source of title and further committed an error in holding that the sale deed could not be considered in evidence."

35. In view of above, there is no set form of pleadings. The pleading should be precise, concise and in accordance with Order-6, Rule-2 CPC and the evidence by which the pleadings are to be proved need not be pleaded. The evidence can be adduced to prove the pleadings. However the evidence can not be adduced in absence of pleadings, therefore if the pleading has not been made, the evidence to prove the same can not be adduced. Thus the nature of pleading and evidence to prove it depends on the facts and circumstances of the case.

36. Adverting to the facts of the case, the plaintiff-respondents has stated in paragraph-2 of the plaint that the plaintiffs had purchased the plot in dispute through registered sale deed dated 31.10.1979 from Shri Chhote Lal, the power of attorney holder of Smt. Lalti Devi and since the time of purchase they are in possession till date, therefore, the pleading was sufficiently made in regard to their ownership to the effect that the land in dispute was purchased from the previous owner and after purchase they are in possession of the land in dispute. Thus, the claim is based on the sale deed dated 31.10.1979, which includes as to how the executor was owner, which is not required to be pleaded. However, if objection is raised any evidence is required to be adduced to prove as to how the executor was owner, the evidence could have been adduced and considered in accordance with law and considered accordingly. Similarly, in the

written statement a plea was taken that Smt. Lalti Devi was not the previous owner of the land in dispute and she had no right to execute the sale deed and Chhote Lal was not her power of attorney holder. The previous owner of the land in dispute was Devi Deen, the real uncle of the defendant-appellant and he was in possession and owner of the land in dispute and after his death it is continuing. It was required to be proved by cogent evidence, which the defendant-appellant has failed to do, which is apparent from the findings recorded by the first appellate court on the basis of evidence and material on record and it does not suffer from any perversity, illegality or error.

37. One of the pleas of learned counsel for the defendant-appellant is that the suit for permanent injunction without prayer for declaration was not maintainable. The suit for permanent injunction only is not maintainable if there is any cloud on the title of plaintiff and in such circumstance, the plaintiff is required to pray for declaration of his title also. Therefore it is to be seen as to whether, there was any cloud on the title of plaintiff-respondents and the cloud on the title of plaintiff-respondent was genuine and of any substance on account of which he was required to make prayer for declaration also.

38. The defendant- appellant pleaded in written statement that Smt. Lalti Devi had no right to execute the sale deed and as she was not the owner of the land in dispute and the uncle of the defendant-appellant Devi Deen was the owner of the land in dispute. However it was without any evidence even prime facie, whereas there is registered sale deed in favour of the plaintiff-respondents, therefore it can not be said that there was a cloud on the title of the plaintiff-respondents and the suit for permanent injunction without prayer for declaration was not maintainable. Thus, the contention of learned counsel for the defendant-appellant is misconceived and not sustainable.

39. A coordinate Bench of High Court of Madras, in the case of **Arulmigu Velukkai Sri Azhagiya Singaperumal Devasthanam rep. by its Trustees and Others Vs. G.K. Kannan and Others (Supra)**, has taken similar view. The relevant paragraphs 35 to 39 are extracted here-in-below:-

"35. It can now be deduced that, to constitute a cloud on plaintiffs title, there must be evidence for the Court to conclude prima facie that the plaintiffs assertion of title to a legal character, or to a right over a property has come under the cloud. Let it not be forgotten, that life's experience in this country, which both the Courts and the legal practitioners would vouchsafe, that not every litigant makes a bonqftde denial of plaintiffs title. While, a bonqftde denial of plaintiff title with some evidence may merit consideration, to nonsuit the plaintiff with a colourable denial of former's title will be unconscionable, if only it is acknowledged that fairness is integral to our adversarial jurisprudence.

36. Hence, it is necessary for the Court to weigh:

• *The quality of the pleadings to ascertain if the defendant alleges if a third party to the suit has the title, or, if he traces his title to the same source from which plaintiff also derives title, or if the defendant relies on an independent source of title to some other source;*

• If the evidence produced by the defendant to prove his plea of denial of the plaintiffs title covers the same period for which the plaintiff has produced the evidence, or whether such evidence as produced by both the plaintiff and the defendant are separated by a clear time-line;

• If any adverse inference is required to be drawn against any of the parties for not producing the evidence which is in their capacity to produce, and evaluate the relative quality of the evidence made available before it. (What is indicated here is not exhaustive since every case has its own character. When the rule of probability determines the nature of the decision to be made, it can never be exhaustive too.). This precisely is the exercise what the Court engages in it is required to enter a finding on a disputed title incidentally in a suit for bare injunction.

37. Ideally, the Court may engage in a certain process to achieve a certain degree of balance between a bonafide denial of title and a colourable denial of title:

• Firstly, it may independently evaluate the plaintiff's title based on the evidence he produces, and then evaluate the resistance to it in terms of the defendant's case. Then it may try viewing the conclusion arrived on the plaintiffs case through the conclusion arrived in defendants case (something like holding a glass in between the eye and the object).

• If the vision to the plaintiffs title is not obstructed or blurred, then there is no cloud on plaintiffs title, and if it is not, then there is one (though in actual working, the mind works faster and enables an understanding instantaneously).

• And if after this process, the Court holds that the suit is maintainable without a relief of declaration, then subject to the rule of res judicata, the defendant may institute a suit to establish his title.

38. The above course, in the estimate of this Court, will infuse a certain degree of processual fairness to the whole discourse relating to 'cloud on title', and non-suiting the plaintiff for not seeking a declaratory relief If it were to be understood differently, then a person with a settled title and possession for a long period can face a threat to such title at anytime of the defendant's choice, who may emerge from nowhere, with mere denial of the plaintiffs title on his lip. And the defendant will be under no burden to prove his case, since the defendant in our legal system can recline on the comfort of the procedural law, and wait for the plaintiff to prove his title. And, in the process, he may count every shades of weakness in the plaintiffs case, the advantage of which the plaintiff does not have, since the law on burden of proof does not permit the plaintiff to rely on the weakness of the defendant's case.

39. If fairness has to reign supreme in our processual jurisprudence, it is necessary to eliminate a seeming opportunity available to the defendant to steal an unfair procedural advantage over the plaintiff. It then becomes indispensable for Courts of facts to realise their responsibility, assert their role as fair arbiters within the bounds of available procedure, and ascertain if the denial of the plaintiff's title by the defendant is bonafide, or hollow and colourable.

40. A full bench of this Court, in the case of Ram Jas And Others Vs. Surendra Nath and Another (Supra), considered the question referred to it i.e. "Whether Sub-section (2) of Section 90-A of the Evidence Act as amended by the U. P. Civil Laws (Reforms and Amendment) Act controls the operation of Section 90(1) and (2) of the Evidence Act as amended by the said U. P. Civil Laws (Reforms and Amendment) Act, 1954." and answered the same in paragraphs nos.14, 15 and 16, which are extracted here-in-below:-

14. The presumptions under the Evidence Act are only the inferences which a logical and reasonable mind normally draws. Facts and circumstances (from) which certain inferences follow are indicated in various provisions of the Evidence Act running from Sections 79 to 90-A. As already seen the sections of the Evidence Act Lay down different circumstances in which a presumption is to be raised. Whenever the law permits the raising of a presumption the Court can by reason of Section 4 of the Evidence Act raise the presumption for purpose of proof of a fact. If the presumption is available in one section it can raise it under that section. If it is not available in one section and is available in another section, then the Court can raise presumption under that section. It all depends upon the circumstances available in the case as applicable to a particular document. Hence, even if the case falls under Section 90-A and sub-section (2) thereof is applicable and no presumption can be drawn under Section 90-A(1) it will not exclude the Court from drawing the presumption, if the circumstances permit it to be drawn, under any other provision of the Evidence Act including Section 90 of the Act. The presumption, if available under Section 90, can, therefore, be raised by the Court even after coming to the conclusion that a presumption under Section 90-A is not available.

15. The presumptions available under Sections 90 and 90-A are also not similar. Section 90(2) permits the raising of the presumption in respect of the signature, handwriting, execution and attestation, while Section 90 permits a presumption only in respect of execution. Section 90 deals with documents which are more than 20 years old while Section 90-A places no such restriction and includes also documents from judicial record Neither of the two sections, therefore, can be said to be occupying a field which the other exclusively occupies. They deal with different fields and different circumstances and permit different types of presumptions to oe raised.

16. For the reasons given above it is not possible to hold that Sub-section (2) of Section 90-A will override and nullify Section 90 if the document, though more than twenty years old, is the basis of the suit or the defence or is relied upon in the plaint or written statement. We are, therefore, of opinion that Om Prakash v. Bhagwan (AIR 1974 All 389) does not lay down the correct law.

41. The defendant-appellant has taken a plea that Smt. Lalti Devi had no right to execute the sale deed and Chhote Lal was not his power of attorney holder, whereas it has not been disputed that the registered sale deed dated 31.10.1979 executed by Chhote Lal neither has been executed by him as power of attorney holder of Smt. Lalti Davi nor it is in regard to the land in dispute, the boundaries of which given in the said sale deed have also not been

disputed. According to the boundaries given in the sale deed, the house of Om Prakash is on the east, house of Smt. Manno Devi on the west, agricultural field of Jagat Narian on the north and road railway station, Atariya on the south of village Atariya, Pargana- Manwa, Tehsil- Sidhauli, District- Sitapur. The correction deed of the said sale deed dated 31.10.1979 was executed by Chhote Lal on 30.08.1989 to the effect that the said sale deed has been executed by him as power of attorney holder of Smt. Lalti Devi and on his behalf also. Despite opportunity of rebuttal granted to the defendant-appellant, no rebuttal had been filed. Admittedly, the said sale deed and the correction deed have neither been challenged nor set-aside by any competent court of law till date.

42. The first appellate court, after considering the pleadings, evidence and material on record found that as per the boundaries which have been given in the plaint, the house of Smt. Manno Devi is on the western side of the land in dispute, who had executed the sale deed of the land in dispute on 28.08.1970, which shows the house of Minmukira i.e. Manno Devi on the western side. The same boundaries are in sale deed dated 31.10.1979 in favour of the plaintiff-respondents. The boundaries given in the plaint have also not been denied or disputed by the defendant-appellant in the written statement. In evidence also the defendant-appellant has stated that the land in dispute is after his thatch on the eastern side of his house and the house of his brother Ram Sundar is adjacent to his house. Therefore, the admitted boundaries of the plaint are in accordance with the sale deeds.

43. The first appellate court has recorded a finding that Laxman was a resident of Basantpur, who used to come to Manno Devi in the concerned village and the Devi Deen had come with him. The defendant-appellant has also not stated in his evidence that Manno Devi had any other house in the village. He has also admitted the relationship of Laxman and Devi Deen, from whom he claimed the right on land in dispute being his uncle. He also admitted that he has seen his grand mother, who had died in the year 1980, who used to live with his brother Ram Sundar. Ram Sundar is son of Nanhe. It is also admitted that Ram Sundar was residing in the house on the western side of the land in dispute, which has been partitioned and in one of the portion, the defendant-appellant Raja Ram son of Putai is residing and in the other Ram Sundar son of Nanhe. Therefore, it is also apparent that the grand mother of the defendant-appellant and wife of Laxman was residing on the western side of the land in dispute. He has also admitted that Devi Deen has died and his grand mother had died prior to Devi Deen. The defendant-appellant on the one hand shows his ignorance about Manno Devi but on the other hand though admits residence of his grand mother in the house on the western side in a portion of which he is residing but does not disclose her name, whereas admits she had died before the death of uncle of the defendant-appellant. The DW-3 and DW-4, who are aged about 80 years and 65 years respectively and of the same village have deposed that Smt. Manno Devi was the owner of the land in dispute and she had sold it to Babu Lal. DW-4 has also stated that the house on the western side of the land in dispute is of Manno Devi in which Raja Ram and Ram Sundar are living after division. The defendant-appellant has also admitted in his evidence the residence of Laxman, who was of Basantpur. He had three sons Devi

Deen, Nanhe and Putai and had come to Atariya to Manno Devi. It is also proved from admission of the defendant-appellant that he and his uncle Devi Deen had sold their some land of Basantpur and also placed on record of the trial court copies of sale deeds.

44. The first appellate court, after considering the pleadings, evidence and material on record has also recorded that the defendant-appellant has taken different stands at different places in regard to the land in dispute and also about the ownership of the land in dispute from his uncle and father. The first appellate court, after considering the pleadings, material and evidence on record has recorded a finding that the land in dispute and the house on the western side of the land in dispute was of the Manno Devi and not of Devi Deen or his brothers and if it would have been of Devi Deen then he must have challenged the sale deed executed by Smt. Manno Devi because the sale deed was executed by her in the year 1970 and Devi Deen had died in the year 1980.

45. The first appellate court, after considering and scrutinizing the pleadings, evidence, material on record and also the commission report has recorded a finding of possession and ownership of the plaintiff-respondents on the land in dispute and also that if it would have been of the defendant-appellant and he would have been using the same, it would not have been left in the shape of Khandhar in the dilapidated condition.

46. In view of above and considering the over all facts and circumstances of the case, this Court does not find any perversity, illegality or error in the findings recorded by the first appellate court on the basis of pleadings of the parties, evidence and material on record. The substantial question of law formulated by this Court is answered accordingly. This second appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed.

47. The second appeal is, accordingly, **dismissed**. No order as to costs.

(2024) 6 ILRA 128
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.06.2024

BEFORE

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

Writ-A No. 26011 of 2014

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

Counsel for the Petitioners:
Ashok Kumar, Praveen Kumar, Praveen Kumar Shukla, Tryambak Nath Mishra

Counsel for the Respondents:
C.S.C., Shiv Nath Singh

CIVIL LAW – Constitution of India – Article 226 - UP Secondary Education (Service Selection Boards) Act, 1982 - Writ Petition – against impugned order of DIOS, denying the salary of the position of Principal for the period of 16.03.2004 to 03.07.2008 to the legal representatives of deceased Principal – quantum of extra emoluments - court finds that, it is admitted fact that, the deceased principal was a regularly selected Principal/Headmaster selected by the Selectin Board and posted at the respondent college's establishment and further, DIOS directed to the Committee of Management to handover the charge of Principal – but, he had discharged his duties of the Principal upto 15.03.2004 – since, respondent no. 6 who was *ad hoc* Headmaster prior to deceased of said

college challenged his appointment order in a writ petition – deceased Principal went out of office on account of a Stay order passed in WP – interim order was challenged in a SLP – status quo by Supreme court – deceased was remain in said college without any salary since he was neither posted with any other institution nor transferred elsewhere – finally SLP was allowed - Supreme Court set-aside the interim order by restoring the position of deceased as Principal of the said college vide order dated 16.05.2008 – he occupied on position until his retirement on 30.06.2009 and later on died – stand taken by the govt. that respondent no. 6 received salary as officiating principal for that period of which the legal heirs of the deceased principal claiming the salary and two persons cannot be allow to draws salary on the same post – court held, sixth respondent cannot be permitted to retain the advantage of an interlocutory order that was ultimately vacated by the Supreme Court – on the other hand, both equity and law require that the deceased principal being selected Principal by the Board and joined the post and functioned, to be ousted without recompense under an interim order passed by this court, must be held entitled to salary for the post of Principal for the entire period of time – hence, direction issued to pay the salary & other consequential benefits to the heirs of deceased – further, respondent no. 6 would be entitled to his emoluments as Assistant Teacher and the emoluments drawn as the officiating principal by him would have to be refunded to the St. – Writ Petition Allowed**.** (Para – 17, 18, 19, 25, 26)

Writ Petition Allowed. (E-11)

List of Cases cited:

1. SLP (Civil) No. 7125 of 2004 order dated 16.05.2008,

2. Civil Appeal No. 3913 of 2008 order dated 16.05.2008,

3. Amarjeet Singh & ors. Vs Devi Ratan & ors.(2010 1 SCC 417),

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

1. This writ petition is directed against an order of the District Inspector of Schools, Bulandshahar (for short, 'the DIOS') dated 24.02.2014, denying for the first petitioner's father and the second petitioner's husband salary of the position of Principal, Raja Mahendra Pratap Inter College, Jasnawali Khurd, District Bulandshahr for the period 16.03.2004 to 03.07.2008. The petitioners have also prayed that a mandamus be issued to the respondents, ordering them to calculate and release the total salary, which was payable to the late Vishan Singh from 24.01.2004 to 03.07.2008, and recover the excess salary paid to Jaswant Giri, respondent No.6 for the said period.

2. The late Vishan Singh was a retired Headmaster of the Raja Mahendra Pratap Inter College, Jasnawali Khurd, District Bulandshahr. The first petitioner, Hitesh Kumar is a son whereas the second petitioner, Smt. Omwati is his widow. The late Vishan Singh was working prior to his appointment with the Raja Mahendra Pratap Inter College, Jasnawali Khurd, District Bulandshahr (for short, 'the respondent College') as an Assistant Teacher in the Maha Kavi Surya Sanskrit Inter College, Khurrampur, Sant Vash, District Bulandshahr. He was selected by the Uttar Pradesh Secondary Education Services Selection Board (for short, 'the Selection Board') for the post of Headmaster in the respondent College. The respondent College did not have the post of a Principal as the said College did not have aid for the intermediate section. The post, that was borne on the State grant, therefore, was the post of a Headmaster. The late Vishan Singh joined as the Headmaster of the respondent College in January, 2004. His signatures were attested by the DIOS and salary to teachers and other employees

of the respondent College for the month of January, 2004 was also disbursed under the signatures of the late Vishan Singh.

3. Jaswant Giri, who was the *ad hoc* Headmaster prior to the Vishan Singh's regular appointment as the Headmaster, filed Writ Petition No.4941 of 2004 before this Court. This Court passed an interim order dated 11.02.2004, staying operation of the appointment order made in favour of the late Vishan Singh as the Headmaster of the respondent College. It is said that the interim order was obtained by making a false statement by Jaswanti Giri. The interim order dated 11.02.2004 was challenged by the late Vishan Singh by preferring a special leave petition to the Supreme Court, being SLP (Civil) No.7125 of 2004. In the said special leave petition, the Supreme Court vide order dated 07.04.2004 passed an interim order, directing status quo in the meanwhile. After grant of the status quo in the special leave petition, the late Vishan Singh approached the DIOS, who orally directed that Jaswant Giri as well as the late Vishan Singh may work in the respondent College. It is pertinent to mention that during the period 24.01.2004 to 03.07.2008, no salary whatsoever was paid to the late Vishan Singh. He was neither placed with any other institution nor was he transferred elsewhere.

4. Subsequently, special leave petition preferred by the late Vishan Singh was granted and Civil Appeal No.3913 of 2008, arising out of SLP (Civil) No.7125 of 2004 allowed by the Supreme Court by their Lordships' judgment and order dated 16.05.2008. The said judgment disposed of a large number of appeals, but so far as the late Vishan Singh's appeal is concerned, that is to say, Civil Appeal No.3913 of 2008, it was decided along with a batch of seven other appeals, involving identical question of fact and law, where the following order was made:

"Civil Appeal No. 3897 of 2008

(Arising out of SLP(C) No.2691 of 2004)

Civil Appeal Nos. 3928-3929 of 2008

(Arising out of SLP(C) Nos.1605-1606 of 2005)

Civil Appeal No. 3861 of 2008

(Arising out of SLP(C) No.23691 of 2003)

Civil Appeal Nos. 3903-3904 of 2008

(Arising out of SLP(C) Nos.4094-4095 of 2004)

Civil Appeal No. 3913 of 2008

(Arising out of SLP(C) No.7125 of 2004)

Civil Appeal Nos. 3915-3917 of 2008

(Arising out of SLP(C) Nos.814-816 of 2004)

Civil Appeal No. 3934 of 2008

(Arising out of SLP(C) No.24475 of 2005

Civil Appeal No. 3935 of 2008

(Arising out of SLP(C) No.24535 of 2005)

39. Delay condoned.

40. Leave granted.

41. The challenge in these appeals is to the interim orders passed by the High Court in regard to the selection of Principals of various institutions, pursuant to the advertisements dated 12th August, 1998, 24th December, 1999 and 3 rd March, 2002. In view of our judgment and order in Civil Appeals (Arising out of SLP

(C) Nos.19335-36 of 2003) and other connected appeals, these appeals are also allowed and the impugned orders passed by the High Court are set aside."

5. Thus, the interim order passed in favour of Jaswant Giri by this Court was set aside. After the judgment and order dated 16.05.2008 was passed by the Supreme Court, the late Vishan Singh was paid salary from 04.07.2008 onwards, but for the period 24.01.2004 to 03.07.2008, no salary was paid to him. The late Vishan Singh made various applications for the purpose to the DIOS, but in the vain. The late Vishan Singh retired as Principal in the month of June, 2009. After his retirement as well, he made a number of representations for the payment of his salary for the period 24.01.2004 to 03.07.2008, but nothing was done by the DIOS. Vishan Singh died in the month of August, 2012.

6. After Vishan Singh's demise, the petitioners as his heirs and LRs, into whose hands his estate came, approached the DIOS, making a number of representations, claiming salary for the deceased Principal, relative to the period of time 24.01.2004 to 03.07.2008. These representations, it is said, fell on deaf ears. The petitioner then approached this Court instituting Writ Petition No.5482 of 2013, which was disposed of with a direction to the DIOS to consider and decide the petitioners' claim on account of the late Vishan Singh's services in accordance with law, preferably within a period of four months from the date of presentation of a certified copy of this Court's order. It was after a long drawn battle through tiresome and repeat representations and an ultimate contempt action the petitioners had to resort to that the DIOS passed the impugned order dated 24.02.2014, rejecting the petitioners' claim for the late Vishan Singh's salary relating to the period 16.01.2004 to 03.07.2008 as Headmaster of the respondent College. The representation was rejected on the ground that since during the period 16.03.2004 to 03.07.2008, the salary of ad hoc Headmaster had been paid to Jaswant Giri, the same could not be paid twice over to the late Vishan Singh through his heirs. It was, however, said that for the period 24.01.2004 to 15.03.2004, that the late Vishan Singh worked as the Headmaster, he was entitled to salary.

7. Aggrieved by the aforesaid order, the present writ petition was instituted on 05.05.2014.

8. A notice of motion was issued on 08.05.2014. A counter affidavit in the matter, however, was not filed for a period as long as nine and a half years, approximately. The counter affidavit came to be filed on 08.11.2023, after this Court ordered the personal presence of the Joint Director of Education, Meerut Region, Meerut and the DIOS vide order dated 03.11.2023. The order dated 03.11.2023 reads:

"Perused the office report dated 02.11.2023. According to the office report, notice issued to respondent No. 3 has led to the postal tracking report showing delivery of notice confirmed to respondent No. 3. In this view of the matter, service upon respondent No. 3 is held sufficient.

When the case is called on, no one appears on behalf of respondent No. 3.

In this case, notice was issued to the respondents as far back as on 08.05.2014, and till date, the said

respondents have not cared to file a counter affidavit. If parties to a cause, for as long as a period of nearly nine years, do not choose to file a return/counter affidavit despite orders, it is imperative for this Court to summon those parties in person, with option to file their counter affidavit, or else, hear them.

The immense bulk of adjournments are caused due to parties on the respondents' side of the array not filing their returns, pleadings etc. and this lapse, taken in its stride, is ultimately leading to swelling dockets. If a party does not choose to file a return/counter affidavit for as long as nine years, this Court is of opinion that such a party, whether private or official, should be summoned to attend in person. The other course of proceedings ex-parte, as experience would dictate, leads more to protraction than an effective decision of the cause. Ex-parte judgments and orders are invariably asked to be set aside, and adhering to standards that favour opportunity of hearing, judgments and orders passed ex-parte are set aside, putting the clock back for the parties to where it all began. This all leads to immense protraction and delay.

Accordingly, let the Joint Director of Education, Meerut Division, Meerut and the District Inspector for Schools, Bulandshahr appear before this Court in person on 08.11.2023 at 02:00 p.m.

Adjourned to ***08.11.2023.***

To be taken up at ***02:00 p.m.***

The Registrar (Compliance) is directed to communicate this order to the Joint Director of Education, Meerut Division, Meerut and the District Inspector for Schools, Bulandshahr ***today."***

9. This Court considers it appropriate to highlight the fact that delays of 9-10 years or so, on the part of the functionaries of the State, arrayed as respondents, is not an isolated matter in the present case. The need arising, this Court would not hesitate in directing compilation of data in this regard. And, this comes along with a barrage of criticism by the litigants about delays in the dispensation of justice, which includes the State litigants as well. There have been in the past, of which judicial notice must be taken, directions to functionaries, like the Chief Secretary and so on, to streamline matters, but these are usually forgotten with the turn of the day. To the individual litigants, not by dozen or scores, but a far larger number, the story remains the same. The State's returns in their causes are awaited. In this case also, if the Court had not directed the two official respondents to appear in person vide our order dated 03.11.2023, the return filed on 19.12.2023, would not have been put in, may be for some more years. So much for the necessity and usefulness of enforcing personal attendance of parties and witnesses, without which no Court can function. The reason for the delay in filing a return in this case is furnished by the DIOS in his personal affidavit dated 08.11.2023. In paragraph No.4 of the DIOS's affidavit aforesaid, it is averred:

"4. That the delay in filing the counter affidavit is due to the fact that since the record of the present case was misplaced in the office of the answering respondent due to which it could not be noticed that the counter affidavit has to be filed in the present writ petition. It was after receiving the notice regarding the

order dated 03.11.2023 passed by this Hon'ble Court in the present writ petition, the answering respondent get the record searched in his office and is filling the counter affidavit. However, the deponent tenders his unconditional and unqualified apology for the inconvenience caused to this Hon'ble Court by this act of the deponent."

10. If for a misplaced record, the counter affidavit in a cause could be delayed by as much as nine years and a half, the sense of responsibility of this protesting galaxy of official litigants, who protest every appearance in Court, can well be fathomed. We have already indicated the peril of proceeding ex parte, if a respondent is not putting in his return, in our order dated 03.11.2023 and there is just no way, but to ensure that returns are filed by respondents, whether private or public functionaries. Ex parte judgments and then their relatively liberal recall by established standards of procedure do more injustice to the litigants than any kind of justice to the cause.

11. When this matter came up on 08.11.2023, the parties having exchanged affidavits, at least the respondents' return being there, the petition was admitted to hearing, which proceeded forthwith. The matter was adjourned on 08.11.2023 for further hearing to 30.11.2023. On 30.11.2023, there was no time and the cause had to be adjourned to 14.12.2023. In the meantime, on 13.12.2023, the petitioners filed a rejoinder affidavit in the office. The matter was finally heard on 14.12.2023 in the presence of the learned Counsel for the petitioners and the learned Counsel for the State, representing respondent Nos.1, 3 and 4. No one appeared on behalf of respondent No.5 despite service being sufficient. There was no appearance on behalf of respondent No.6 as well, though the said respondent was adequately served and service upon him was held sufficient on 14.12.2023, when the learned Counsel for the appearing parties concluded their submissions. Judgment was reserved.

12. Heard Mr. Om Narayan Dwivedi, Advocate holding brief of Mr. Tryambak Nath Mishra, learned Counsel for the petitioners and Ms. Monika Arya, learned Additional Chief Standing Counsel on behalf of respondent Nos. 1, 3 and 4.

13. In the counter affidavit filed on behalf of respondent Nos.3 and 4 jointly, it is admitted that the late Vishan Singh was selected as the Principal of the respondent College or Headmaster, whatever be the designation, by the Selection Board. It is also acknowledged that on receiving the panel of selected candidates, the DIOS vide his letter dated 15.01.2004 directed the Committee of Management of the respondent College to handover charge of the Principal to Vishan Singh. It is also admitted that in compliance with the DIOS's direction, the respondent College, by a resolution of the Committee of Management dated 19.01.2004, resolved to handover charge to Vishan Singh, which was handed over on 24.01.2004.

14. It is next said in paragraph No.5 of the counter affidavit that the officiating Principal Jaswant Giri filed a writ petition before this Court, being Writ Petition No.4941 of 2004, where this Court, vide order dated 11.02.2004, stayed the operation of the order passed by the DIOS, which resulted in restoration of the previously working incumbent Jaswant Giri on the post of officiating Principal. A

perusal of the order dated 11.02.2004 passed by this Court in Writ Petition No.4941 of 2004 shows that what was stayed was the operation of the order dated 19.01.2004 passed by the DIOS and the order dated 24.01.2004. Now, there was no order dated 24.01.2004 as such. It was just that on the said date Vishan Singh took over charge of the respondent College as the Principal. It is next averred in the counter affidavit that Vishan Singh moved Special Leave Petition No.7125 of 2004 before the Supreme Court, wherein vide order dated 07.04.2004, while issuing notice on the SLP, status quo in the meanwhile was ordered. The SLP was tagged by the Supreme Court with other special leave petitions. It is admitted that by judgment and order dated 16.05.2008, the interim order passed this Court dated 11.02.2004 was set aside. It is also acknowledged that in compliance of the aforesaid judgment passed by the Supreme Court, Vishan Singh was restored to his position as Principal of the respondent College w.e.f. 04.07.2008. He occupied on the position until his retirement on 30.06.2009.

15. The stand taken is that from 24.01.2004 to 03.07.2008, Jaswant Giri received salary attached to the post of officiating Principal of the respondent College and excluding that period, for the period that Vishan Singh had worked, he was paid salary attached to the post of Principal of the respondent College. Precisely, the stand that is taken in the impugned order is echoed in the return, where it is said that for the period 24.01.2004 to 03.07.2008, when Jaswant Giri received salary for the post of officiating Principal, two persons cannot be paid against a single post. It is, however, added that during the period that the late Vishan Singh worked, to wit, 24.01.2004 to 15.03.2004, he is entitled to receive salary, which apparently has been paid to the petitioners. There is apparently some incongruence in the respondents' stand on its own terms about the fact that Jaswant Giri worked from 24.01.2004 to 03.07.2008, and not the late Vishan Singh. Whereas in the impugned order as well as in paragraph No.8 of the counter affidavit, it is conceded that from 24.01.2004 to 15.03.2004, it was Vishan Singh, who worked as Principal of the respondent College and entitled to salary, yet it is said in the same paragraph that from 24.01.2004 to 03.07.2008, it was Jaswant Giri, who worked as the officiating Principal and drew salary attached to the post for this period of time.

16. There is on the admitted stand of the respondents, some kind of an overlap in the period of time, when Vishan Singh and Jaswant Giri worked as Principal of the respondent College. This confusion has not been much dispelled, but it is inconsequential. It is inconsequential because after all for the period 24.01.2004 to 15.03.2004, Vishan Singh's heirs have been held entitled to receive salary on account of the former discharging duties of the Principal, though they claimed it for a longer period of time from 24.01.2004 to 03.07.2008.

17. Upon hearing learned Counsel for the parties and perusing the record, what we find is that it is not in dispute that Vishan Singh was a regularly selected Principal or Headmaster, whichever was the post, then provided for in the respondent College's establishment. He was selected by the Selection Board and the respondents admit in the counter affidavit that the DIOS passed an order dated

15.01.2004, directing the Committee of Management of the respondent College to handover charge of Principal of the said College to Vishan Singh. The Committee of Management passed a resolution on 19.01.2004 and charge of the respondent College was entrusted to Vishan Singh on 24.01.2004. As a later concession by the respondents would show Vishan Singh discharged duties of the Principal up to 15.03.2004. Initially, he was denied salary, but after the matter was considered by the DIOS by the order impugned, Vishan Singh's heirs were granted salary for his services as Principal of the respondent College from 24.01.2004 to 15.03.2004.

18. Vishan Singh went out of office on account of the interim order dated 11.02.2004 passed by this Court in Writ Petition No.4941 of 2004 filed by respondent No.6, Jaswant Giri, who was prior to Vishan Singh taking over as the Principal, the Officiating Principal. The stay order passed by this Court was construed by the respondents in the manner that Vishan Singh had to be ousted from office and the sixth respondent, Jaswant Giri reinstated as the Officiating Principal.

19. It is of utmost importance to notice that Vishan Singh remained as if it were in no man's land between 16.03.2004 to 03.07.2008, whereafter he was handed over charge of the Principal, in consequence of the judgment passed by the Supreme Court in Civil Appeal No.3913 of 2008 on 16.05.2008, setting aside the interim order of this Court dated 11.02.2004. During this period of time, Vishan Singh did not go back to Maha Kavi Surya Sanskrit Inter College, Khurrampur, Bulandshahr, where he was an Assistant Teacher. He continued with the respondent College, where he had taken over as Principal, but ousted on account of this Court's interim order dated 11.02.2004. He was not paid salary from 16.03.2004 to 03.07.2008 for any post, either of an Assistant Teacher with Maha Kavi Surya Sanskrit Inter College, Khurrampur, Bulandshahr, or as the Principal of the respondent College. This fact is specifically asserted in paragraph No.12 of the writ petition, which says that during this period of time, he was neither posted with any other institution nor transferred elsewhere. After all, he was a regularly selected candidate by the Selection Board, who had already taken over as the Principal of the respondent College under orders of the DIOS and a resolution of the Management. His ouster is attributable to the interim order of this Court passed on the writ petition, preferred by respondent No.6, Jaswant Giri; nothing else. Queerly, in answer to paragraph No.12 of the writ petition, in paragraph No.16 of the counter affidavit, it is pleaded by the Joint Director of Education, Meerut Region, Meerut and the DIOS thus:

"16. That the contents of paragraph no. 12 of the writ petition are not admitted hence denied, in reply thereto, it is submitted that in the status quo order passed by Hon'ble Apex Court, the District Inspector of Schools permitted/ instructed the petitioner's father to hold the post of Principal of the institution."

(emphasis by Court)

20. The admission in paragraph No.16 by respondent Nos.3 and 4 shows that the DIOS permitted/ instructed Vishan Singh to hold the post of Principal of the respondent College. This shows that Vishan Singh was never asked to go away from the respondent College. He was not an

Assistant Teachers with the respondent College and the fact, that during the period 24.01.2004 to 03.07.2008, he was not paid any salary, is not denied by the respondents. The salary was paid for this period to respondent No.6, Jaswant Giri on the strength of the interim order dated 11.02.2004 passed by this Court in the writ petition. But admittedly, the late Vishan Singh was also permitted to stay with the respondent College and he was not posted elsewhere; not transferred elsewhere; and, not paid salary attached to any other post during this period of time.

21. It must be remarked that during all this while, the late Vishan Singh was not a *persona non grata*. He was the regularly selected Principal of the respondent College, who had joined the said institution and ousted in consequence of the interim order made by this Court on 11.02.2004. This interim order was ultimately set aside by the Supreme Court by their Lordships' judgment and order dated 16.05.2008 passed in Civil Appeal No.3913 of 2008. There is no case that the writ petition filed by Jaswant Giri was pursued further to a different event. Admittedly, it was under the judgment of the Supreme Court that Vishan Singh's right to hold the post of Principal of the respondent College finally crystallized and he held that post until his retirement upon reaching the age of superannuation on 30.06.2009. Now, the question is, can the late Vishan Singh be denied salary for the post of Principal of the respondent College, of which he had taken lawful charge on 24.01.2004, but ousted on 16.03.2004, in consequence of the interim order dated 11.02.2004 passed by this Court in Writ Petition No.4941 of 2004, though the said order was set aside finally vide judgment and order dated 16.05.2008 passed by the Supreme Court in Civil Appeal No.3913 of 2008.

22. We do not think so. The submission by the respondents that two persons cannot draw salary on the same post, canvasses so much of a rule bound stand that it conflicts with very fundamental principles of fairness and the way rights enjoyed under interim orders, are construed in the event those rights are lost in consequence of judgment. The rule bound point of view that two persons cannot draw salary on the same post for the same period of time, can be remedied by recovering so much of it from the sixth respondent, who has drawn it on the strength of the interim order, over and above his salary as an Assistant Teacher with the respondent College. But, as the reputed maxim goes: actus curiae neminem gravabit, the late Vishan Singh could not be denied his right to be paid for the post of Principal of the respondent College, because of an interlocutory error committed by this Court in passing the interim order dated 11.02.2004. The late Vishan Singh's entitlement to receive salary, attached to the post of Principal that he had already joined after regular selection by the Selection Board, cannot be denied. The sixth respondent, in consequence, would be entitled to retain his salary for the period 24.01.2004 to 03.07.2008, payable for the post of an Assistant Teacher that he substantively held, but not the enhanced emoluments that he must have received attached to the post of officiating Principal. The respondent Authorities are not at all right in thinking that if the late Vishan Singh is paid salary attached to the post of Principal for the period 24.01.2004 to 03.07.2008, a period of time during which Jaswant Giri had already been paid for the post of officiating Principal, it would amount to double payment on the same post. It could be very logically worked out consistent with the financial rules

applicable by leaving with the sixth respondent Giri for the period 24.01.2004 to 03.07.2008, salary that he would have earned as an Assistant Teacher and pay Vishan Singh salary attached to the post of Principal. If this Court had not passed an interim order on 11.02.2004, Vishan Singh, who had already joined the post of Principal and paid salary for some period of time, would have continued to receive it until his retirement. Jaswant Giri too would have received salary attached to the post of Assistant Teacher for the entire period of time that he was in service. This position was subjected to a disequilibrium because of the interim order passed by this Court on 11.02.2004 in the writ petition. If, therefore, whatever Jaswant Giri received in extra emoluments as the officiating Principal for the relevant period of time, is recovered from the said respondent, no financial loss would ensue to the exchequer nor would it lead to the precipitation of financial indiscipline by paying two incumbents salary attached to the same post.

23. The principle that benefits drawn by a party under an interim order of the Court, if judgment goes the other way, cannot be retained and must be restituted, is well acknowledged by the law. Reference in this connection may be made to **Amarjeet Singh and others v. Devi Ratan and others, (2010) 1 SCC 417.In Amarjeet Singh** *(supra)*, the facts may be noticed from the report of the decision of their Lordships of the Supreme Court, which read:

"2. The facts and circumstances giving rise to these appeals are that the appellants and the respondents in these cases were appointed as Excise Inspectors under the provisions of the U.P. Excise Service (Class II) Rules, 1970 (hereinafter called as "the 1970 Rules"). The parties became eligible for consideration for promotion to the post of Superintendent of Excise under the said 1970 Rules. The criteria of promotion for the post of Superintendent of Excise and for the higher post of Assistant Excise Commissioner (hereinafter called "AEC") had been "merit" under the provisions of the U.P. Assistant Excise Commissioners Service Rules, 1992 (hereinafter called as "the 1992 Rules"). The said Rules stood amended w.e.f. 10-10-1994 and the criteria for promotion was changed from "merit" to "seniority subject to rejection of unfit".

3. The appellant Amarjeet Singh along with some other Excise Inspectors filed Writ Petition No. 1113 (SB) of 1994 before the Allahabad High Court challenging the selection process for promotion under the 1992 Rules. The High Court vide judgment and order dated 1-2-1995 held that the vacancies which had come into existence prior to 10-10-1994 i.e. the date of amendment, be filled up as per the unamended Rules i.e. on the basis of "merit" and not on the basis of "seniority subject to rejection of unfit".

4. Being aggrieved, the State of U.P. preferred a special leave petition before this Court and this Court vide order dated 30-10-1995 passed an interim order permitting the State authorities to make promotions as per the 1994 Amendment Rules but it was subject to the result of the petition as this Court made it clear that if the petition was dismissed, the respondents would be reverted to the lower post from which they would be promoted. In view of the said interim order of this Court, sixty-one Excise Inspectors stood promoted, subject to the final outcome of the special

leave petition. This Court dismissed the said special leave petition vide order dated 19-8-1998 in limine. However, the State authorities for the reasons best known to them, did not revert the promoted officers and they continued to hold the higher posts.

5. The Departmental Promotional Committee (hereinafter called "DPC") meant for filling up forty-two vacancies, which came into existence prior to 10-10-1994, met on 19-12-1998. After scanning the service records and determining the inter se merit of the candidates, the Committee came to the conclusion that only thirty candidates were suitable for promotion to the posts of AEC and they were to be promoted as per the availability of yearwise vacancies. The respondents, herein, were found unsuitable for promotion in the said selection process. After completing the aforesaid exercise, twelve vacancies for the post of AEC remained unfilled. Therefore, the twelve vacancies were carried forward to enable the State authorities to fill up the same under the amended Rules on a different criterion i.e. "seniority subject to rejection of unfit". Thus twelve officers/respondents were promoted under the amended Rules by another DPC held on 22-1-1999.

6. The State Government issued the Order dated 15-5-1999 reverting all Excise Inspectors promoted on 6-12-1995 under the interim order of this Court and gave notional promotions with retrospective effect to the appellants as well as to all the reverted officers/respondents. As a consequence, a seniority list dated 12-7-2000, was issued, wherein the appellants were placed over and above the respondents.

7. Being aggrieved, the respondents approached the High Court challenging the said seniority list dated 12-7-2000. The High Court vide impugned judgment and order dated 11-4-2002 held that as the postings to both sets of officers i.e. those who had been promoted by DPC dated 19-12-1998 and another DPC dated 22-1-1999 had been made on the same day and had been given notional promotion from one and the same date, their inter se seniority was to be fixed as it existed in the feeding cadre of Excise Inspectors and thus quashed the seniority list dated 12-7-2000 and further directed the State to prepare a fresh seniority list placing the appellants below the respondents. Hence these appeals."

24. In the context of these facts, it was held in **Amarjeet Singh:**

"16. In view of the fact that the respondents continued on a higher post under the orders of this Court for years together and even after dismissal of the petition filed by the State, and the exercise for making promotions was not undertaken by the State authorities, the appellants should not suffer for no fault of theirs. It has fairly been conceded by the learned counsel appearing for the respondents that had the exercise of making promotions been undertaken immediately after the order of this Court dated 19-8-1998, the appellants could have been promoted much earlier and they could have been senior to the respondents. Thus the question does arise as to whether the appellants should be asked to suffer for the interim order passed by this Court in a case having no merits at all.

17. No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the

case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim actus curiae *neminem gravabit,* which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court. (Vide *Shiv Shankar v. U.P. SRTC [1995 Supp (2) SCC 726 : 1995 SCC (L&S) 1018 : (1995) 30 ATC 317] , GTC Industries Ltd. v. Union of India [(1998) 3 SCC 376 : AIR 1998 SC 1566] and Jaipur Municipal Corpn. v. C.L. Mishra [(2005) 8 SCC 423] .)*

18. In *Ram Krishna Verma v. State of U.P. [(1992) 2 SCC 620 : AIR* 1992 SC 1888] this Court examined the similar issue while placing reliance upon its earlier judgment in Grindlays Bank Ltd. v. ITO [(1980) 2 SCC 191 : 1980 SCC (Tax) 230 : AIR 1980 SC 656] and held that no person can suffer from the act of the court and in case an interim order has been passed and the petitioner takes advantage thereof and ultimately the petition is found to be without any merit and is dismissed, the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised.

19. In *Mahadeo Savlaram Shelke v. Pune Municipal Corpn*. [(1995) 3 SCC 33] this Court observed that while granting the interim relief, the court in exercise of its discretionary power should also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the court that in the event of his failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in favour of the plaintiff. Even otherwise the court while exercising its equity jurisdiction in granting injunction is also competent to grant adequate compensation to mitigate the damages caused to the defendant by grant of injunction. The pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the court. The court can do so in exercise of its inherent jurisdiction in doing ex debito justitiae mitigating the damage suffered by the defendant by the act of the court in granting injunction restraining the defendant from proceeding with the action complained of in the suit. Such a procedure is necessary as a check on abuse of the process of the court and adequately compensate the damages or injury suffered by the defendant by act of the court at the behest of the plaintiff.

20. In *South Eastern Coalfields Ltd. v. State of M.P.* [(2003) 8 SCC 648 : AIR 2003 SC 4482] this Court examined this issue in detail and held that no one shall suffer by an act of the court. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or 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, has resulted in one party gaining an advantage it would not have otherwise earned, or the

other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences.

22. Similarly, in Karnataka Rare Earth v. Deptt. of Mines & Geology [(2004) 2 SCC 783] a similar view has been reiterated by this Court observing that the party which succeeds ultimately is to be placed in the same position in which it would have been if the court would not have passed an interim order."

25. It is precisely this principle spoken of in **Amarjeet Singh** that is attracted to the facts of the present case. We have already elaborated, how it is attracted. For sure, the sixth respondent cannot be permitted to retain the advantage of an interlocutory order that was ultimately vacated by a judgment of the Supreme Court. He cannot retain whatever he had drawn in salary, therefore, as the officiating Principal of the respondent College. On the other hand, both equity and law require that the late Vishan Singh, who had joined the post of Principal or Headmaster, whatever be the designation, after selection by the Selection Board on 24.01.2004 and functioned up to 15.03.2004, to be ousted without recompense under an interim order passed by this Court, must be held entitled to salary for the post of Principal of the respondent College for the entire period of time, that is to say, the period from 16.03.2004 to 03.07.2008. This is the logical consequence and one that is equitable as well, because Vishan Singh did not draw salary, as already said hereinabove, from any other source. There is material to show, in fact, an admission by respondent Nos.3 and 4 that Vishan Singh was permitted to stay on in the respondent College during the period of time that Giri was permitted to officiate. The salary attached to the post of Principal has, therefore, to be paid to Vishan Singh's heirs, to wit, the petitioners.

26. Taking notionally that Vishan Singh had worked during period of time from 24.01.2004 to 03.07.2008 and not Giri, as already remarked, Giri would be entitled to his emoluments as an Assistant Teacher with the respondent College, which he would retain, and anything drawn on account of his emoluments as the officiating Principal, would have to be refunded to the State. For the purpose, respondent Nos.3 and 4 would take steps to determine the quantum of these extra emoluments drawn for the relevant period of time after hearing respondent No.6 regarding the quantum alone; not the liability to pay back and recover the same from respondent No.6. The petitioners would be entitled to salary that Vishan Singh must be deemed to have earned during the period 24.01.2004 to 03.07.2008 as the Principal/ Headmaster of the respondent College. The entitlement to terminal benefits/ death-cum-retirement benefits payable to the petitioner and the

sixth respondent respectively, would be revised and redetermined by respondent Nos.3 and 4, accordingly.

27. In the result, this writ petition succeeds and is **allowed**. The impugned order dated 24.02.2014 passed by the District Inspector of Schools, Bulandshahar is hereby **quashed.** A mandamus is issued in the terms indicated above, by which each of the respondent Nos.1 to 6 shall be bound.

28. Costs easy.

29. It is ordered, accordingly.

30. Let a copy of this judgment be communicated to the Secretary (Secondary Education), Government of U.P., Lucknow, the Secretary, U.P. Secondary Education Services Selection Board, Alengang, Prayagraj, the Joint Director of Education, Meerut Region, Meerut, the District Inspector of Schools, Bulandshahr by the Registrar (Compliance) and to the Authorized Controller, Raja Mahendra Pratap Inter College, Jasnawali Khurd, District Bulandshahr and Jaswant Giri son of Richhpal, resident of Preeti Vihar, Gali No.1, Near Sanjeev General Store, Bulandshahr through the Civil Judge (Sr. Div.), Bulandshahr by the Registrar (Compliance).

(2024) 6 ILRA 141
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED LUCKNOW 13.06.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application u/s 482 No. 640 of 2016

Anil Katiyar & Anr. ...Applicants

Versus

State of U.P. ...Opp. Party

Counsel for the Applicants:
Nandit Kumar Srivastava, Pranjal Krishna, Tapeshwar Kumar Maurya

Counsel for the Opp. Party:
G.A.

(A) Criminal Law – Criminal Procedure Code, 1973 – Sections 190, 190(1)(b), 173 & 482 - The Prevention of Corruption Act, 1988 – Sections 13(1)(d), 13(2) & 19: -
Application u/s 482 – for quashing of impugned summoning order as well as the entire criminal proceeding initiated under PC Act, 1988 - both the applicants had no role in conducting the examination or type test during Selection in question alleged to be held in year 2008, they were merely members of selection committee – prior to this proceeding, twice inquiries were conducted against applicants, but they did not assigned any specific role – further, in absence of requisite sanction orders required u/section 19 of PC Act, 1988, the impugned proceeding, initiated against applicants not sustainable – held, in absence of procedural requirement under Section 19 and in absence of any substantive evidence on record implicating the applicants in criminal misconduct, the cognizance taken by the court below is legally untenable – hence, instant application is allowed. (Para – 21, 22, 44)

(B) Criminal Law – Criminal Procedure Code, 1973 – Sections 190, 190(1)(b), 173 & 482 - The Prevention of Corruption Act, 1988 – Sections 13(1)(d), 13(2) & 19: -
Application u/s 482 – for quashing of impugned summoning order as well as entire criminal proceeding - - court finds that, in spite of several orders passed by the Hon'ble Apex court as well as this Court, the learned Magistrates are still passing orders and taking cognizance on printed proforma, by filing up the banks, without application of judicial mind and is objectionable and deserves to be deprecated – Hence, summoning and cognizance order is bad in eyes of law – Accordingly, directions issued to all the District Courts of Uttar Pradesh for necessary compliance. (Para -41, 42, 46)

Application Allowed. (E-11)

List of Cases cited:

1. Dilwar Vs St. of Har. (2018, 16 SCC 521),

2. Menka Gandhi Vs U.O.I. (AIR 1978 SC 597),

3. Hussainara Khatoon (I) Vs. St. of Bihar (1980 1 SCC 81),

4. Abdul Rehman Antulay Vs. RS Nayak (1992 1 SCC 225),

5. P. Ramchandra Rao Vs. St. of Karn. (2002 4 SCC 578),

6. H. N. Rishbud Vs St. of Delhi (AIR 1955 SC 196),

7. Bassaruddin & ors. Vs. St. of UP & ors.(2011 (1) JIC 335 (All) (LB),

8. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr.(AIR 2012 SC 1747),

9. Sunil Bharti Mittal Vs. C.B.I. (AIR 2015 SC 923),

10. Darshan Singh Ram Kishan Vs St. of Mah. (1971 2 SCC 654),

11. Ankit Vs St. of UP & anr.(Application U/s 482 No. 19647 of 2009 decided on Dt. 15.10.2009),

12. Kavi Ahmad Vs St. of U.P. & anr.(Criminal Revision NO. 3209/2010

13. Abdul Rasheed & ors. Vs St. of U.P. & ors.(2010 (3) JIC 761 (All),

14. Lalan Kumar Singh & ors. Vs St. of Mah. (2022 SCC Online SC 1383),

15. Haryana Vs Bhajan Lal (1992 Supp. (1) SCC 335),

16. R P Kapoor Vs St. of Pun. (AIR 1960 SC 866),

17. St. of Bihar Vs P.P. Sharma (1992 SCC (Crl.) 192),

18. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr.(2005 SCC (Cril.) 283),

19. Neeharika Infrastructure Pvt. Ltd. Vs. St. of Mah. (AIR 2021 SC 1918),

20. S W Palankattkar & ors. Vs St. of Bihar (2002 (33) ACC 168),

21. M/s Pepsi Food Ltd. & anr. Vs S.J.M. & ors. (1998 (5) SCC 749).

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

1. Heard Sri Pranjal Krishna, Advocate assisted by Sri Saurabh Shukla, learned counsel for the applicants and Sri Ajay Kumar Agnihotri, learned A.G.A. alongwith Sri Ashok Kumar Singh, learned A.G.A.-I for the State.

2. The present application under Section 482 Cr.P.C. has been filed with a prayer to quash the entire proceedings of Criminal Case No.319 of 2015 (State Vs. Awadhu Ram & Others), under Sections 13(1)(d) and 13(2) of The Prevention of Corruption Act, 1988 arising out of Crime No.102/2014, Police Station Husainganj, District Lucknow, investigated by CIS(1) CB CID, Lucknow pending in the Court of learned Special Judge (P.C. Act), Lucknow as well as to quash the cognizance/summoning order dated 08.09.2015.

3. Learned counsel for the applicants has filed a supplementary affidavit on 17.05.2024 in the Court, which was taken on record.

4. Learned counsel for the applicants submitted that the present matter pertains to the appointment of Junior Clerks in the Office of the Engineer-in-Chief and Circle cadre of the Irrigation

Department in the year 2008. The applicants were merely members of the Selection Committee constituted for this purpose.

5. Learned counsel for the applicants further submitted that the selection procedure comprised two stages: a typing test and an interview. The applicants had no role in conducting or evaluating the typing test, which was conducted by experts from the Directorate of Technical Education and Employment and Training Department, Lucknow.

6. Learned counsel for the applicants further submitted that the interview was conducted as per the Uttar Pradesh Procedure for Direct Recruitment for Group 'C' Post Rules, 2003. The applicants had no role in evaluating the educational and sports qualifications of the candidates, which was done by a Sub-Committee.

7 . Learned counsel for the applicants further submitted that the final results were compiled based on the typing test results provided by the experts and the interview conducted by the Selection Committee. The applicants performed their duties in accordance with the rules and have not committed any wrong.

8. Learned counsel for the applicants further submitted that two inquiries were conducted by Mr. Radha Charan and Mr. A.N. Gupta in 2011 and 2012 respectively and they did not assign any specific role or criminal conspiracy to the applicants. Copies of the Enquiry Reports dated 14.11.2011 and 11.10.2012 are annexed as Annexures No. 11 and 14 respectively alongwith the affidavit filed in support of the present application under Section 482 Cr.P.C.

9. Learned counsel for the applicants further submitted that the applicants herein are law-abiding senior citizens, retired from the Irrigation Department, Government of Uttar Pradesh, with unblemished service records. The Applicant No. 1 retired as Chief Engineer on 31.12.2014 whereas the Applicant No. 2 retired as Superintending Engineer on 30.04.2009.

10. Learned counsel for the applicants further submitted that the prosecution has failed to produce any material evidence against the applicants and the cognizance taken by the Court of Learned Special Judge (P.C. Act), Lucknow, is without sanction for prosecution as required under Section 19 of the Prevention of Corruption Act, 1988, for Mr. Awadhu Ram, who is still a public servant. The allegations in the Police Report (Chargesheet) do not constitute any prima facie offence against the applicants and are absurd and inherently improbable.

11. Learned counsel for the applicants further submitted that by the order dated 08.09.2015 cognizance taken by the learned Magistrate on printed proforma without assigning any reason is abused of process of law.

12. Learned counsel for the applicants further submitted that after submission of charge sheet the applicants have been summoned mechanically by order dated 08.09.2015 and the learned trial court while summoning the applicants had materially erred and did not follow the dictum of law as propounded by the

Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the learned trial court without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. The learned trial court has summoned the applicants through a printed proforma order, which is wholly illegal.

13. On the other hand, learned A.G.A-I for the State opposed the argument advanced by learned Counsel for the applicants and submitted that all legal procedures have been duly followed in the process of investigation and filing of the chargesheet. The procedural requirements, including those under the Prevention of Corruption Act, 1988, have been complied with, justifying the learned trial court's decision to proceed with the case.

14. Learned A.G.A-I for the State further submitted that the chargesheet and accompanying evidences established a prima facie case against the applicants under Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988. The allegations and evidence suggest that the applicants, while serving as members of the Selection Committee, engaged in corrupt practices to derive undue benefits.

15. Learned A.G.A-I for the State further submitted that the learned trial court had upheld the cognizance of chargesheet and subsequent prosecutions in corruption cases based on substantial evidence. The trial court's decision to take cognizance and summon the applicants is totally legal and does not requrire any interference by this Hon'ble Court.

16. After considering the arguments advanced by learned counsel for the parties and perusal of record in 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 and the contents of the F.I.R. as well as summoning order dated 08.09.2015, this court deems it appropriate to discuss the relevant provisions of the Prevention of Corruption Act, 1988.

17. ***Section 13(1)(d) of the Prevention of Corruption Act, 1988***

"Section 13(1)(d): This section defines specific actions that constitute "criminal misconduct" by a public servant. According to this provision, a public servant is said to commit the offense of criminal misconduct if he:

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest."

18. Section 13(2) of the Prevention of Corruption Act, 1988

"Section 13(2): This section prescribes the punishment for the offense defined in Section 13(1). It states that any public servant who commits criminal misconduct as defined in Section 13(1) shall be punishable with imprisonment for a term not less than four years but which

may extend to ten years, and shall also be liable to fine."

19. Section 19 of the Prevention of Corruption Act, 1988

"19. Previous sanction necessary for prosecution.

(1) No Court shall take cognizance of an offence punishable under [sections 7, 11, 13 and 15] [Substituted 'sections 7, 10, 11, 13 and 15' by Act No. 16 of 2018, dated 26.7.2018.] alleged to have been committed by a public servant, except with the previous sanction,

(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] [Substituted 'who is employed' by Act No. 16 of 2018, dated 26.7.2018.] 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] [Substituted 'who is employed' by Act No. 16 of 2018, dated 26.7.2018.] in connection with the affairs of a State and is not removable from his office save by or with 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 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, presecribe 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.

20. After careful scruitiny of the afroesaid legal provisions, this Court finds that the purpose of prosecution sanction is to provide a safeguard against frivolous or vexatious litigation. It ensures that the prosecution of a public servant is based on substantial grounds and is scrutinized by a higher authority before proceeding to trial. The absence of requisite sanction under Section 19 of the Prevention of Corruption Act, 1988 is a critical procedural defect that invalidates the cognizance and subsequent proceedings. As such, the prosecutions

initiated without the necessary sanction are deemed null and void.

21. In the present case, the applicants are accused under Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988. However, several crucial points undermine the legitimacy of the prosecution, which are being reproduced hereunder:-

(i) The applicants were merely members of the Selection Committee for the appointment of Junior Clerks in the Irrigation Department. Their duties were confined to conducting interviews and they had no role in the typing test evaluation or the verification of candidates' qualifications.

(ii) The selection process included a typing test and an interview. It is clear from the records that the applicants had no role in conducting or evaluating the typing test, which was managed by experts from the Directorate of Technical Education and Employment and Training Department, Lucknow. Similarly, the evaluation of educational and sports qualifications was undertaken by a Sub-Committee, independent of the applicants' influence.

(iii) Two inquiries conducted in the year 2011 and 2012 by Mr. Radha Charan and Mr. A.N. Gupta, respectively, did not assign any specific role or criminal conspiracy to the applicants. The Inquiry Reports dated 14.11.2011 and 11.10.2012 do not implicate the applicants in any criminal activity.

(iv) The prosecution has not produced any material evidence against the applicants. The cognizance taken by the Court of Learned Special Judge (P.C. Act), Lucknow, is without the necessary sanction for prosecution as provided under Section 19 of the Prevention of Corruption Act, 1988 for Mr. Awadhu Ram, who remains a public servant. The allegations in the chargesheet do not constitute any prima facie offence against the applicants and are considered absurd and inherently improbable.

(v) The prosecution has failed to produce material evidence against the applicants that would justify the allegations under Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988. The cognizance and subsequent proceedings appear to lack proper application of judicial mind and are based on insufficient grounds.

22. The procedural requirements of Section 19 of the Prevention of Corruption Act, 1988, and the absence of any substantive evidence implicating the applicants in criminal misconduct, the cognizance taken by the Court of the Learned Special Judge (P.C. Act), Lucknow, is legally untenable. The failure to obtain the mandatory sanction as provided under Section 19 of the Prevention of Corruption Act, 1988 vitiates the entire prosecution process. Therefore, the applicants are entitled to have the criminal proceedings quashed.

23. Further, this Court is also of the view that an another issue for consideration before this Court is that whether the learned Magistrate may summon the accused person on a printed proforma without assigning any reason and take cognizance on police report filed under Sections 173 of Cr.P.C. In this regard, it is relevant to mention here that a Court can take cognizance of an offence

only when condition requisite for initiation of proceedings before it as set out in Chapter XIV of the Code are fulfilled. Otherwise, the Court does not obtain jurisdiction to try the offences under section 190 (1) of the Cr.P.C. provided that "subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence,

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

24. At this juncture, it is fruitful to have a look so far as the law pertaining to summoning of the accused persons, by taking cognizance on a police report filed under section 173 of the Cr.P.C., is concerned and the perusal of the case law mentioned herein below would clearly reveal that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since, it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the material collected by the Investigating Officer results in sufficient grounds to proceed further and would constitute violation of law so as to call a person to appear before the criminal court to face trial. This discretion puts a responsibility on the magistrate concerned to act judiciously keeping in view the facts of the particular case as well as the law on the subject and the orders of Magistrate does not suffers from non-application of judicial mind while taking cognizance of the offence.

25. Fair and proper investigation is the primary duty of the Investigating Officer. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. There is clear need for time line in completing investigation for having in-house oversight mechanism wherein accountability for adhering to lay down timeline, can be fixed at different levels in the hierarchy, vide **Dilawar vs. State of Haryana, (2018) 16 SCC 521, Menka Gandhi vs. Union of India, AIR 1978 SC 597, Hussainara Khatoon (I) vs. State of Bihar, (1980)1 SCC 81, Abdul Rehman Antulay vs. R.S. Nayak, (1992) 1 SCC 225 and P. Ramchandra Rao vs. State of Karnatka, (2002) 4 SCC 578.**

26. For the purposes of investigation, offences are divided into two categories "cognizable" and "non-cognizable". When information of a cognizable offence is received or such commission is suspected, the proper police officer has the authority to enter in the investigation of the same but where the information relates to a non-cognizable offence, he shall not investigate it without the order of the competent Magistrate. Investigation includes all the proceedings

under the Cr.P.C. for the collection of evidence conducted by a police officer or by any person other than a Magistrate (who is authorised by a Magistrate in his behalf). Investigation consists of steps, namely (i) proceeding to spot, (ii) ascertainment of the facts and circumstances of the case, (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence and (v) formation of opinion as to whether on the material collected therein to place the accused before a Magistrate for trial and if so to take necessary steps for the same by filing a charge sheet under Section 173, Cr.P.C., vide **H.N. Rishbud vs. State of Delhi, AIR 1955 SC 196.** Thereafter, the learned Magistrate has to take cognizance after application of judicial mind and by reasoned order and not in mechanical manner.

27. In the case of **Basaruddin & others Vs. State of U.P. and others, 2011 (1) JIC 335 (All)(LB)**, the Hon'ble Court was pleased to observed as under:-

"From a perusal of the impugned order, it appears that the learned Magistrate on the complaint filed by the complainant has summoned the accused in a mechanical way filling the date in the typed proforma. Learned Magistrate while taking cognizance of the offence on complaint was expected to go through the allegations made in the complaint and to satisfy himself as to which offences were prima facies, being made out against the accused on basis of allegations made in the complaint. It appears that the learned Magistrate did not bother to go through the allegations made in the complaint and ascertain as to what offences were, prima facie, being made out against the accused on the basis of allegations made in the complaint. Apparently, the impugned order passed by the learned Magistrate suffers from non-application of mind while taking cognizance of the offence. The impugned order is not well reasoned order, therefore, the same is liable to be quashed and the petition deserves to be allowed and the matter may be remanded back to the learned Chief Judicial Magistrate, Lakhimpur Kheri with direction to him to go through the allegations made in the complaint and ascertain as to what offences against the accused were prima facie being made out against the accused on the basis of allegations made in the complaint and pass fresh order, thereafter, he will proceed according to law."

28. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747,** the Hon'ble Apex Court was pleased to observe that Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

29. In the case of **Sunil Bharti Mittal v. Central Bureau of Investigation, AIR 2015 SC 923**, the Hon,ble Apex Court was pleased to observe in paragraph no.47 of the judgment as under:

"47. However, the words "sufficient grounds for proceeding"

appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself.."

30. In the case **of Darshan Singh Ram Kishan v. State of Maharashtra , (1971) 2 SCC 654**, the Hon'ble Court was pleased to observe that the process of taking cognizance does not involve any formal action, but it occurs as soon as the Magistrate applies his mind to the allegations and, thereafter, takes judicial notice of the offence. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."

31. In the case of **Ankit Vs. State of U.P. And Another passed in Application U/S 482 No.19647 of 2009 decided on 15.10.2009**, this Court was pleased to observe in paragraph No.8 of the judgment as under:-

"8. In the beginning, the name of the court, case number, state vs. ..... under section ..... P.S. ..... District ..... case crime No. ..... /2009 also have been printed and blanks have been filled up by mentioning the case number, name of the accused, section, P.S. District etc. by some employee. Below afore cited printed matter, the following sentence has been mentioned in handwriting "अभियुक्त अंकित की गिरफ्तारी मा0 उच्च न्यायायल द्वारा Crl. Writ No. 19559/08 अंकित बनाम राज्य में पारित आदेश दिनांक 5.11.08 द्वारा आरोप पत्र प्राप्त होने तक स्थगित थी।"

Below aforesaid sentence, the seal of the court containing name of Sri Talevar Singh, the then Judicial Magistrate-III, has been affixed and the learned magistrate has put his short signature (initial) over his name. The manner in which the impugned order has been prepared shows that the learned magistrate did not at all apply his judicial mind at the time of passing this order and after the blanks were filled up by some employee of the court, he has put his initial on the seal of the court. This method of passing judicial order is wholly illegal. If for the shake of argument, it is assumed that the blanks on the printed proforma were filled up in the handwriting of learned magistrate, even then the impugned order would be illegal and invalid, because order of taking cognizance of any other judicial order cannot be passed by filling up blanks on the printed proforma. Although as held by this Court in the case of ***Megh Nath Guptas & Anr V State of U.P. And Anr,***

***2008 (62) ACC 826**, in which reference has been made to the cases **of Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC)**, the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."*

32. In the case **of Kavi Ahmad Vs. State of U.P. and another passed in Criminal Revision No. 3209 of 2010**, wherein order taking cognizance of offence by the Magistrate under Section 190(1)(b) on printed proforma without applying his judicial mind towards the material collected by the Investigating Officer has been held illegal.

33. In the case of **Abdul Rasheed and others Vs. State of U.P. and another 2010 (3) JIC 761 (All).** The relevant observations and findings recorded in the said case are quoted below:-

"6. Whenever any police report or complaint is filed before the Magistrate, he has to apply his mind to the facts stated in the report or complaint before taking cognizance. If after applying his mind to the facts of the case, the Magistrate comes to the conclusion that there is sufficient material to proceed with the matter, he may take cognizance. In the present case, the summoning order has been passed by affixing a ready made seal of the summoning order on a plain paper and the learned Chief Judicial Magistrate had merely entered the next date fixed in the case in the blank portion of the ready made order. Apparently the learned Magistrate had not applied his mind to the facts of the case before passing the order dated 20.12.2018, therefore, the impugned order cannot be upheld.

7. Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. Such tendency must be deprecated and cannot be allowed to perpetuate. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith."

34. In view of the above, this Court finds and observes that the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind and without satisfying himself as to which offence were prima-facie being made out against the applicants

on the basis of the allegations made by the complainant. Thus, the impugned cognizance order passed by the learned Magistrate is against the settled judicial norms.

35. Further, Hon'ble the Supreme Court of India in the case **of Lalankumar Singh and Others vs. State of Maharashtra** reported in **2022 SCC Online SC 1383** has specifically held in paragraph No.38 that the order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. Paragraph No.38 **of Lalankumar Singh and Others (supra)** is being quoted hereunder:-

"38. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect could be made to the judgment of this Court in the case of Sunil Bharti Mittal v. Central Bureau of Investigation, which reads thus:

"51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."

36. Further, Hon'ble the Supreme Court of India has provided guidelines in case of **State of Haryana Vs. Bhajan Lal reported in 1992 Supp (1) SCC 335** for the exercise of power under Section 482 Cr.P.C. which is extraordinary power and used separately in following conditions:-

"102.(1) Where the allegations made in the first information report or the

complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused."

(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

37. Further, the Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:- **(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192, (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283 and (v) Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918.**

38. From the aforesaid decisions, the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continued.

39. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court itself envisages three circumstances under which the inherent jurisdiction may be exercised:- (i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of

justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

40. In M/s Pepsi Food Ltd. and another Vs. Special Judicial Magistrate and others: 1998 (5) SCC 749, Hon'ble Apex Court has observed:

"Summoning of an accused in a criminal case, is a serous matter. Criminal law can not be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning the accused. Magistrate had to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

41. This Court feels sorry in observing this fact that in spite of several orders passed by the Hon'ble Apex Court as well as this Court, the learned Magistrates are still passing orders and taking cognizance on printed proforma without application of judicial mind.

42. Even in the instant case, there is nothing in the summoning order to show that the Magistrate concerned perused the material available on record before passing summoning order and taking cognizance on the charge sheet. Hence the summoning and cognizance order is bad in the eyes of law and resultantly it is not sustainable as the learned Magistrate failed to look into the oral as well as documentary evidence before the impugned order was passed.

43. Thus, in view of the law laid down by the Hon'ble Apex Court and the facts and circumstances, as narrated above and also with the assistance of the aforesaid guidelines and keeping in view the nature and gravity and the severity of the offence, it deems proper and to meet the ends of justice that the proceeding of the aforementioned case is liable to be quashed.

44 . Accordingly, the instant application under Section 482 Cr.P.C. is allowed. Keeping in view the law laid down by the Hon'ble Apex Court in the above referred judgment and in view of the submission made by learned counsel for the parties, the entire proceedings of Criminal Case No.319 of 2015 (State Vs. Awadhu Ram & Others), under Sections 13(1)(d) and 13(2) of The Prevention of Corruption Act, 1988 arising out of Crime No.102/2014, Police Station Husainganj, District Lucknow, investigated by CIS(1) CB CID, Lucknow pending in the Court of learned Special Judge (P.C. Act), Lucknow as well as the cognizance/summoning order dated 08.09.2015 are hereby quashed so far as it relates to the instant applicants, namely, **Anil Katiyar and Sudhir Chandra Khare.**

45. No order as to the costs.

46. The Senior Registrar of this Court is directed to transmit a copy of this judgment and order to the learned District Judges and Chief Judicial Magistrate/Chief Metropolitan Magistrate of all the District Courts of Uttar Pradesh immediately for necessary compliance and information.

(2024) 6 ILRA 155
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED LUCKNOW 14.06.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application u/s 482 No. 2784 of 2024

Ashish Kumar Tiwari @ Rahul & Ors.
...Applicants
Versus
State of U.P & Anr. ...Opp. Parties

Counsel for the Applicants:
Manuvendra Singh

Counsel for the Opp. Parties:
G.A.

A. Criminal Law – Indian Penal Code,1860 - Sections 143, 147, 281, 283, 188 & 269 - Disaster Management Act, 2005: Section 51(b); Code of Criminal Procedure: Section 195(1) – No Court shall take cognizance of any offence u/Ss 172 to 188 I.P.C. except upon a complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. (Para 16)

It is clear that the F.I.R. was registered without jurisdiction as Section 188 of I.P.C. is described as a non-cognizable offence in the penal code. If any offence under any other law, if punishable for less than three years or with fine which shall be considered as non- cognizable, bailable and triable by the Magistrate of First Class. Thus, taking cognizance u/s 188 I.P.C. is also without jurisdiction. (Para 16, 24)

A court cannot take cognizance of an offence u/s 188 IPC without a written complaint from the concerned public servant. The absence of such a complaint in the current case makes the cognizance and summoning order dated 13.09.2022 legally unsustainable. (Para 20)

B. It is a well-recognised canon of interpretation that provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise. Even if the clause is capable of two interpretation Court is inclined to choose the narrower interpretation for obvious reasons. Section 190 of the Code empowers "any magistrate of the first class" to take cognizance of "any offence" upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the Court with a complaint is to that extent curtailed. (Para 21)

C. The investigation of non-cognizable offence by the police without prior permission of the competent Magistrate is illegal. Even mere accepting the charge sheet by the Magistrate and taking the cognizance of the offence does not validate the proceeding. Investigation into the non-cognizable offence without written order of the Magistrate is strictly contrary to the provision of this Section. (Para 27)

As per Section 155(2) of Cr.P.C., the police have no right or jurisdiction to investigate the matter, without prior permission of the Magistrate, who has got jurisdiction to try those offences. Therefore, the entire charge sheet filed by the police is vitiated by serious incurable defects and procedural irregularities. (Para 28)

D. Despite the gravity of the alleged offences, the failure to adhere to procedural safeguards undermines the integrity of the legal process. While the police may have acted in good faith to prevent potential violations of law and order, their actions, including the registration of the FIR and filing of the charge sheet, were not in strict compliance with the legal requirements outlined in relevant judicial precedents. (Para 36, 37)

The absence of a written complaint from the concerned public servant for the offence u/s 188 IPC violates the mandatory procedural requirement u/s 195(1)(a)(i) Cr.P.C. Therefore, the cognizance of this offence is legally unsustainable. The allegations u/Ss 143, 147, 281, 283, and 269 IPC lack specific and concrete evidence. The FIR and charge sheet do not provide sufficient proof to substantiate the charges. (Para 38)

E. Scope and ambit of section 482 Cr.PC - **The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists -** Circumstances under which the extra ordinary power of the court inherent therein as provisioned in the said section of the Cr.P.C. can be exercised:
(i) to give effect to an order under the Code;
(ii) to prevent abuse of the process of court, and
(iii) to otherwise secure the ends of justice. (Para 39, 43)

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. (Para 40)

The words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. *A fortiori*, the order would be bad in law if the reason given turns out to be *ex facie* incorrect. 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 St.d 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. (Para 40)

F. Words & Phrases – *'complaint'* – Code of Criminal Procedure: Section 2(d) - "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. (Para 17)

In view of the present facts and circumstances of the case, the investigation done by the police in this case is without jurisdiction and based on such invalid investigation report, the cognizance taken by the learned Magistrate is also illegal. Secondly, the entire proceeding before the learned Magistrate is vitiated by serious incurable defects. (Para 44)

Application allowed. (E-4)

Precedent followed:

1. Sachida Nand Singh & anr. Vs St. of Bihar & anr., (1998) 2 SCC 493 (Para 21)

2. Daulat Ram Vs St. of Pun., AIR 1962 SC 1206 (Para 22)

3. M.S. Ahlawat Vs St. of Har. & anr., AIR 2000 SC 168 (Para 23)

4. Inder Mohan Goswami Vs St. of Uttaranchal, (2007) 12 SCC 1 (Para 39)

5. Lalankumar Singh & ors. Vs St. of Mah., 2022 SCC OnLine SC 1383 (Para 40)

6. St. of Har. Vs Bhajan Lal, 1992 Supp (1) SCC 335 (Para 41)

7. R.P. Kapoor Vs St. of Pun., AIR 1960 S.C. 866 (Para 42)

8. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.) 192 (Para 42)

9. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., 2005 SCC (Cri.) 283 (Para 42)

10. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah., AIR 2021 SC 1918 (Para 42)

11. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168 (Para 43)

Present application seeks staying the cognizance and summoning order dated 13.09.2022, passed by the court of Civil Judge (Senior Division) / F. T. C. IInd Pratapgarh.

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

1. Heard Shri Manuvendra Singh, learned counsel for the applicants, Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite parties and perused the material placed on record.

2. The instant application under Section 482 Cr.P.C. has been filed on behalf of the applicant, namely- Ashish Kumar Tiwari @ Rahul and 27 others with a prayer to stay the cognizance and summoning order dated 13.09.2022 passed by the court of Civil Judge (Senior Division) / F. T. C. IInd Pratapgarh, which has been taken on the charge sheet dated 06.08.2022, arising out of the Case Crime No.0106 of 2021, under section 143, 147, 281, 283, 188, 269, I.P.C. & 51(b) Disaster Management Act, 2005, Police Station Kohandaur, District-Pratapgarh with a further prayer seeking any other order or direction this Court may kindly pass.

3. Learned Counsel for the applicants submitted that a First Information Report (FIR) was lodged at the police station Kohandaur Pratapgarh by opposite party no.2, on 30.05.2021 at 23:31 and as per Prosecution Story information was received through an informer that some people are going to take out a candle march from Shivpur Khurd and block the road of Kohandaur, Kandharpur in front of Shivpur village regarding the arrest of the accused related to the murder of Arvind Dubey in village Shivpur Khurd. On the information, the opposite party No.2 left from Kandharpur with his associates and reached village Shivpur Tiraha and saw that the accused persons alongwith 50-60 persons (name and address unknown) from village Shivpur Khurd were violating the Covid-19 guidelines without following social distancing and without permission people were coming carrying placards with anti-police and anti-police slogans in their hands and raising anti-police slogans. When they saw police coming to Shivpur intersection they sat on the road going to Kohdaur Near Khushhali Baba Temple and blocked the Kandharpur Road.

4. Learned Counsel for the applicants further submitted that the statement of the complainant was recorded by the investigation officer under section 161 Cr.P.C. in which the complainant reiterated the same version of the FIR dated 30.05.2021.

5. Learned Counsel for the applicants further submitted that the statement of the witnesses namely Constable Amit Kumar PNO 192612874, Cons. Vivek Pratap Kushwaha, PNO 192612630, Sub Inspector Virendra Kumar Tripathi PNO- 880897817, & Sub Inspector Vijay Kumar PNO-0902340147, have been recorded by the Investigating Officer under section 161 Cr.P.C. their statements were also similar to the version of the FIR dated 30.05.2021.

6. Learned Counsel for the applicants further submitted that the statements of the independent witnesses, namely-Manoj Kumar Dubey Son of Indramani, Satish Dubey Son of Indramani Dubey, have been recorded by the Investigating Officer under section 161 Cr.P.C. wherein they stated that Shanu Dubey son of Nandu Dubey was not present on the spot at the time of incident

and on basis of their statements name of the accused Shanu dubey was removed.

7. Learned Counsel for the applicants further submitted that the applicants were violating the Covid-19 Guidelines which were promulgated by District Magistrate, Pratapgrh, thus, the District Magistrate, Pratapgarh was duty bound to make a complaint to the learned Area Judicial Magistrate concerned either under his own signature or through any authorized official subordinate to him, but in this case a police has been lodged FIR dated 30.05.2021 and also submitted Police Report dated 06.08.2022 against the present applicants and it is very surprising that concerning Trail Court without applying its own mind, issued summoning dated 13.09.2022 in absence of a separate complaint under section 195(1)(a)(i) Cr.P.C. which is inevitable for the purpose of taking cognizance and putting the accused to trial.

8. Learned counsel for the applicants further submitted that the F.I.R. was registered under Sections 188 I.P.C., which is without jurisdiction as Section 188 of I.P.C. is described as non cognizable offence in the penal code and Section 195(1) Cr.P.C. specifically provides that no court shall take cognizance of any offence under Sections 172 to 188 except upon a complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Thus, taking cognizance under Section 188 I.P.C. is also without jurisdiction.

9. Learned counsel for the applicants further submitted that as per Section 2(d) Cr.P.C., the opposite party no.2 had no right to lodge the FIR for offences as mentioned above rather he had to file the complaint only before the concerned court. He further submitted that not only the FIR was registered but also the investigation was carried out and charge sheet was submitted without any jurisdiction.

10. Learned counsel for the applicants further submitted that even if the entire story of the prosecution is accepted as true (only for the sake of argument though not admitted), Section 188 of I.P.C. is not made out against the applicants.

11 . Learned counsel for the applicants further submitted that as per Section 190 Cr.P.C., it is evident that the concerned Magistrate can take cognizance of any offence on three conditions i.e. (i) Upon receiving a complaint of facts, (ii) Upon a police report, and (iii) Suo-moto.

12. Learned counsel for the applicants further submitted that the impugned order dated 13.09.2022 passed by the court of Civil Judge (Senior Division) / F. T. C. IInd Pratapgarh, by which the applicants were summoned, is also non speaking as the Magistrate has not considered any material available before him while summoning the applicants to face the trial. As such, the impugned order dated 13.09.2022 on the face of record appears to be unjustified, arbitrary, illegal and is passed without application of judicial mind, therefore, the same is liable to be set aside by this Court and the present application under Section 482 Cr.P.C. is liable to be allowed.

13. On the other hand, learned A.G.A-I. for the State opposed the argument advanced by learned counsel for the applicants and submits that the impugned cognizance and summoning

order dated 13.09.2022 is rightly passed and no interference by this Court is required in the instant matter, therefore, the instant application is liable to be dismissed at this stage only.

14. On careful perusal of the averments made in this application under Section 482 Cr.P.C. as well as after hearing the learned counsel for the parties, the factual matrix disclose that a First Information Report (FIR) was lodged at the police station Kohandaur Pratapgarh by opposite party no.2, on 30.05.2021 at 23:31 and as per Prosecution Story information was received through an informer that some people are going to take out a candle march from Shivpur Khurd and block the road of Kohandaur, Kandharpur in front of Shivpur village regarding the arrest of the accused related to the murder of Arvind Dubey in village Shivpur Khurd. On the information, the opposite party No.2 left from Kandharpur with his associates and reached village Shivpur Tiraha and saw that the accused persons alongwith 50-60 persons (name and address unknown) from village Shivpur Khurd were violating the Covid-19 guidelines without following social distancing and without permission people were coming carrying placards with anti-police and anti-police slogans in their hands and raising anti-police slogans. When they saw police coming to Shivpur intersection they sat on the road going to Kohdaur Near Khushhali Baba Temple and blocked the Kandharpur Road..

15. First of all, it would be relevant to quote Section 195(1) Cr.P.C., which is being reproduced hereunder:-

"195(1) Cr.P.C*. :- No Court shall take cognizance –*

(a)

(I) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or other public servant to whom he is administratively subordinate;

(b)

(I) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476 of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii),

[except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.] [Substituted by Act 2 of 2006, Section 3 for "except on the complaint in writing of that Court, of of some other Court to which

that Court is subordinate" (w.e.f. 16-4-2006).]"

16. From perusal of the aforesaid Section 195 (1) Cr.P.C., it is clear that the F.I.R. was registered without jurisdiction as Section 188 of I.P.C. is described as a non-cognizable offence in the penal code whereas it is specifically mentioned that no Court shall take cognizance of any offence under Sections 172 to 188 I.P.C. except upon a complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Thus, taking cognizance under Section 188 I.P.C. is also without jurisdiction.

17. It would further be relevant to quote Section 2(d) Cr.P.C. which is being reproduced hereunder:-

'"complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

18. From perusal of the aforesaid Section 2(d) Cr.P.C., it is clear that the opposite party no.2 had no right to lodge the F.I.R. for offences as mentioned above rather he had to file the complaint only before the concerned Magistrate.

19. It would also be relevant to quote Section 188 of I.P.C., which is being reproduced hereunder:-

"Section 188 I.P.C.- Disobedience to order duly promulgated by public servant.

Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both;

And if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

20. From perusal of the aforesaid Section 188 I.P.C. read with Section 195(1)(a)(i) Cr.P.C. which mandates that no court shall take cognizance of an offence under section 188 IPC except on a written complaint by the concerned public servant. In this case, the absence of such a complaint invalidates the cognizance of the offence under this section. As provided by section 195(1)(a)(i) Cr.P.C., a court cannot take cognizance of an offence under section 188 IPC without a written complaint from the concerned public servant. The absence of such a complaint in the current case makes the cognizance and summoning order dated 13.09.2022 legally unsustainable.

21. Hon'ble the Supreme Court in the case of ***Sachida Nand Singh and***

Another Vs. State of Bihar and Another; (1998) 2 SCC 493 was pleased to observe para 7 as under:-

"Even if the clause is capable of two interpretation we are inclined to choose the narrower interpretation for obvious reasons. Section 190 of the Code empowers "any magistrate of the first class" to take cognizance of "any offence" upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the Court with a complaint is to that extent curtailed. It is a well-recognised canon of interpretation that provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise."

22. Further, Hon'ble the Supreme Court in the case of ***Daulat Ram Vs. State of Punjab; AIR 1962 SC 1206*** was pleased to observe para 4 as under:-

"Now the offence under s. 182 of the Penal Code, if any, was undoubtedly complete when the appellant had moved the Tehsildar for action. Section 182 does not require that action must always be taken if the person who moves the public servant knows or believes that action would be taken. In making his report to the Tehsildar therefore, if the appellant believed that some action would be taken (and he had no reason to doubt that it would not) the offence under that section was complete. It was therefore incumbent, if the prosecution was to be launched, that the complaint in writing should be made by the Tehsildar as the public servant concerned in this case. On the other hand what we find is that a complaint by the Tehsildar was not filed at all, but a charge sheet was put in by the Station House Officer. The learned counsel for the State Government tries to support the action by submitting that s. 195 had been complied with inasmuch as when the allegations had been disproved, the letter of the Superintendent of Police was forwarded to the Tehsildar and he asked for "a calendar". This paper was flied along with the charge sheet and it is stated that this satisfies the requirements of s. 195. In our opinion, this is not a due compliance with the provisions of that section. What the section comtemplates is that the complaint must be in writing by the public servant concerned and there is no such compliance in the present case. The cognizance of the case was therefore wrongly assumed by the court without the complaint in writing of the public servant namely the Tehsildar in this case. The trial was thus without jurisdiction ab inito and the conviction cannot be maintained."

23. Further, Hon'ble the Supreme Court in the case of ***M.S. Ahlawat Vs. State of Haryana and Another; AIR 2000 SC 168*** was pleased to observe para 5 as under:-

"Chapter XI of IPC deals with false evidence and offences against public justice' and Section 193 occurring therein provides for punishment for giving or fabricating false evidence in a judicial proceeding. Section 195 of the Criminal Procedure Code (Cr.P.C.) provides that where an act amounts to an offence of contempt of the lawful authority of public servants or to an offence against public justice such as giving false evidence under Section 193 IPC, etc. or to an offence relating to documents actually used in a court, private prosecutions are barred

absolutely and only the court in relation to which the offence was committed may initiate proceedings. Provisions of Section 195 Cr.P.C. are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that Section. It is settled law that every incorrect or false statement does not make it incumbent upon the court to order prosecution, but to exercise judicial discretion to order prosecution only in the larger interest of the administration of justice."

24. Now coming to the provision of first schedule of Cr.P.C., Section 188 of Indian Penal Code is covered under the said provision which is declared as non-cognizable and bailable offence, and triable by the Magistrate of the First Class. Like wise classification of offence against other laws in Cr.P.C., it also describes, if any offence under any other law, if punishable for less than three years or with fine which shall be considered as non- cognizable, bailable and triable by the Magistrate of First Class.

25. On perusal of the above said provisions, it is abundantly clear that the offence registered against the applicant under Section 188 of IPC is non-cognizable in nature. Now, coming to Section 155(2) of Cr.P.C. which reads as follows:

"No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial"

26. Particularly, Section 155(2) mandates the police concerned that such police officer shall investigate the non-cognizable offence with the permission of the Magistrate only. This Section describes that no Police Officer shall investigate a non-cognizable case without the order of the Magistrate having power to try such case for trial.

27. The provision in sub Section (2) of Section 155 of Cr.P.C., for asking permission of the Court to investigate a non-cognizable offence is mandatory in nature. Therefore, the investigation of non-cognizable offence by the police without prior permission of the competent Magistrate is illegal. Even mere accepting the charge sheet by the Magistrate and taking the cognizance of the offence does not validate the proceeding. Even subsequent permission by the Magistrate also cannot cure the illegality. As could be seen from Section 460 of Cr.P.C. these defects of non- taking permission before investigating a non- cognizable offence is also not curable. Though the charge sheet is filed after due investigation without prior permission of the Court and that the Magistrate has accepted the charge sheet and taken the cognizance, it does not mean to show permission is granted by the Magistrate to investigate such non- cognizable offence. Therefore, investigation into the non-cognizable offence without written order of the Magistrate is strictly contrary to the provision of this Section.

28. This Court further finds that the above said two offences are non-cognizable offences. Therefore, as per Section 155(2) of Cr.P.C., the police have no right or jurisdiction to investigate the matter, without prior permission of the Magistrate, who has got jurisdiction to try those offences. Therefore, the entire charge sheet filed by the police is vitiated by serious incurable defects and procedural irregularities.

29. This Court also acknowledges the serious nature of the allegations leveled

against the applicants under sections 143, 147, 281, 283 and 269 of the IPC, as well as Section 51(b) of the Disaster Management Act, 2005. However, upon review of the evidence and legal framework surrounding the case, certain critical procedural deficiencies have come to light, thus, this Court deems it appropriate to discuss the relevant sections imposed upon the applicants in the present case.

30. **Section 143 IPC** (Unlawful Assembly): An assembly of five or more persons is designated as unlawful if the common object of the persons composing that assembly is to:

(a) Commit any mischief or criminal trespass, or other offence;

(b) Resist the execution of any law, or legal process;

(c) Commit any mischief or criminal trespass, or other offence.

In the present case, the FIR alleges that the applicants were part of an unlawful assembly violating COVID-19 guidelines. However, the prosecution must establish that the assembly's common object was illegal. Without specific evidence of an illegal common object, merely being present in a group does not constitute an offence under this section.

31. S**ection 147 IPC** (Rioting): Rioting involves the use of force or violence by an unlawful assembly or by any member thereof in prosecution of the common object of such assembly.

Thus, to charge someone with rioting under section 147 IPC, it must be proven that the unlawful assembly used force or violence. The FIR and subsequent charge sheet must provide specific instances of such conduct. General allegations of rioting without concrete evidence cannot sustain a charge under this section.

32. **Section 281 IPC** (Danger or Obstruction in Public Way or Line of Navigation):

Definition: Whoever causes any danger, obstruction, or injury to any person in any public way or public line of navigation.

Thus, blocking a road can potentially fall under this section if it causes danger or obstruction. The prosecution must provide evidence showing that the applicants' actions specifically led to such danger or obstruction. In this case, evidence must demonstrate the direct result of the applicants' actions causing danger or obstruction.

33. **Section 283 IPC** (Danger or Obstruction in Public Way): Definition: Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes, or knowingly or negligently causes, obstruction, danger, or injury to any person in any public way or public line of navigation. Similar to section 281, this section emphasizes the injury or obstruction caused in a public way. Concrete evidence of specific obstruction or injury caused by the applicants is necessary to support this charge.

34. **Section 269 IPC** (Negligent Act Likely to Spread Infection of Disease

Dangerous to Life): Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life.

Though, violating COVID-19 guidelines could fall under this section if it can be shown that the applicants' actions were likely to spread the infection. The prosecution must establish a direct causal link between the applicants' conduct and the potential spread of the disease. Mere presence in a gathering without evidence of actual spread or likelihood thereof is insufficient.

35. **Section 51(b) of the Disaster Management Act, 2005**: Punishment for obstruction, refusal to comply with directions of the central government or state government, or national or state authority.

Thus, this section pertains to non-compliance with directives issued under the Disaster Management Act. In this case, the applicants are alleged to have violated COVID-19 curfew guidelines issued by the authorities. The prosecution must demonstrate that the applicants willfully disobeyed such directives and that such disobedience falls within the ambit of this section.

36. The Court notes that the registration of the FIR and subsequent charge sheet by the police, without a separate written complaint by the public servant concerned as mandated by section 195(1)(a)(i) of the Criminal Procedure Code, 1973, raises substantial procedural irregularities. Despite the gravity of the alleged offences, the failure to adhere to procedural safeguards undermines the integrity of the legal process.

37. Furthermore, this Court finds that while the police may have acted in good faith to prevent potential violations of law and order, their actions, including the registration of the FIR and filing of the charge sheet, were not in strict compliance with the legal requirements outlined in relevant judicial precedents.

38. The absence of a written complaint from the concerned public servant for the offence under Section 188 IPC violates the mandatory procedural requirement under Section 195(1)(a)(i) Cr.P.C. Therefore, the cognizance of this offence is legally unsustainable. The allegations under Sections 143, 147, 281, 283, and 269 IPC lack specific and concrete evidence. The FIR and charge sheet do not provide sufficient proof to substantiate the charges.

39. Further, the Hon'ble Supreme Court of India in the case **Inder Mohan Goswami v. State of Uttaranchal (2007)12 SCC 1** has held that it would be relevant to keep into mind the scope and ambit of section 482 Cr.PC and circumstances under which the extra ordinary power of the court inherent therein as provisioned in the said section of the Cr.P.C. can be exercised, para 23 is being quoted here under:-

"23. This court in a number of cases has laid down the scope and ambit of courts powers under section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of

the process of the court. Inherent power under section 482 Cr.P.C. can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court, and

(iii) to otherwise secure the ends of justice."

40. Further, Hon'ble the Supreme Court of India in the case of **Lalankumar Singh and Others vs. State of Maharashtra** reported in **2022 SCC Online SC 1383** has specifically held in paragraph No.38 that the order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. Paragraph No.38 of Lalankumar Singh and Others (supra) is being quoted hereunder:-

"38. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect could be made to the judgment of this Court in the case of Sunil Bharti Mittal v. Central Bureau of Investigation, which reads thus:

"51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."

41. Further, Hon'ble the Supreme Court of India has provided guidelines in case **of State of Haryana Vs. Bhajan Lal**

reported **in 1992 Supp (1) SCC 335** for the exercise of power under Section 482 Cr.P.C. which is extraordinary power and used separately in following conditions:-

"102.(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused."

(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

42. Further the Hon'ble Supreme Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases**:- (i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192, (iii) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283 and (iv) Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918**.

43. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it has been held by the Hon'ble Supreme Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be

exercised very cautiously to do real and substantial justice for which the court alone exists.

44. In view of the above said facts and circumstances of the case, the investigation done by the police in this case is without jurisdiction and based on such invalid investigation report, the cognizance taken by the learned Magistrate is also illegal. Secondly, the entire proceeding before the learned Magistrate is vitiated by serious incurable defects.

45. Thus, in view of the law laid down by the Hon'ble Supreme Court and the facts and circumstances, as narrated above and from the perusal of the record, the impugned cognizance and summoning order dated 13.09.2022 passed by the court of Civil Judge (Senior Division) / F. T. C. IInd Pratapgarh, which has been taken on the charge sheet dated 06.08.2022, arising out of the Case Crime No.0106 of 2021, under section 143, 147, 281, 283, 188, 269, I.P.C. & 51(b) Disaster Management Act, 2005, Police Station Kohandaur, District-Pratapgarh, as well as the entire criminal proceedings in pursuance thereof are against the spirit and directions issued by the Hon'ble Supreme Court and are liable to be quashed.

46. Accordingly, the impugned cognizance and summoning order dated 13.09.2022 passed by the court of Civil Judge (Senior Division) / F. T. C. IInd Pratapgarh, which has been taken on the charge sheet dated 06.08.2022, arising out of the Case Crime No.0106 of 2021, under section 143, 147, 281, 283, 188, 269, I.P.C. & 51(b) Disaster Management Act, 2005, Police Station Kohandaur, District-Pratapgarh as well as the entire criminal proceedings in pursuance thereof are hereby **quashed** in respect of all the 28 applicants.

47. For the reasons discussed above, the instant application under Section 482 Cr.P.C. filed by the applicant, namely-(1) Ashish Kumar Tiwari @ Rahul, 2. Chandra Prakash Tiwari @ Happy, 3. Prashant Tiwari, 4. Shubham Dubey, 5. Sachin Tiwari, 6. Roopam Dubey, 7. Vivek Dubey, 8. Himanshu Tiwari, 9. Keshav Dubey, 10.Shashank Dubey @ Veeru, 11.Amit Tripathi @ Aparadhi, 12.Prince @ Ashutosh Dubey, 13.Mauni Tiwari @ Navin Kumar, 14.Shekhar Dubey, 15. Avinash Tiwari, 16.Satendra Dubey, 17.Abhimanu Tiwari, 18. Ashish Tiwari 19.Rishikesh Sharma, 20. Jitendra Ojha, 21.Aditya Tiwari, 22.Gangasagar Tiwari, 23.Arun Dubey @Arun Kumar Dwivedi, 24.Gyan Prakash Dubey @ Subbey, 25. Vivek Ojha, 26.Shani Tiwari, 27.Gulashan Tiwari, 28.Shanu Dubey is **allowed** in respect of the above named applicants.

48. Learned Senior Registrar of this Court is directed to transmit a copy of this order to the trial court concerned for its necessary compliance.

(2024) 6 ILRA 167
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED LUCKNOW 07.06.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 426 of 2024

Shiva Pankaj & Anr. ...Applicants
Versus
State of U.P & Anr. ...Opp. Parties

Counsel for the Applicants:
Annapurna Agnihotri

Counsel for the Opp. Parties:
G.A.

A. Family Law – Maintenance – Family Courts Act: Section 7; Code of Criminal Procedure: Section 125 – Maintainability - As the Family Court exercises jurisdiction of judicial magistrate while deciding an application u/s 125 Cr.P.C., an application u/s 483 Cr.P.C. seeking a direction to the Family Court for expeditious disposal of an application u/s 125 Cr.P.C. would be maintainable. (Para 9)

Family Court exercises two types of powers. Cases except the case under Chapter IX of the Code are decided by the Family Court as a District Court. The Family Court while dealing with the proceedings under Chapter IX of the Code Family Court exercises the jurisdiction of a Judicial Magistrate First Class. (Para 8)

As the petitioners' application u/s 125(1) Cr.P.C. for payment of interim maintenance is pending since 18.04.2023 although the period of sixty days provided in the third proviso appended to Section 125(1) Cr.P.C. for disposal of the application for interim maintenance has expired long ago, it would be expedient in the interest of justice that a direction be issued to the Family Court for expeditious disposal of the application for interim maintenance. (Para 11 to 13)

Writ petition allowed. (E-4)

Precedent followed:

Rajesh Shukla Vs Meena & anr., 2005 CriLJ 3800 (Para 7)

Present application seeks issuance of a direction to the APJ-07, Family Court, Lucknow to decide the case of the applicant u/s 125 Cr.P.C., expeditiously.

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

1. Heard Ms. Annapurna Agnihotri, the learned counsel for the applicants and Sri Rakesh Kumar Singh, the learned AGA for the State.

2. Keeping in view the nature of relief claimed, issuance of notice to the opposite party no. 2 is dispensed with.

3. By means of the instant application filed under Section 483 Cr.P.C., the applicants have sought issuance of a direction to the learned Additional Principal Judge (APJ-07), Family Court, Lucknow to decide Case No. 121/2022 (Shiva Pankaj & Anr. v. Prahlad Kumar), under Section 125 Cr.P.C., expeditiously.

4. The learned AGA has raised a preliminary objection that under Section 483 Cr.P.C., this Court exercises power of superintendence over the courts of judicial magistrates subordinate to it whereas the applicants are seeking a direction to the learned Additional Principal Judge, who is not a court of magistrate and, therefore, the application under Section 483 Cr.P.C. seeking issuance of a direction to the Additional Principal Judge, Family Court is not maintainable.

5. Replying to the aforesaid preliminary objection, the learned counsel for the petitioner has submitted that while deciding an application under Section 125 Cr.P.C., the Family Court exercises the jurisdiction of a magistrate and, therefore, an application under Section 483 Cr.P.C. will be maintainable for issuing a direction for expeditious disposal of an application under Section 125 Cr.P.C.

6. Section 7 of the Family Courts Act provides as follows:-

"7. Jurisdiction.-(1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district court

or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment."

7. A Full Bench of Madhya Pradesh High Court was dealing with the following question ***in Rajesh Shukla v. Meena & Anr***..: 2005 CRILJ 3800 'Whether against the order passed by the Family Court in an application under Section 125 of the Code while exercising jurisdiction under Chapter IX of the Code, revision under Sub-section (4) of Section 19 of the Act should be registered as Civil Revision or Criminal Revision or Revision Petition (Family) ?"

8. While deciding this question, the Full Bench of Madya Pradesh High Court held that "From perusal of the scheme of the Act, it is clear that Family Court exercises two types of powers. Cases except the case under Chapter IX of the Code are decided by the Family Court as a District Court. The Family Court while dealing with the proceedings under Chapter IX of the Code Family Court exercises the jurisdiction of a Judicial Magistrate First Class."

9. As the Family Court exercises jurisdiction of judicial magistrate while

deciding an application under Section 125 Cr.P.C., an application under Section 483 Cr.P.C. seeking a direction to the Family Court for expeditious disposal of an application under Section 125 Cr.P.C. would be maintainable.

10. Accordingly, I reject preliminary objection raised by the learned AGA and proceed to examine the merits of the case.

11. The petitioner no. 1 got married to the opposite party no. 2 on 19.02.2012. She gave birth to a daughter-petitioner no. 2, on 23.01.2014. The petitioner no. 1 alleges that the opposite party no. 2 used to ill treat her and he threw her and her daughter out of her matrimonial home in the night of 21.12.2021. On 02.02.2022, the petitioners filed an application under Section 125 Cr.P.C. claiming maintenance. The opposite party no. 2 filed an application dated 17.05.2023 under Section 125(4) Cr.P.C. praying for rejection of the application under Section 125 Cr.P.C. On 28.02.2023, the petitioners filed an application for payment of interim maintenance, to which the opposite party no. 2 filed his objections on 18.04.2023. The case has repetitively been adjourned since then and the application for interim maintenance has not been decided till date.

12. The third proviso appended to Section 125(1) Cr.P.C. provides that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of he service of notice of the application to such person.

13. As the petitioners' application under Section 125(1) Cr.P.C. for payment of interim maintenance is pending since 18.04.2023 although the period of sixty days provided in the third proviso appended to Section 125(1) Cr.P.C. for disposal of the application for interim maintenance has expired long ago, it would be expedient in the interest of justice that a direction be issued to the Family Court for expeditious disposal of the application for interim maintenance.

14. Accordingly, the instant petition is ***allowed.***

15 . The learned Additional Principal Judge (APJ-07), Family Court, Lucknow is directed to dispose of the pending application for payment of interim maintenance to the petitioners expeditiously, keeping in view the statutory mandate contained in third proviso appended to Section 125(1) Cr.P.C.

(2024) 6 ILRA 170
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.06.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Transfer Application (Criminal) No. 27 of 2022

Smt. Ankita Singh ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Viplava Singh, Sunil Kumar Singh, Surya Bux Singh

Counsel for the Respondent:
G.A., Udai Bhan Pandey

Criminal Law – Indian Penal Code, 1860 – Sections 498A, 323, 504 & 506 - Dowry Prohibition Act, 1961 - Section ¾

- The Code of Criminal Procedure, 1973 – Section 407 - Transfer application - Maintainability of – Held, the apprehension of bias and fear for personal safety are substantial grounds for transfer - Influence exerted by opponent's relative who is Sub-Inspector in police could unduly affect investigation and trial proceedings - Threats received by applicant jeopardize their ability to participate in trial fearlessly - Pendency of domestic violence case supports argument for consolidating proceedings in one jurisdiction, ensuring comprehensive consideration of all aspects and evidence connected to the dispute and also guided by principles laid down by Apex Court – Hence, transfer would mitigate risk of bias, ensure safety of applicant and facilitate fair trial. (Para 2, 21, 22)

Transfer application is allowed. (E-13)

List of Cases cited:

1. Maneka Sanjay Gandhi Vs Rani Jethmalani (1979) 4 SCC 167

2. K. Anbazhagan Vs Superintendent of Police (2004) 3 SCC 767

3. Abdul Nazar Madani Vs St. of T. N. (2000) 6 SCC 204

4. Rupali Devi Vs St. of U. P. & ors. reported in (2019) 5 SCC 384

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

1. Heard Shri Surya Bux Singh, learned Counsel for the applicant, Shri Udai Bhan Pandey, learned Counsel for the opposite party Nos. 2 to 4, Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite party No.1 and perused the entire material placed on record.

2. This application under Section 407 Cr.P.C. has been moved on behalf of applicant, namely-Smt. Ankita Singh with a prayer to transfer the proceedings of Case No.5024 of 2021 (State vs. Ashish Singh and Others) arising out of Case Crime No.651 of 2020 under Sections 498A, 323, 504 and 506 I.P.C. and Sections 3/4 of Dowry Prohibition Act, Police Station-Kotwali Ayodhya, District-Ayodhya pending in the court of Chief Judicial Magistrate, Ayodhya to the competent Court at District Gorakhpur.

3. Learned Counsel for the applicant submitted that the marriage of applicant was solemnized with the opposite party No.4 on 29.11.2016 and after marriage she was being victimized for demand of dowry, then under the compulsion of harassment and torture, a complaint was made to National Commission for Women and an FIR was lodged on 07.09.2020. He further submitted that applicant is a resident of Gorakhpur, but under the order of National Commission for Women, the FIR was lodged at Ayodhya.

4. Learned Counsel for the applicant further submitted that one Rakesh Kumar Singh (accused in the F.I.R.) is the Uncle (Chacha) of the opposite party no. 4 and is currently serving in Uttar Pradesh Police and at the time of lodging of the FIR, he was posted as Sub-Inspector in District Bahraich and being in the Police department he interfered in the investigation of the case, therefore, proper investigation was not done by the investigating officer as the Uncle of the opposite party no. 4 was exercising his influence.

5. Learned Counsel for the applicant further submitted that the applicant being aggrieved by the interference in the investigation made by Rakesh Kumar Singh, moved an application dated 30.11.2020 before the Additional Director General (Zone), U.P. Lucknow to transfer the Case Crime No. 651 of 2020 under sections 498A and 506 I.P.C. and Sections 3/4 of Dowry Prohibition Act, Police Station-Kotwali Ayodhaya, District Ayodhaya to District Gorakhpur as the applicant/ first informant is lady and is unable to do pairvi and appear before the investigating officer at Ayodhya and it was also stated in the application that accused persons are influential persons of the locality and are interfering with the investigation. He further submitted that thereafter, the matter was referred to the Additional Director General (Crime), Police Headquarter, Lucknow with the recommendation that the case of the applicant be transferred to District Gorakhpur from District Ayodhya, however, despite the recommendation being made by Additional Director General (Zone), Lucknow to transfer the case from Ayodhya to Gorakhpur, the same was not done due to the fact that Rakesh Kumar Singh (accused in the F.I.R.) was posted in nearby District as Sub- Inspector and was regularly interfering with the investigation.

6. Learned Counsel for the applicant further submitted that ultimately the investigation was conducted in a hasty manner exonerating Rakesh Kumar Singh of all charges and the charge sheet was only submitted against opposite parties nos. 2 to 4 only under section 498A I.P.C. and sections 3/4 of Dowry Prohibition Act on 06.04.2021.

7. Learned Counsel for the applicant further submitted that on the aforesaid chargesheet cognizance has been taken by the learned Magistrate on 22.07.2021. He further submitted that applicant/ first informant is lady and her father is aged about 63 years and there is no other male member in the family of the applicant to accompany her from Gorakhpur to Ayodhay on each and every date for appearance before the trial court.

8 . Learned Counsel for the applicant further submitted that the applicant is living with her parents at parental house in Gorakhpur and the opposite parties no. 2 to 4 have not taken care of the applicant and being aggrieved by their act, the applicant filed an application under section 12 of Protection of Women from Domestic Violence Act, 2005 against opposite parties no. 2 to 4 and Rakesh Kumar Singh who is cousin father-in-law of the applicant in the Court of Additional Chief Judicial Magistrate, Gorakhpur being Complaint Case No. 15333 of 2020 (Smt. Ankita Singh V. Ashish Singh and others) and the said case is also pending in the concerned court in Gorakpur.

9. Learned Counsel for the applicant further submitted that applicant moved an application for obtaining the result of the investigation before the concerned Investigating Officer to know the progress of the case, on which she was told by the police that the charge sheet has been submitted on 05.04.2021 and she was further advised to visit the concerned court to know the status of her case, then the applicant sent her father, who went to Ayodhya where he came to know that the cognizance has been taken and the case is fixed for 22.11.2021, then the father of the applicant i.e. Anil Kumar Singh reached the concerned court to do pairvi of the case on

22.01.2022 where the opposite party Nos.2 to 4 alongwith some antisocial elements threatened the old father of the applicant and warned her father that if the applicant, her father and other witnesses of case pursue this case and produce the evidence against them, they shall be killed in Ayodhya, thereafter, the father of the applicant informed about this incident to Police Station concerned, but nothing was done by the police due to influence of Rakesh Kumar Singh, accused in FIR.

10. Learned Counsel for the applicant further submitted that the opposite party Nos.2 to 4 are ardent criminals and antisocial elements and the brother of the opposite party No.2 i.e. Rakesh kumar Singh is a police person who has been exonerated in present case, who threaten the applicant and her family members, as such, there is danger of life of the applicant if she goes to do pairvi of the case in Ayodhya.

11. Learned Counsel for the applicant further submitted that an application under Section 12 of Protection of Women from Domestic Violence Act, 2005 against opposite parties no. 2 to 4 and Rakesh Kumar Singh, in the Court of Additional Chief Judicial Magistrate, Gorakhpur being Complaint Case No. 15333 of 2020 (Smt. Ankita Singh V. Ashish Singh and others) and the said case is also pending in the concerned court in Gorakhpur, thus, the present case may be transferred to District-Gorakhpur from District-Ayodhya so that the applicant can easily do pairavi in both the cases.

12. On the other hand, Shri Udai Bhan Pandey, learned Counsel for the opposite party Nos.2 to 4 opposed the contentions made by learned Counsel for the applicant and submitted that the allegations leveled by the applicant in the FIR are false and fabricated and the FIR has been lodged only with the intention to harass and torture the opposite party No.4 and his family members. He further submitted that after lodging of the FIR the opposite party No.4 himself made representation to the concerned authorities requesting them to conduct fair investigation in the matter, thus, he submits that this application lacks merit and substance and the same is liable to be rejected by this Court as the applicant is having apprehensions about danger of her life and she has no credible evidence to demonstrate this fact that the proceedings of the trial are affected by the opposite party Nos.2 to 4 but he did not dispute this fact that the case filed by the applicant under Section 12 of the Protection of Women from Domestic Violence Act, 2005 is pending in District-Gorakhpur.

13. Learned A.G.A-I for the State-opposite party No.1 also made an agreement with the submissions advanced by learned Counsel for the opposite party Nos.2 to 4 and submitted that if the applicant is aggrieved by the threats given by the opposite party Nos.2 to 4, she may approach competent forum for redressal of her grievances.

14. I have heard learned Counsel for the respective parties and perused the material placed on record.

15. Before entering into the merits of this case, this Court deems it appropriate to discuss provision of Criminal Procedure Code, 1973 relating to transfer of cases from one court to another court of competent jurisdiction.

16. Section 407 of the Criminal Procedure Code, 1973, provides the High

Court with the authority to transfer cases to another court if it believes that a fair and impartial trial cannot be held, or for other reasonable causes. Section 407 (6) of Cr.P.C., 1973 would read as under:-

"407. Power of High Court to transfer cases and appeals.—

(1) Whenever it is made to appear to the High Court—

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, it may order—

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the applications unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any Subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interest of Justice, order that, pending the disposal of the application the proceedings in the Subordinate Court shall

be stayed, on such terms as the High Court may think fit to impose:

Provided that such stay shall not affect the Subordinate Court's power of remand under section 309.

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197."

Thus, the principles governing the transfer of cases include the need to maintain public confidence in the administration of justice, ensuring the safety of the parties, and preventing any undue influence on the judicial process.

17. Now coming to the case in hand, the key reasons provided by the applicant for seeking the transfer of the aforesaid case from District-Ayodhya to District-Gorakhpur includes:-

1. ***Influence on Investigation***:- The applicant claims that the uncle of the opposite party No.4, being a Sub-Inspector in the police, used his position to influence the investigation, whereby his name was exonerated from the chargesheet though he was named in the FIR. This creates a significant risk of bias-ness in the proceedings, compromising the integrity of the trial.

2. ***Threats and Intimidation***:- The applicant has been threatened with harm to prevent them from attending the trial at District-Ayodhya. This intimidation can impede the applicant's ability to present her case effectively and seek justice and the father of the applicant was also threatened by the opposite party Nos. 2 to 4.

3. ***Related Domestic Violence Case***:- A domestic violence case under Section 12 of the Protection of Women from Domestic Violence Act, 2005 is already pending in District-Gorakhpur against the opposite party Nos.2 to 4. Consolidating both cases in one jurisdiction could facilitate a more coherent and comprehensive adjudication of related matters.

18. Further, Hon'ble Supreme Court has been pleased to render landmark judgments providing insight into the circumstances under which courts have allowed the transfer of cases:

1. ***Maneka Sanjay Gandhi vs Rani Jethmalani (1979) 4 SCC 167***:- The Hon'ble Supreme Court has held that justice should not only be done but should manifestly and undoubtedly be seen to be done. If there is a reasonable apprehension in the mind of the applicant that justice will not be done, the case should be transferred.

2. ***K. Anbazhagan vs Superintendent of Police (2004) 3 SCC 767:-*** The Hon'ble Supreme Court ordered the transfer of a case due to the potential influence and interference by high-ranking officials in the investigation, emphasizing the importance of an impartial and fair trial.

19. Further, the Hon'ble Supreme Court in the case of ***Abdul Nazar Madani vs State of Tamil Nadu (2000) 6 SCC 204*** was pleased to order the transfer of a case from Coimbatore to Bangalore, citing the need for a fair trial, which is a fundamental right under Article 21 of the Constitution of India. Paragraph No.7 of the aforesaid judgment is reproduced hereinunder:-

"7.The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC. 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."

20. Further, the Hon'ble Supreme Court in the case ***of Rupali Devi vs. State of Uttar Pradesh and Others*** reported in ***(2019) 5 SCC 384*** has been pleased to observe paragraph Nos.12, 13, 14 and 15 which read as under:-

"12. Section 498-A of the Penal Code was introduced by the Criminal Law (Second Amendment) Act, 1983. In addition to the aforesaid amendment in the Penal Code, the provisions of Sections 174 and 176 of the Code of Criminal Procedure, 1973 relating to inquiries by police in case of death by suicides and inquiries by Magistrates into cause of such deaths were also amended. Section 198-A was also inserted in the Code of Criminal Procedure with regard to prosecution of the offences under Section 498-A. Further by an amendment in the first schedule to CrPC, the offence under Section 498-A was made cognizable and non-bailable. Of considerable significance is the introduction of Section 113-A in the Evidence Act by the Criminal Law (Second Amendment) Act, 1983 providing for presumption as to abetment of suicide by a married woman to be drawn if such suicide had been committed within a period of seven years from the date of marriage of the married woman and she had been subjected to cruelty. Section 113-A is in the following terms:

*"**113-A. Presumption as to abetment of suicide by a married***

woman.—*When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.*

Explanation.—For the purposes of this section, "cruelty" shall have the same meaning as in Section 498-A of the Penal Code, 1860.""

13. The object behind the aforesaid amendment, undoubtedly, was to combat the increasing cases of cruelty by the husband and the relatives of the husband on the wife which leads to commission of suicides or grave injury to the wife besides seeking to deal with harassment of the wife so as to coerce her or any person related to her to meet any unlawful demand for any property, etc. The abovestated object of the amendment cannot be overlooked while answering the question arising in the present case. The judicial endeavour must, therefore, always be to make the provision of the laws introduced and inserted by the Criminal Laws (Second Amendment) Act, 1983 more efficacious and effective in view of the clear purpose behind the introduction of the provisions in question, as already noticed.

14. "Cruelty" which is the crux of the offence under Section 498-A IPC is defined in Black's Law Dictionary to mean "the intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human; abusive treatment; outrage (abuse, inhuman treatment, indignity)". Cruelty can be both physical or mental cruelty. The impact on the mental health of the wife by overt acts on the part of the husband or his relatives; the mental stress and trauma of being driven away from the matrimonial home and her helplessness to go back to the same home for fear of being ill-treated are aspects that cannot be ignored while understanding the meaning of the expression "cruelty" appearing in Section 498-A of the Penal Code. The emotional distress or psychological effect on the wife, if not the physical injury, is bound to continue to traumatise the wife even after she leaves the matrimonial home and takes shelter at the parental home. Even if the acts of physical cruelty committed in the matrimonial house may have ceased and such acts do not occur at the parental home, there can be no doubt that the mental trauma and the psychological distress caused by the acts of the husband including verbal exchanges, if any, that had compelled the wife to leave the matrimonial home and take shelter with her parents would continue to persist at the parental home. Mental cruelty borne out of physical cruelty or abusive and humiliating verbal exchanges would continue in the parental home even though there may not be any overt act of physical cruelty at such place.

15. The Protection of Women from Domestic Violence Act, as the object behind its enactment would indicate, is to provide a civil remedy to victims of domestic violence as against the remedy in criminal law which is what is provided under Section 498-A of the Penal Code. The definition of "domestic violence" in the Protection of Women from Domestic Violence Act, 2005 contemplates harm or injuries that endanger the health, safety,

life, limb or well-being, whether mental or physical, as well as emotional abuse. The said definition would certainly, for reasons stated above, have a close connection with Explanations (a) & (b) to Section 498-A of the Penal Code which define "cruelty". The provisions contained in Section 498-A of the Penal Code, undoubtedly, encompass both mental as well as the physical well-being of the wife. Even the silence of the wife may have an underlying element of an emotional distress and mental agony. Her sufferings at the parental home though may be directly attributable to commission of acts of cruelty by the husband at the matrimonial home would, undoubtedly, be the consequences of the acts committed at the matrimonial home. Such consequences, by itself, would amount to distinct offences committed at the parental home where she has taken shelter. The adverse effects on the mental health in the parental home though on account of the acts committed in the matrimonial home would, in our considered view, amount to commission of cruelty within the meaning of Section 498-A at the parental home. The consequences of the cruelty committed at the matrimonial home results in repeated offences being committed at the parental home. This is the kind of offences contemplated under Section 179 CrPC which would squarely be applicable to the present case as an answer to the question raised."

21. Further, in the present case, the apprehension of bias and fear for personal safety are substantial grounds for transfer. The influence exerted by the opponent's relative who is a Sub-Inspector in the police could unduly affect the investigation and trial proceedings. The threats received by the applicant further jeopardize their ability to participate in the trial fearlessly.

22. Further, the pendency of a related domestic violence case in District-Gorakhpur supports the argument for consolidating the proceedings in one jurisdiction, ensuring comprehensive consideration of all aspects and evidence connected to the dispute and also taking note of the circumstances and guided by the principles laid down in the aforementioned case laws, it is expedient for the ends of justice to transfer the case from District-Ayodhya to District-Gorakhpur. This transfer would mitigate the risk of bias, ensure the safety of the applicant, and facilitate a fair trial.

23. Further, this Court finds that the threats to the applicant's life and the potential for a biased investigation are serious concerns that merit consideration for the transfer of the case to ensure a fair trial and the convenience of the applicant, who already has a domestic violence case pending in District-Gorakhpur, further supports the need for the transfer.

24. This Court is also convinced that a fair and impartial trial cannot be ensured if the case continues to be heard in the Ayodhya District Court due to the influence exerted by the uncle of opposite party No.4 and the threats received by the applicant and her family members.

25. Thus, in view of the law laid down by the Hon'ble Supreme Court and in light of the observations and discussions made above and keeping in view the facts and circumstances of the case, and from the perusal of the record, the proceedings of Case No.5024 of 2021 (State vs. Ashish Singh and Others) arising out of Case Crime No.651 of 2020 under Sections 498A, 323, 504 and 506 I.P.C. and Sections 3/4 of Dowry Prohibition Act, Police

Station- Kotwali Ayodhya, District-Ayodhya pending in the court of Chief Judicial Magistrate, Ayodhya are liable to be transferred from Ayodhya District Court to the Gorakhpur District Court as the apprehension of bias and fear for personal safety are substantial grounds for transfer. The influence exerted by the opponent's relative who is a Sub-Inspector in the police could unduly affect the investigation and trial proceedings. The threats received by the applicant further jeopardize their ability to participate in the trial fearlessly..

26. Accordingly, the proceedings of Case No.5024 of 2021 (State vs. Ashish Singh and Others) arising out of Case Crime No.651 of 2020 under Sections 498A, 323, 504 and 506 I.P.C. and Sections 3/4 of Dowry Prohibition Act, Police Station-Kotwali Ayodhya, District-Ayodhya pending in the court of Chief Judicial Magistrate, Ayodhya are hereby transferred from Ayodhya District Court to the Gorakhpur District Court and the proceedings of the case be conducted by the competent trial court at District-Gorakhpur, expeditiously.

27. For the reasons discussed above, the instant application under Section 407 Cr.P.C. filed by the applicant is ***allowed*** in respect of the instant applicant, namely-Smt. Ankita Singh.

28. Registry of this Court is directed to take necessary steps and make arrangements to transfer all the records and proceedings of the aforesaid case to the District Court of Gorakhpur, forthwith.

29. Let a copy of this order be transmitted to both the District Courts i.e. District Court Ayodhya and District Court Gorakpur for necessary action and compliance, forthwith, by the office of the Senior Registrar of this Court.

30. No order as to cost(s).

(2024) 6 ILRA 179
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.06.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Misc. Writ Petition No. 4461 of 2024

Mohd. Irfan Siddiqui ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohammad Azam Siddiqui

Counsel for the Respondents:
G.A.

A. Criminal Law - Constitution of India, 1950-Article 226- Criminal Procedure Code,1973-Section 154-lodging of FIR-Non-compliance of the guideline in case of Lalita Kumari-Direction issued to take appropriate steps in the matter in question.(Para 1, 2)

B. In Lalita Kumari Case, the Hon'ble Apex Court, after noticing the disparity in registration of FIRs by police officers on case to case basis across the country, issued notice to the Union of India, the Chief Secretaries of all the States and Union Territories and Director Generals of Police/Commissioners of Police to the effect that if steps are not taken for registration of FIRs immediately and the copies thereof are not handed over to the complainants, they may move the Magistrates concerned by filing complaints for appropriate directions to the police to register the case immediately

and for apprehending the accused persons, failing which, contempt proceedings must be initiated against such delinquent police officers if no sufficient cause is shown.(Para 2)

The writ petition is disposed of. (E-6)

List of Cases cited:

Lalita Kumari Vs Govt. of U.P. & ors. (2014) 2 SCC 1

(Delivered by Hon'ble Attau Rahman Masoodi, J.
&
Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard learned counsel for the petitioner and learned Additional Government Advocate for the respondents.

2. Learned counsel for the petitioner submits that petitioner has approached opposite parties for lodging the F.I.R., however no heed has been paid in the matter in question. So, the petitioner has approached this Court with the following main relief:-

"A writ, order or direction in the nature of Mandamus directing opposite party no. 1 to take appropriate action against to fix accountability of officer with respect to non-compliance of the guideline issued by Hon'ble Supreme Court of India in case of ***Lalita Kumari versus Govt. of U.P. & others*** *and as well as issue the circular no.15011/91/2013-SC/ST-W on dated 06.02.2014 Government of India Ministry of Home Affairs Center state division as annexure no 1 to this writ petition."*

3. After hearing learned counsel for the parties and going through the record as well as taking into consideration the law laid down by Hon'ble Apex Court in the case of ***Lalita Kumari Vs. Government of Uttar Pradesh and others reported in (2014) 2 SCC 1,*** we hereby direct the petitioner to approach opposite party No.1 in respect to the grievances which he has raised in the present writ petition and thereafter opposite party no.1 shall take appropriate steps in the matter in question as per law laid down by Hon'ble Apex Court in the case of Lalita Kumari (supra).

4. With the above observations, the writ petition is ***disposed of.***

(2024) 6 ILRA 180
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.06.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 120 of 2012

Bindheshwari Devi Srivastava & Ors.
...Appellants
Versus
Ramesh Chandra Maurya & Ors.
...Respondents

Counsel for the Appellants:
Somesh Tripathi, Jay Krishna Shukla

Counsel for the Respondents:
O.P. Srivastava

A. Motor Accident Claim-Motor Vehicles Act, 1988-Section 173-The appellants sought compensation, claiming the accident was due to the negligent driving of the truck driver-Tribunal dismissed the claim, attributing negligence to the deceased-inconsistencies found in the defenses evidence-The high court set aside the Tribunal dismissal and ruled in favour of the appellants and reaffirms the legal principles the burden of proof lies initially with the claimants to establish

negligence, but once prima facie case is made, the burden shifts to the opposite party-the assessment of evidence must be done meticulously, considering all relevant factors, including witness testimonies and circumstantial evidence. (Para 1 to 23)

B. The doctrine res ipsa loquitor shifts the burden of proof to the defendant to show that there was no negligence on their part once initial presumption is established. There is no evidence of any voluntary action or contribution to the accident by the deceased. The doctrine allows for an inference that the accident is of a kind that ordinarily does not happen in the absence of negligence. (Para 4 to 21)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Mallamma Vs Balaji & Ors (2003) 2 T.A.C. 482

2. S.Kaushnuma Begum & ors Vs The New India Assr. Co.Ltd. & Ors (2001) AIR Supreme Court 485

3. The New India Assr. Co. Ltd. Vs Pazhaniammal & ors (2011) 4 TAC 481

4. United India Fire & Gen. Ins. Co. Ld. Vs. Maddali Suseela [1979) ACJ 110

5. Smt. Kaushnuma Begum Vs New India Assr. Co. Ld (2001) ILR Kar 493

6. Pushpabai Parshotam Udeshi Vs Ranjit G.& P. Co. Pvt. Ltd. [(1977) 2 SCC 745 : AIR 1977 SC 1735.]

7. Sunita Vs Raj. SRTC (2020) 13 SCC 486

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

1. Heard, Shri Somesh Tripathi, learned counsel for the appellant-claimants and Shri O.P.Srivastava, learned counsel for the respondent no.3. None appeared on behalf of respondents no.1 and 2 despite the notice has been served upon them personally.

2. This First Appeal From Order has been filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and order dated 07.01.2012 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.1, Raebareli in M.A.C. No.270 of 2010; Bindheshwari Devi Srivastava and others Versus Ramesh Chandra Maurya and others, by means of which the Claim Petition filed by the appellant-claimants has been dismissed.

3. Learned counsel for the appellant submitted that on 07.08.2010 at about 4.00 in the evening when the deceased Ashok Kumar Srivastava was waiting for some person on the side of Lucknow-Allahabad Highway near the gate of Pragatipuram Colony near his motorcycle, the Truck, which was being driven rashly and negligently by its Driver dashed to the deceased and his Motorcycle from the back side and crushed the Motorcycle as well as the deceased, who succumbed to the injuries suffered in the accident. The accident was an outcome of the rash and negligent driving of the driver of the Truck, but learned Tribunal without considering it and applying the principle of 'res ipsa loquitur' wrongly and illegally held that the accident was on account of the negligence of the deceased, therefore, the appellant-claimants are not entitled for any compensation. He further submitted that the accident on 07.08.2010 at 4.00 in the evening at Lucknow-Allahabad Highway is neither disputed nor the death of the deceased on account of the said accident, but learned Tribunal while applying the principle of 'res ipsa loquitur' and merely

on the basis of technical report of the vehicles held that the accident has occurred due to negligence of the deceased, but failed to consider that when the accident was on the Highway and the accident had occurred by the Truck which was coming from the opposite direction, it cannot be said that there was no negligence on the part of the Driver of the offending Truck, even if there may be some negligence on the part of the deceased, whereas there was no negligence on his part.

4. Learned counsel for the appellant-claimants further submitted that the learned Tribunal failed to consider that the First Information Report was lodged in regard to the accident against the Truck Driver and the charge-sheet has been filed against him, therefore, prima facie, rash and negligent driving of the Driver of the Truck is proved, which is sufficient to award the compensation.

5. On the basis of above, submission of learned counsel for the appellant-claimants is that the impugned judgment and order passed by the Motor Accident Claims Tribunal is not sustainable and liable to be set aside and the application for compensation filed by the appellant-claimants is liable to be allowed and the widow, daughters and minor sons and the mother of the deceased, who was an employee of I.T.I. Limited, Raebareli and working on the post of Senior Technical Assistant are entitled for the compensation.. Learned counsel for the appellant-claimants relied on **Mallamma Versus Balaji and others; 2003 (2) T.A.C. 482 (Kant.), S.Kaushnuma Begum and others Versus The New India Assurance Co.Ltd. and others; AIR 2001 Supreme Court 485 and The New India Assurance Co. Ltd. Versus Pazhaniammal and others; (2011) 4 TAC 481.**

6. Per contra, learned counsel for the respondent no.3; the National Insurance Company Limited vehemently opposed the submissions of learned counsel for the appellant-claimants. He submitted that the deceased had suffered the injuries in the accident on account of his own negligence and succumbed to the same. As per own case of the appellant-claimants the deceased was standing on the side of the road facing towards Lucknow when the Truck came from the opposite side and he got injuries in the accident, whereas if he was standing facing towards the side from which the Truck was coming, he could have saved himself but he had not tried to save him. He further submitted that since the pleading in the claim petition and the evidence in regard to occurrence was contradictory, therefore learned Tribunal has rightly and in accordance with law applied the principle of 'res ipsa loquitur' and held that the accident had occurred on account of negligence of the deceased, therefore the appellant-claimants are not entitled for any compensation and the claim petition has rightly been dismissed. He further submitted that the technical reports of the vehicles also indicate that the accident was on account of negligence of the deceased. On the basis of above, submission of learned counsel for the respondent no.3 is that the impugned judgment and order has been passed in accordance with law. There is no illegality or infirmity in it. The appeal has been filed on misconceived and baseless grounds. It is liable to be dismissed.

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

8. The claim petition was filed by the appellant-claimants alleging therein that on 07.08.2010 at about 4.00 in the evening the deceased, who was an employee of I.T.I. Ltd., Raebareli working on the post of Senior Technical Assistant, was waiting for some person on the side of Lucknow-Allahabad Highway alongwith his motorcycle having Registration No.UP-33-P-3373, when the Truck having Registration No.UP-78-B-4281 coming from the side of Ratapur Crossing being driven rashly and negligently by its driver dashed to the deceased and his Motorcycle from the back side and crushed the Motorcycle as well as the deceased, who succumbed to the injuries sustained in the accident in the District Hospital, Raebareli. First Information Report of the accident was lodged vide Case Crime No.1038/2010, under Sections 279, 338, 427 and 304-A IPC at Police Station-Mill Area, District-Raebareli against the Driver of Vehicle No.UP-78-B-4281. The Truck was apprehended on the spot of accident by the public, which was got released by the owner from the Court and the driver has been released on bail. The charge sheet has been filed against the Driver of the Vehicle and the criminal case is going on. The deceased was working in I.T.I. Ltd., Raebareli and drawing monthly salary of Rs.18,612.58 and was the only earning member of his family and accordingly the compensation of Rs.52,28,000/- was claimed.

9. A common written statement was filed by the respondents no.1 and 2 i.e. the owner and Driver of the Truck bearing Registration No.UP-78-B-4281 denying the averments made in the claim petition. However it is admitted that the respondent no.1 is registered owner of the Truck and it is insured by the National Insurance Company Ltd., Raebareli, which was valid from 15.07.2010 to 14.07.2011. The respondent no.2 is the Driver of the Truck No.UP-78-B-4281, who is having a valid Driving Licence issued from the Regional Transport Officer, Raebareli, which is valid from 01.04.2010 to 31.03.2013. The respondents no.1 and 2 denied the accident from the said Truck. However it was stated that since the Truck was insured, therefore, the respondent no.3-National Insurance Company Ltd. is liable to pay the compensation, if any.

10. The respondent no.3-National Insurance Company Ltd. filed written statement denying the averments made in the claim petition. It was stated in the written statement that the Truck and the Motorcycle were not involved in the accident. In the alternative, it was pleaded that if the offending Truck No.UP-78-B-4281 is found to have involved in the accident, the Insurance Company is entitled for benefit of Section 147 of the M.V.Act because it was not being driven in accordance with law and terms and conditions of the policy and it was being driven without Truck permit, fitness, Registration Certificate and valid and effective Driving Licence of the Driver. It was also pleaded that the Insurance Company cannot be held liable because the details of the driving licence of the Driver have not been placed on record by the owner in accordance with Section 134(c) of the M.V.Act. The concerned Police Station has also not provided the relevant information in terms of Section 158(c) of the M.V.Act. It was also pleaded that on account of negligence of the deceased the Insurance Company is not liable to pay the compensation. The First Information Report, post-mortem report etc. have not been provided to the Insurance Company. It

was also pleaded that the Truck was not being driven rashly and negligently, rather the accident had occurred on account of contributory negligence of the deceased.

11. On the basis of pleadings of the parties six issues were framed by the Tribunal. Smt. Bindheshwari Devi Srivastava i.e. the appellant-claimant No.1/wife of the deceased appeared as CPW-1, Mohd. Nazim as CPW-2 and Chandra Kumar Srivastava, Senior Office Assistant of I.T.I. Ltd., Raebareli as CPW-3. The relevant papers were also placed on record. Shri Shiv Shanker Maurya, the Driver of the Truck appeared as D.W.1. The Registration Certificate, Insurance Certificate, Driving Licence etc. were placed on record by the respondents no.1 and 2. No oral evidence was adduced by respondent no.3. However the accident inspection report, Panchnama, sketch plan etc. were placed on record by the respondent no.3.

12. After considering pleadings of the parties and affording opportunity of hearing the Tribunal came to the conclusion that the evidence adduced by the appellant-claimants does not match with the averments made in the claim petition that the accident had occurred, while the deceased was standing on the right side of Lucknow-Allahabad highway near gate of Pragati Puram Colony, the truck coming from the side of Lucknow dashed from the back side. As per CPW-2, the deceased was standing facing towards Lucknow and the truck had come from the side of Lucknow, wherefore the Truck could not have dashed from the back side if his face was towards Lucknow, from which side the truck was coming and according to him the deceased had not tried to save him. Thereafter the Tribunal applying principle of 'res ipsa loquitur' and examining the technical reports of the vehicles and considering that the front show of the Truck at Sl.No.11 in the technical report is damaged from the right side and at Sl.No.19 the right light is in order, whereas the right indicator is damaged and the front bumper on the right side is also damaged, on account of which it appears that the deceased while coming from I.T.I, Ltd., Raebareli from his service, without any evidence in this regard and as to what is the timing of office and the way of coming from office, turned from the left side of the road to the right side when the Truck coming from the side of Lucknow would have dashed the left side of handle of the Motorcycle in which the deceased suffered injuries on account of his own negligence. However learned Tribunal failed to consider that CPW-2 stated that the deceased was standing facing Lucknow side, but immediately thereafter stated that the deceased was standing on his left side at about 10 steps away and since his face was on the other side he could not see the speed and manner of driving of truck and he had seen the accident. Therefore if the deceased was standing on the left side of the CPW-2, then he could not have seen his actions, however he has categorically stated that he had seen the accident, but the tribunal failed to consider it.

13. The learned tribunal without any evidence and examination of the person who had prepared the technical reports of vehicles has recorded a finding that the technical report was prepared by Anant Ram Tiwari without any influence of any person from the side of the Insurance Company or owner of the vehicle. However on perusal of the accident inspection report of both the vehicles i.e. the offending Truck having Registration No.UP-78-B-4281 and the Motorcycle of the deceased having

Registration No.UP-33-P-3373, this court is of the view that learned Tribunal erred in holding that the right bumper of the Truck would have dashed the left handle of the Motorcycle on account of which the accident had occurred, therefore no negligence of the offending Truck driver is proved and it is self proved on the basis of it that the accident was on account of sole negligence of the deceased because if the accident would have occurred as per imagination of the Tribunal as described by it applying the principle of 'res ipsa loquitur', the truck could not have dashed only the left side of handle of the Motorcycle, but it would have certainly dashed front wheel also alongwith the handle of the Motorcycle because it is not the case of none of the parties that there was any divider and cut at the place of accident on the road from where the deceased may have taken 'U' turn for going to the Pragati Puram Colony on the opposite side, or even otherwise taken 'U' turn because left handle would have been dashed only if a vehicle is going ahead of the offending vehicle or if coming from the opposite side takes 'U' turn and thereafter coming on the side of other vehicle and in such situation the negligence or fault of offending truck cannot be denied.

14. On examining the findings recorded by the Tribunal in the light of the accident inspection report of the Motorcycle at Sr.No.12 the handle is damaged and at Sr.No.19 head light is damaged and both the indicators are broken, but there is no report that the handle of the motorcycle was damaged from the left side only. Both the tyres and rim of the Motorcycle are also in good condition as per condition of tyres at Sl.No.16 of the accident inspection report of Motorcycle having Registration No.UP-33-P-3373. However the Mud Guard is damaged and Dikki is broken. The accident inspection report of the Truck No.UP-78-B-4281 also indicates at Sl.No.19 that head light of the truck is in order, whereas the right side indicator is broken and both the back lights are broken and the front bumper at the right side is damaged. Therefore only on the basis of accident inspection report of the vehicles the presumption drawn by the Tribunal in regard to the manner of accident, on account of which the deceased had died, is not correct and this court is of the view that the findings have been recorded without considering and appreciating the whole evidence appropriately, therefore it is not sustainable.

15. Even otherwise if it is taken to be correct the negligence or fault of Truck Driver, which was coming from the opposite side of the road on the Lucknow-Allahabad Highway and passing from the City, where the residential Colony is situated, cannot be ignored and it cannot be said that there was no negligence of the Truck Driver, if he was not completely liable for the accident on account of rash and negligent driving of the vehicle.

16. The respondent no.2 Shiv Shanker Maurya, Driver of the Truck No.UP-78-B-4281 appeared as D.W.1, who has admitted the accident and the Truck was apprehended on the spot in front of Gate of Pragati Puram Colony and he was driving the vehicle at the time of accident which was got released from the Court. He has also admitted that he had ran away from the spot, therefore, if there would have no negligence or fault of the Truck Driver, he would not have ran away from the spot. However it may not be the only ground for holding negligence or fault of the driver.

The F.I.R. was lodged against the truck driver and after investigation charge sheet has been filed by the police, therefore the allegation of rash and negligent driving of driver of truck has been found prima facie proved and the trial is going on, therefore it is alos to be considered in the light of the evidence adduced before the Tribunal.

17. The High Court of Karnataka, in the case of **Mallamma Versus Balaji and others (Supra)**, has held that filing of the charge-sheet against the driver is also a prima facie case to hold that the driver was responsible for the accident and burden shifts on him to prove the same. The High Court also considered with reference to several judgments as to when and how the principle of 'res ipsa loquitur' i.e. "speak for itself" can be applied. The Relevant paragraphs 8 to 12 are extracted below:-

"8. In this connection, reference may be made to a decision reported in T*he United India Fire and General Insurance Company Limited v. Maddali Suseela* [1979 ACJ 110.] wherein the Division Bench of the Andhra Pradesh High Court has observed in Para 25 as under:—

"The maxim res ipso loquitur applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so cause."

The following passage from *Halsbury's Laws of England* (3rd edition at page 77) is very inceptive:

"An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous".

"In *Pushpabai v. Ranjit G & P. Co.* referring to the doctrine of res ipso loquitur the Supreme Court said at page 346 thus;"

"The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who cause it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence.

It is further observed thus:

"Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might probably have happened in a manner which did not connote negligence on this part."

"The general principle is that he who alleges a fact must prove it. Normally

it is the duty of the plaintiff who alleged negligence to prove the same."

9. Therefore, keeping in mind the ratio laid down in the aforesaid two decisions, it can be held that the driver of the milk tank was mainly responsible for the accidental death of late Bhimaraya.

10. In a recent decision of the Supreme Court in case of *Smt. Kaushnuma Begum v. New India Assurance Company Limited [ILR 2001 Kar 493.]* wherein it was held that "jurisdiction of the Tribunal is not restricted to decide claims arising out of negligence in the use of Motor Vehicles. Negligence is one of the Species of the Causes of action for making a claim for compensation in respect of Accidents arising out of the use of Motor Vehicles. There are other premises for such cause of action."

11. In another decision of the Supreme Court in case of P*ushpabai Parshotam Udeshi v. Ranjit Ginning and Pressing Co. Pvt. Ltd.* [(1977) 2 SCC 745 : AIR 1977 SC 1735.] wherein it was held that "Motor Vehicles Act (1939) Section 110A(1)(b) - Death caused due to rash and negligent driving - Compensation - Rash and negligent driving - Proof-Burden - Application of principle "res ipsa loquitor - Requirements."

12. Therefore, under these circumstances, I am of the considered view that the Tribunal has wrongly come to the conclusion and held that the claimant has not proved the negligence on the part of the driver of the milk van involved in the accident. Filing of the charge sheet against the driver is also a prima facie case to hold that the driver of the said lorry was responsible for the accident and burden shifts on him to prove the same."

18. The Hon'ble Supreme Court, in the case of **Sunita Versus Rajasthan SRTC; (2020) 13 SCC 486**, has observed that the Tribunal had justly placed reliance on the contents of FIR and charge-sheet which prima facie indicate the negligence in driving bus.

19. The Hon'ble Supreme Court, in the case of **S.Kaushnuma Begum and others Versus The New India Assurance Company Ltd. (Supra),** has held that even if there is no negligence on the part of the driver or owner of the motor vehicle, but accident happen while the vehicle was in use, should not the owner be made liable for damages to the person who suffered on account of such accident.

20. The Division Bench of High Court of Kerala at Ernakulam, in the case of **New India Assurance Company Limited Versus Pazhaniammal and others (Supra),** has held that the quality of evidence to prove negligence and the extent of negligence to be established is certainly different from culpable negligence punishable under the criminal law and the Tribunals cannot look at the question as an umpire in an adversarial litigation between parties. It has further been held that in the absence of specific pleadings and evidence, if the totality of the circumstances convince the Tribunal that there has been negligence, the Tribunal will certainly be justified in passing an award under Section 166 of the Motor Vehicles Act. The relevant paragraph 10 is extracted here-in-below:-

"10. Notwithstanding Section 140 and 163 A of the Motor Vehicles Act even

now in a claim under Section 166 of the Motor Vehicles Act negligence has to be established. But the quality of evidence to prove negligence and the extent of negligence to be established is certainly different from culpable negligence punishable under the criminal law. Tribunals cannot look at the question as an umpire in an adversarial litigation between parties. Even in the absence of specific pleadings and evidence, if the totality of the circumstances convince the Tribunal that there has been negligence, the Tribunal will certainly be justified in passing an award under Section 166 of Motor Vehicles Act. Tribunals called upon to discharge the legislature mandate of ensuring just and reasonable compensation to the victims cannot function merely as umpires in an adversarial litigative process. The Tribunals should play the dynamic role expected of them under a welfare legislation in a socialist republic to effectively and expeditiously translate the compassion of the legislature into tangible benefits to the victims. The primary mandate to and the very purpose of constitution of the Tribunal under the provisions of the Motor Vehicles Act is to ensure just and reasonable compensation to the victims and the Tribunal should not and can never afford to ignore that basic tenet. In that view of the matter we are satisfied that the materials available sufficiently justify the impugned award."

21. In view of above and considering the overall facts and circumstances of the case this court is of the view that the learned Tribunal has failed to examine and scrutinize the evidence correctly and in right perspective and has also failed to apply the principle of 'res ipsa loquitur' correctly, therefore this court is of the view that the impugned judgment and order passed by the Motor Accident Claims Tribunal is not sustainable in the eyes of law and it is liable to be set aside and matter is liable to be remitted back to the concerned Tribunal to pass a fresh order in accordance with law.

22. The appeal is **partly allowed**. The matter is remitted back to the concerned tribunal to pass a fresh order in accordance with law and in the light of observations made in this order expeditiously and preferably within a period of six months from the date of production of a certified copy of this order without granting unnecessary adjournment to either of the parties. No order as to costs.

23. The lower court record shall be sent back to the concerned Tribunal expeditiously and in any case within a period of two weeks from today.

(2024) 6 ILRA 188
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.06.2024

BEFORE

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

Second Appeal No. 1761 of 1983

Phagoo ...Appellant
Versus
Gokaran & Ors. ...Respondents

Counsel for the Appellant:
Ashutosh Srivastava, Shreesh Srivastava, Shreyas Srivastava

Counsel for the Respondents:
Shakti Dhhar Dube, P.H. Vashishtha

A. Civil Law –Civil Procedure Code, 1908 - Section 100 - Second Appeal- suit for

partition of four houses owned by Tirath Ram-After the death of Tirath Ram- Share devolved upon his wife, mother and two daughters- Wife of Tirath Ram remarried- Sonar community- Custom of reversion of the husband's property after remarriage- Plaintiff claimed to have purchased mother's share by a registered sale deed- On the strength of the said sale deed, partition of the suit property sought- Daughters of Tirath ram had filed suit for partition- Suit was dismissed for default- Trial Court evaluated all the evidence- Plaintiff could not prove the factum of remarriage of Tirath Ram's wife- suit dismissed.

B. Plaintiff preferred first appeal- Daughters filed cross-objections- points for determination framed by the appellate court- trial court decree set aside- daughters' cross-objections allowed- Plaintiff held to be entitled to 1/3rd share of the suit property.

C. Second Appeal- admitted- first substantial question of law- whether the Lower Appellate Court had jurisdiction to entertain the appeal- answered negative- pertains to pecuniary jurisdiction of the court- cancellation of fictitious sale deeds not required- cross objections cannot be regarded as appeal- valuation of cross-objections of no consequence- Suit properly valued as per the relief of partition claimed- Lower Appellate Court rightly decided that it had the pecuniary jurisdiction to hear the appeal. (Paras 29, 30 and 31)

HELD: About the cross-objections, the valuation of which is Rs.30,000/-, the Lower Appellate Court remarked that the cross-objections preferred by defendant Nos.9 and 10 were one that did not challenge the decree of dismissal of the suit nor a decree for declaration of their share was sought. Defendant Nos.9 and 10 laid a case in the cross-objections about the findings recorded by the Trial Court being wrong. The Lower Appellate Court, therefore, opined that the cross-objections cannot be regarded as an appeal and the valuation of the cross-objection made at Rs.30,000/- by the defendant, was of no consequence. It would not in any manner change the valuation of the appeal which would be governed by the valuation of the suit made by the Trial Court. The valuation of a suit for the purpose of jurisdiction is made on the basis of reliefs claimed by the plaintiff, founded on the case that he/ she pleads. We agree with the Lower Appellate Court that the plaintiff, in substance, claimed a partition of his 1/3rd share and recovery of rent in the specified sum from defendant Nos.9, 10 and 11. He valued the suit on the basis of the said relief. He did not value the suit for reliefs of cancellation of the four sale deeds executed by Lakhraji, because he regarded the same to be *ultra vires* and void. A document, that is *void ab initio* for want of even a semblance of title in the executant, can always be disregarded and other reliefs claimed by the plaintiff upon establishment of his right. A document or documents regarded by the plaintiff void need not be sought cancellation of, for these do not at all create any rights in derogation of the plaintiffs, or for that matter, anyone else's. This distinction between documents that according the plaintiff's case pleaded are *void ab initio* and those that must be adjudged void and, therefore, require cancellation is well established. Since a relief for cancellation of a void document, according to the plaintiff's case, is not necessary at all, the plaintiff was not required to seek cancellation of the four sale deeds, executed by Lakhraji, defendant No.8 in favour of defendant Nos.1 to 7. He was, therefore, not required to seek relief of cancellation or implicitly regarded as having sought a relief of cancellation, which would add to the valuation of the suit, and, *a fortiori* to the appeal. The Lower Appellate Court was, therefore, perfectly right in its reasoning to have kept the relief of cancellation out of the subject matter of the suit and, therefore, its valuation. (Para 29).

There is another vantage to it. Though, a suit is to be valued according to the reliefs claimed in the plaint, the plaintiff in any case would never be required to seek cancellation of the four sale deeds. If Lakhraji had a right to execute those sale deeds, the suit being one for partition, the rights of co-sharers and parties to the suit would be determined on the basis that Lakhraji had a share. If Lakhraji did not have a share, the shares of parties to the suit would be

determined accordingly. Therefore, in either event, there would be no necessity to seek cancellation of the four sale deeds executed by Lakhraji. (Para 30).

In the opinion of this Court, therefore, the suit and the appeal were rightly valued and the appeal was within the pecuniary jurisdiction of the Lower Appellate Court according to the law at the time that he heard the appeal. The learned Additional District Judge was also right in excluding from consideration the valuation shown on the cross-objection, because the cross-objection preferred by defendant Nos.9 and 10 did not claim any share in the decree or sought the decree of dismissal passed by the Trial Court to be reversed or modified. The cross-objection was limited to certain objections to the findings recorded by the Trial Court, which could in any case be objected to at hearing of the appeal before the Lower Appellate Court, without lodging cross-objections by defendant Nos.9 and 10. We, therefore, answer Substantial Question No.1 in the affirmative and hold that the learned District Judge had pecuniary jurisdiction to entertain and determine the appeal. (para 31)

D. Second Appeal- Second substantial question of law- whether the Court below has erred in law in considering the effect of the dismissal of Suit No.64 of 1968- answered negative- Tirath Ram's daughters instituted a suit for partition against Smt. Jashoda and Lakhraji, seeking a declaration of their share and Jashoda, excluding Lakhraji- dismissed for default ex parte- bar of the plaintiff's right to institute a fresh suit under Order IX Rule 9 of the Code, if the suit was dismissed under Order IX Rule 8 of the Code- entirely different from the bar of *res judicata*- dismissal of suit- no destruction of party's right, whose suit dismissed in default- if in a suit for partition of property, a decree is passed after trial- execution of that decree becomes barred by limitation or otherwise- a second suit on the same cause of action for a partition and declaration of shares in the joint property would be maintainable- even by the plaintiff of the former suit so long as the property is joint. (Paras 35, 37 and 42)

Held: Now, a bar of the plaintiff's right to institute a fresh suit under Order IX Rule 9 of the Code, if the suit was dismissed under Order IX Rule 8 of the Code, is entirely different from the bar of *res judicata*. It is attracted in a case where the defendant appears and the plaintiff does not, when the suit is called on for hearing and the Court dismisses it in default. The plaintiff is precluded from bringing a fresh suit on the same cause of action by virtue of Order IX Rule 9 of the Code. His remedy is to apply for an order to set aside the dismissal, i.e. if he satisfies the Court that there was sufficient cause for his nonappearance. If he does not seek restoration of a suit dismissed in the defendant's presence, no fresh suit on the same cause of action can be instituted. However, a dismissal of this kind does not bring in any kind of *res judicata*. Whereas dismissal of a suit under Order IX Rule 9 merely bars the plaintiff's remedy of instituting a fresh suit, *res judicata* prevents the issues involved in the earlier suit from being tried, because they are already decided. *Res judicata* comes into play when in an action instituted by the plaintiff and contested by the defendant, an issue is decided finally between parties, the effect of which is expressed in a decree. In consequence, the right of the plaintiff or the defendant in terms of the decision in the earlier suit on merits, creates a right in favour of one and extinguishes that of the other, who fails. Therefore, while *res judicata* decides and determines the right of a party, where the party, who has the issue decided against him, loses his right that he claims, a dismissal of the suit does not lead to a destruction of the party's right, whose suit is dismissed in default. It only bars the remedy. The right survives. Therefore, if in some other and later suit brought by other side, the right in respect of which the remedy to bring a fresh suit is lost to the defaulting defendant because of the provisions of Order IX Rule 9 of the Code, it does not mean that in such suit, rights of the party, whose suit has been dismissed in default, falling for determination, cannot be determined. They ought to be determined because dismissal of the suit under Order XI Rule 8, does not destroy the right itself, as already said. (Para 35)

There is another principle why Suit No.64 of 1968 would not bar, defendant Nos.9 and 10

from claiming the determination of their share in the present suit. It has been held for a principle that if in a suit for partition of property, a decree is passed after trial, but the execution of that decree becomes barred by limitation or otherwise, a second suit on the same cause of action for a partition and declaration of shares in the joint property would be maintainable, even by the plaintiff of the former suit so long as the property is joint. (Para 37)

It must be added here that what this Court has observed regarding the right of a party to seek partition of a joint property, where his suit is dismissed under Order IX Rule 8 of the Code, is not in derogation of the wider principles, well acknowledged that a suit for partition after a decision of the first suit, where the decree is not executed for some reason, is not barred. What this Court has held is that notwithstanding the dismissal of a partition suit instituted by a co-sharer under Order IX Rule 8, even if it be regarded that his right to sue is barred, his right to claim a partition of his share in a suit brought by another cosharer, can never be held barred. This principle is to be understood within the parameters of the wider principles, permitting a second suit for partition to be brought under the circumstances indicated in those decision. (Para 42)

E. Second Appeal- Third substantial question of law- whether the Court below has erred in interpreting the effect of Section 14 of the Act of 1956 over the provisions of Section 2 of the Act of 1856- answered affirmative- Section of the Hindu Succession Act, 1956- Section 2 of the Hindu Widows' Remarriage Act, 1856- Date when succession opened out in favour of the widow- date of remarriage- of utmost importance- no divestment of widow's right possible- if remarriage after the promulgation of the Act of 1956- Lakhraji held to be entitled to 1/4th share of the property- Appeal partly allowed. (Paras 63, 64 and 65)

Held: Therefore, what is relevant is the date when succession opened out in favour of the widow, and more than that, the date when she remarried. If both dates fall after the enforcement of the Act of 1956, even in a case when the Act of 1856 was still in force, the widow would not be divested of her right at all. In case, the succession opened out before enforcement of the Act of 1956, but the widow remarried after the enforcement of the last mentioned Act, the provisions of Section 2 of the Act of 1856 would not apply and there would be no divestment of property that vests in her absolutely under Section 14(1) of the Act of 1956. Likewise, the Act of 1956 having overriding effect on all laws, if either of the two events have happened after the enforcement of the Act of 1956, any custom or uncodified law, would not apply to divest the widow. (Para 63).

In the present case, Lakhraji's husband died on 14.10.1967 and she remarried Phagoo in a customary form of marriage, called *Sagai*, native to the community to which she belonged, in the month of April, 1968. By the time both events happened, the Act of 1956 had come into force. This, then being the position on facts, Smt. Lakhraji must be held to have inherited the suit property from her deceased husband in the specified share as her absolute estate, of which she could not be divested, either by custom or by virtue of Section 2 of the Act of 1856. The issue, if she was in possession of the suit property when succession opened out, is not seriously or even slightly in issue in this appeal, because it is not in dispute that in whatever manner, she was duly recorded in the revenue records to the exclusion of the other heirs entitled. There is also evidence that she was in possession of the suit property and no one has disputed the said fact. Smt. Lakhraji's share would, therefore, vests in her absolutely, of which she would not be divested upon remarriage to Phagoo. (Para 64).

Substantial Question of Law No.3 is, therefore, answered in the affirmative and it is held that the Court below erred in interpreting Section 14 of the Act of 1956 regarding its effect on the provisions of Section 2 of the Act of 1856. (Para 65)

Appeal Partly allowed. (E-14)

List of cases cited:

1. Shaukat Ali Vs Kamal @ Abdulla 1980 LLJ 243

2. Kamla Devi Vs Sunni Central Board of Waqfs, U.P., Lucknow through its Secretary & anr., AIR 1949 All 63

3. Bisheshar Das & anr. Vs RamParshad & anr., (1906) 3 All LJ 379

4. Kannikandath Kizhe Purakkal Velia's Son, Thayan Vs Kannikandath Kozhe Purakkal, 1934 SCC OnLine Mad 424 : AIR 1935 Mad 458

5. Devendra Kumar Srivasatava Vs Prabhat Kumar Srivastava & ors., 2023 SCC OnLine Pat 2458

6. Asha Sharma & ors. Vs Amar Nath & ors., AIR 2003 HP 32

7. Manakkal Nadakumar Vs M. Subramanyan & ors., ILR 2017 (1) Kerala 907

8. Sankar Prasad Khan and others Vs Smt. Ushabala Dasi and other, AIR 1978 CAL 525

9. Gangadhar Charan Naga Goswami & ors. Vs Sm. Saraswati Bewa & anr., AIR 1962 Orissa 190

10. Mst. Bhuri Bai Vs Mst. Champi Bai, 1967 SCC OnLine Raj 10

11. Velamuri Venkata Sivaprasad (dead) by LRs Vs Kothuri Venkateswarlu (dead) by LRs & ors., (2000) 2 SCC 139

12. Kizhakke Vattakandiyil Madhavan Vs Thiyyurkunnath Meethal Janaki, 2024 SCC OnLine SC 517

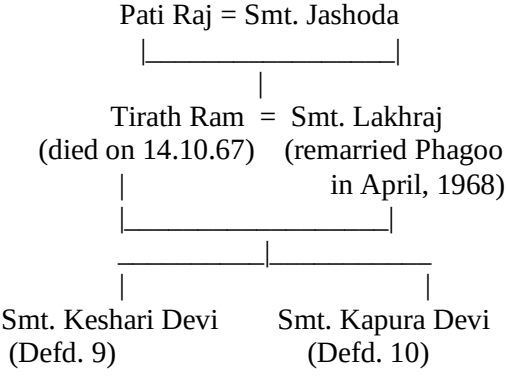
13. Cherotte Sugathan Vs Cherotte Bharathi, (2008) 2 SCC 610

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

1. This is a defendant's second appeal arising out of a preliminary decree for partition.

2. Gokaran, the sole plaintiff of Original Suit No.20 of 1972, instituted a suit for partition of four houses, shown in the schedule, with their own boundaries at the foot of the plaint, giving rise to the suit and all located in Plot No.854/29. The plaintiff demanded partition of his 1/3rd share in the four houses aforesaid, hereinafter referred to as 'the suit property', that he claimed against the defendants on the basis of a registered sale deed dated 13.12.1971, executed in his favour by Smt. Jashoda widow of Patiraj. The suit property was originally owned by one Tirath Ram son of Patiraj, who had acquired it of his own exertions. Tirath Ram died on 14.10.1967. Smt. Jashoda was his mother. She executed a registered sale deed dated 13.12.1971 of her 1/3rd share in the plaintiff's favour. The plaintiff, besides seeking a decree of partition and separate possession, prayed that a decree for the recovery of a sum of Rs.2136/- be passed against defendant Nos.1 and 2, and another for Rs.840/- against defendant Nos.6 and 7, on account of his proportionate share in the rent that the said defendants had realized from the tenants in the suit property.

3. A moreful description of the facts, leading to this appeal, would be necessary. But, before a reference to the facts, it would be apposite to refer to the following pedigree, which the Lower Appellate Court has relied upon and shows the accurate relationship of parties, who were the original owners of the suit property:



4. The plaintiff instituted the suit with a case that Tirath Ram carried on the business of a jeweller in town Khalilabad, District Basti. He constructed four houses, detailed in Schedule A at the foot of the plaint. Tirath Ram died on 14.10.1967, survived by his widow Smt. Lakhraji and two daughters, Smt. Keshari Devi and Smt. Kapura Devi, besides his mother, Smt. Jashoda Devi. Apparently, he died intestate and the four of his heirs would inherit a 1/4th share in the suit property, but for a certain decision of his widow, Smt. Lakhraji. It is the plaintiff's case that amongst the Sonars, a community from which Tirath Ram hailed, there is an ancient custom of remarriage by women after the death of their husband. There is another custom that after remarriage, the woman is divested of the estate that she inherits from her husband, which then reverts to the husband's heirs next in order of succession. Smt. Lakhraji is said to have married one Phagoo, defendant No.1 in the month of April, 1968, in accordance with the community's custom. Phagoo shifted to Smt. Lakhraji's house and settled with her, becoming what is described as 'Ghar Baitha' Husband. Both Lakhraji and Phagoo began a life together as man and wife, in consequence of which, Lakhraji lost all her rights and title to the suit property that she inherited from Tirath Ram. As a result, the share of the other heirs, to wit, Smt. Jashoda, Tirath Ram's mother and his two daughters, Smt. Keshari Devi and Smt. Kapura Devi, defendant Nos.9 and 10 in the suit, was enlarged to a 1/3rd. Smt. Jashoda transferred her 1/3rd share in the suit property vide registered sale deed dated 13.12.1971 in the plaintiff's favour for a total sale consideration of Rs.15,000/-, said to have been paid in cash. The plaintiff thus became a co-sharer in the suit property, comprising the four houses.

5. It is averred in the plaint that in the sale deed executed by Smt. Jashoda, her share has been mentioned as 1/2 due to a clerical error. Defendant Nos.1 to 7 to the suit are men, one of them a minor at the relevant time, to whom Smt. Lakhraji transferred her entire share in the suit property, she inherited from Tirath Ram through four sale deeds, being conveyances dated 28.05.1968, 01.03.1969, 21.05.1970 and 22.04.1971. All the four houses, comprising the suit property, were constructed by the late Tirath Ram, but in the sale deed dated 21.05.1970, there is a mention of the plot alone, whereon the houses were constructed. The plaintiff says that all these four sale deeds are fictitious and without consideration. These have been executed by Smt. Lakhraji, who had no title to convey. Defendant Nos.11 and 13 are tenants of the house on different rates of rent, from whom defendant Nos.1 and 2 have realized a sum of Rs.2136/- in rent during the last three years, proportionate to the plaintiff's share, which he is entitled to recover. Likewise, defendant Nos.6 and 7 have realized rents from tenants, Kishori, Gaya and Ram Khelawan, to whom they let out portions of the houses, comprising the suit property that they purchased from Smt. Lakhraji. The plaintiff claims a sum of Rs.840/- on account of rent realized by defendant Nos.6 and 7 from the tenants aforesaid, proportionate to his share in the suit property.

6. A written statement was filed by defendant Nos.9 and 10, admitting the plaint case to the extent of Tirath Ram's death, their relationship to him and that of Smt. Jashoda to the deceased. It is also admitted that defendant Nos.9 and 10 and Smt. Jashoda succeeded to Tirath Ram's estate as his heirs. These defendants, however, question the sale deed relied upon

by the plaintiff as illegal and void on ground that it was never Smt. Jashoda's conscious act and an instrument executed without consideration or legal necessity. It is also pleaded that the sale deed was one obtained by means of undue influence, because Smt. Jashoda was aged 100 years, who had almost lost her eyesight and become very hard of hearing. To add to this, she was an illiterate and a rustic woman. Defendant Nos.9 and 10 claim that they are entitled to the whole of the suit property after Smt. Jashoda's demise. It is also their case that the plaintiff's brother Prahlad purchased a grove of Tirath Ram from Smt. Lakhraji on 10.04.1969, and, similarly one Shubhkaran, a son of Lalsa Ram, purchased a field belonging to Tirath Ram from Smt. Lakhraji on 09.04.1969. The plaintiff says that Smt. Lakhraji remarried Phagoo in April, 1968 in accordance with the ancient custom of the community. Since Phagoo stays with her as her husband, Smt. Lakhraji, by the other custom of the community, stands divested of her rights and title to the suit property. These defendants, therefore, say that the sale deeds, executed by Smt. Lakhraji in favour of defendant Nos.1 to 7 on the various dates indicated, are without title, fictitious and without consideration. These have been got executed by Phagoo, defendant No.1 in his own name and in favour of his relatives and friends. It is also the case of these defendants that the sale deeds that were executed by Smt. Lakhraji in collusion with Phagoo, as already said, are fictitious and without consideration. There is an alternate plea that if ultimately it is held that they are owners of a 2/3rd share, the said share of theirs may be partitioned and separate possession delivered.

7. Defendant Nos.1, 2 and 8 have filed a joint written statement where they admit that Tirath Ram carried on a jeweller's business before his demise and constructed the suit property. He died in the year 1967. It is pleaded that his widow, Smt. Lakhraji, defendant No.8, succeeded to his estate as his heir and LR. It is not disputed that Smt. Lakhraji executed the various sale deeds in favour of defendant Nos.1 and 2, Phagoo and Ram Asrey, through which they have acquired title. According to these defendants, Tirath Ram was owner in possession of Plot Nos.857/4 and 275. He raised houses, making for the suit property, and Smt. Lakhraji inherited it as his widow and heir, after his demise. Khalilabad was under consolidation operations, when Tirath Ram passed away. Smt. Jashoda, Tirath Ram's mother, surrendered her rights in the suit property in favour of Smt. Lakhraji as also the other properties of Tirath Ram. This led Smt. Lakhraji, defendant No.8, becoming the sole bhumidhar in possession of the suit property, that was mutated in her name alone. The consolidation records became final and Smt. Jashoda did not press her claim during the currency of those operations. Smt. Jashoda was ill for a period of about two months, preceding her death and had lost her power of understanding, with the result that the sale deed relied upon by the plaintiff is a fictitious and forged document. It has been obtained by putting up an imposter for Smt. Jashoda. These defendants denied Smt. Lakhraji's remarriage and also the custom about divesting of a widow's rights that she has inherited from her husband upon remarriage. A plea of the bar of estoppel and acquiescence has also been raised.

8. Defendant Nos.3 to 5 filed their own written statement together, denying that Smt. Lakhraji remarried Phagoo. However, they do not deny the fact that Tirath Ram passed away in the year 1967

and Smt. Lakhraji succeeded to the estate as his widow. These defendants admitted the custom of Sagai in the community of Sonars as well as the fact that Smt. Lakhraji had executed a sale deed in their favour. They have pleaded that Tirath Ram *was bhumidhar* in possession of Plot No.154/21 and 275-M. He built houses thereon, which comprise the suit property. These defendants plead that they had good relations with Tirath Ram, on account of which, he agreed to give them some land for building a house, as they had expressed their desire to construct a house for themselves in Khalilabad for carrying on business. It is these defendants' case that that Tirath Ram agreed to transfer some land to them for a sum of Rs.1500/-. There were parleys held in September, 1967 between defendant Nos.3 to 5 and Tirath Ram, in consequence whereof, Tirath Ram put these defendants in possession of land, agreed to be sold to them. They had commenced laying foundation, when Tirath Ram passed away in October, 1967, without executing a sale deed. It is pleaded, therefore, that the sale deed executed by Smt. Lakhraji in their favour is to honour her husband's words. The defendants plead that they have incurred an expenditure of about Rs.10,000/- or more in laying the foundation and constructing a portion of the building. The sale deed relied upon by the plaintiff has also been challenged by these defendants as an act of Smt. Jashoda with her mind not accompanying it and not binding on the defendants at all. These defendants too raise a plea of estoppel.

9. There is another written statement filed by defendant Nos.11 and 13, again a joint one. These defendants admit that Lakhraji had remarried Phagoo and has been living with him as his wife. The said defendants admit the plaintiff's case that Smt. Jashoda executed a sale deed relating to her share in the suit property in the plaintiff's favour and put him in possession. These defendants have also admitted the execution of the sale deed in favour of defendant Nos.1 to 7 by defendant No.8 and the fact that they were tenants of House No.1 in the list of houses, shown in Schedule A to the plaint. They have been paying rent to the plaintiff relative to their share after execution of the sale deed. It is pleaded that these defendants have been impleaded to the suit without a cause.

10. An additional written statement has been filed by defendant No.12, denying the plaintiff's right, title to and possession of the suit property. He has questioned the plaintiff's right to institute the suit with a plea that the said defendant was a tenant of defendant Nos.1 and 2 and paying rent to them. He has also pleaded that he has vacated the premises and put defendant Nos.1 and 2 in possession.

11. The plaintiff has put in a replication and denied the case of a family arrangement, where Jashoda gave up her rights to her share in Tirath Ram's property. It is pleaded that she remained in her senses till her death. It is also denied that Smt. Lakhraji had secured the consent of defendant Nos.9 and 10, when she executed sale deeds in favour of defendant Nos.6 and 7. The plaintiffs have reaffirmed through another replication the custom of remarriage amongst the Sonars and the appended custom of divesting of rights of the widow in the estate inherited from the deceased husband. Defendant Nos.1 and 2, through a joint additional written statement, and defendant No.10 through another additional written statement, besides defendant Nos.6 and 7, through a separate

additional written statement, have affirmed the cases respectively pleaded by them regarding the plaintiff not at all being the owner of the suit property. It has been reaffirmed that the plaintiff has no share in the suit property.

12. The Trial Court framed the following issues:

"1- Whether the suit is under valued?

(b) Is the court fee paid insufficient?

2- Whether Smt. Lakhraji has remarried with Fagu defendant no.1 as alleged? If so its effect?

3- Whether there was any custom in the community of Tirath Ram of divesting the widow from the property of the deceased?

4- Is the share of plaintiff in the disputed property?

5- To what relief any is the plaintiff entitled?

6- Whether plaintiffs are entitled to recover the amount of rent from the defendants as alleged?"

13. The parties went to trial on the said issues leading both documentary and oral, where the Trial Court held in favour of the plaintiff on Issues Nos.1 and (b). Issue No.2 was answered by the Trial Judge in the negative and holding that the plaintiff had failed to prove that Lakhraji had married defendant No.1. Issue No.3 was also answered in the negative holding that the plaintiff failed to prove the custom in the community, to which Tirath Ram belonged, divesting the widow of her property received from her deceased husband upon remarriage. It was also held that she became absolute owner of the suit property upon her husband's death in view of the provisions of Sections 4 and 14 of the Hindu Succession Act, 1956 (for short, 'the Act of 1956') and that the provisions of the Hindu Widows' Remarriage Act, 1856 (for short, 'the Act of 1856') would not apply once the widow became full owner. It was, therefore, concluded that even if Smt. Lakhraji remarried Phagoo, it would not divest her of title in the suit property. Issue No.4 was answered in the manner that Smt. Jashoda had not executed the sale deed dated 13.12.1971 in the plaintiff's favour for reasons assigned there, including that a copy of Part II Yogya Praurh Register, Ex. A-14, shows that Jashoda had died on 10.12.1971 whereas the sale deed was executed on 13.12.1971.

14. So far as the share of Smt. Keshari Devi and Smt. Kapura Devi is concerned, the Trial Court has evaluated evidence, including the effect of a suit for partition filed by them, being Suit No.64 of 1968, that was dismissed in default, to infer that the case of a family partition taking place later, where defendant Nos.9 and 10 surrendered their rights to resolve the dispute is believeable. The Trial Court has relied, particularly, upon Ex. A-9, Ex. A10 and Ex. A11, extracts of CH Form-23, which show that Lakhraji's name had been entered after Tirath Ram's death. It has been reasoned that Jashoda, who was alive at that time, did not object. It is inferred that Jashoda had surrendered her rights to Lakhraji. The four sale deeds executed by Smt. Lakhraji in favour of defendant Nos.1 to 7 were noticed to have been executed in Smt. Jashoda's lifetime without any

objection from her, and, therefore, affording added reasons about Smt. Jashoda surrendering her rights. Coming back to the share of defendant Nos.9 and 10, is the fact that after dismissal in default of their own suit for partition, they did not get it restored and never entered the witness-box to support their claim. It is, particularly, remarked by the Trial Court that in the consolidation proceedings, where Smt. Lakhraji came to be recorded after Tirath Ram's demise exclusively, defendant Nos.9 and 10 did not raise any objection. There is an added observation that Lakhraji also executed a sale deed in favour of Shubhkaran and Prahlad. This sale deed is admitted by defendant Nos.9 and 10. There is no objection to the aforesaid deeds in favour of Prahlad and Shubhkaran, notwithstanding the case of a remarriage by Lakhraji and resultant divestment of her interest in Tirath Ram's estate. From all this conduct and transactions, the case about defendant Nos.9 and 10 also surrendering their right in favour of Smt. Lakhraji has been accepted by the Trial Court. Based on all these facts, the learned Trial Judge dismissed the suit by means of his judgment and decree of 3rd November, 1980.

15. Aggrieved by the aforesaid decree passed by the learned Trial Judge, Gokaran, the plaintiff, instituted Civil Appeal No.492 of 1980 before the District Judge of Basti, seeking reversal of the Trial Court's decree. The appeal was admitted to hearing on 20.12.1980. Defendant Nos.9 and 10 too filed cross-objections in Civil Appeal No.492 of 1980, with a prayer that the findings of the Trial Court against the said defendants be set aside with costs. No variation, modification or setting aside of the decree was, however, sought. The Lower Appellate Court framed the following points for determination:

"1. Whether Smt. Lakhraji remarried Phagoo?

2. Whether there was a custom amongst the Sonars of remarriage by the widows and if so, is there any custom regarding the divesting of the vested estate in the widow after remarriage? What is the effect of the provisions of Hindu Succession Act and Hindu Widow's Re-marriage Act on the aforesaid custom?

3. Whether there has been a family settlement under which Smt. Lakhraji alone became owner of the disputed properties or alternatively whether Smt. Jashoda surrendered her rights in the properties of Tirath Ram which devolved on her after the death of Tirath Ram?

4. Whether Smt. Jashoda was dead on the date of the alleged execution of the sale-deed, dated 13.12.71, paper no. 140 C or she executed the sale-deed in question?

5. What, if any, was the share of Smt. Jashoda and what, if any, is the share of the plaintiff and defendants 9 and 10 each?"

16. The Lower Appellate Court allowed the plaintiff's appeal as also the cross-objections filed by defendant Nos.9 and 10. The Trial Court's decree was set aside and the suit decreed for relief of partition. The plaintiff was held entitled to a 1/3rd share in the suit property and defendant Nos.9 and 10 to a 2/3rd, which the two defendants would share equally. The plaintiff was also held entitled to recover a sum of Rs.2136/- from defendant Nos.1 and 2 and a sum of Rs.840/- from

defendant Nos.6 and 7, respectively towards rent, received by the said defendants from the tenants. The plaintiff was held entitled to costs of the appeal throughout from all the defendants, including defendant Nos.9 and 10. Defendant Nos.9 and 10 were held entitled to costs of their cross-objections from the remaining defendants.

17 . This appeal was admitted to hearing on the following substantial questions of law:

"1. Whether the court below had the jurisdiction to entertain the appeal filed by the plaintiff?

2. Whether the court below has erred in law in considering the effect of the dismissal of suit no.64 of 1968?

3. Whether the court below has erred in interpreting the effect of Section 14 of the Hindu Succession Act over the provisions of Section 2 of the Hindu Widows Re-marriage Act, 1856?"

18. This appeal was heard and decided by this Court on an earlier occasion and it was quite a long time ago. This appeal was decided vide judgment and decree dated 24.04.2002, allowing it with costs, setting aside the decree of the Lower Appellate Court and restoring that of the Trial Judge. The judgment and decree of this Court was challenged in appeal by special leave before the Supreme Court, being Civil Appeal No. 2220 of 2006, where the appeal was allowed by a short order of their Lordships, holding that the High Court has not recorded any finding on Substantial Questions of Law Nos.2 and 3, perhaps, under an impression that once substantial questions of law are framed and the appeal admitted, this Court gets jurisdiction to re-appreciate evidence and set aside findings of fact recorded by the first Appellate Court. On this finding, the appeal was allowed and the judgment and decree earlier passed by this Court set aside with a remit of the appeal to this Court for decision afresh on the substantial questions of law already framed, or any additional substantial question of law, that may be framed under Section 100(5) of the Code of Civil Procedure, 1908 (for short, 'the Code').

19. There is no cavil about the fact that Substantial Question No.1 was not pressed during hearing before this Court on the earlier occasion, but not after remand. During the resumed hearing of the appeal on 16.08.2021, four other substantial questions of law were framed, bearing Nos.4 to 7. The order dated 16.08.2021 reads:

"Midway during hearing, it was pointed out by Mr. Pramod Jain, learned Senior Advocate assisted by Mr. Ashutosh Srivastava, learned Counsel for the appellant that the Supreme Court, while remanding the case, had left it open to this Court to frame any additional question that might arise. He submits that from the pleading of parties, a stand had been taken that the suit property is agricultural and there has never been a declaration under Section 143 of the U.P. Z.A. & L.R. Act, 1950, the result whereof would be two folds: first, the jurisdiction of the Civil Court would be barred, and in the second place, the law governing succession would be the U.P. Z.A. & L.R. Act and not the Hindu Succession Act. It is also submitted that respondent nos.9 and 10 suited their rights against Lakhraji before the Consolidation Authorities in title

proceedings, on account of which the rights of the respondents are now barred by Section 49 of the U.P. Consolidation of Holdings Act. The question go to the root of the matter, and, therefore ought to be dealt with in this appeal as substantial questions of law. Indeed, the way these are suggested, they appear to be substantial questions of law, subject to what the respondents say under sub-Section (4) of Section 100. It is agreed that the questions, that are now being formulated, shall be absolutely open to objection by the respondents under sub-Section (4) of Section 100 at the further hearing of this appeal. The following additional substantial questions of law, therefore, appear to be involved (consecutively numbered after the questions already formulated):

(4) Whether the property, subject matter of suit, in the absence of a declaration under Section 143 of the U.P. Z.A. & L.R. Act, by its user as abadi, can be regarded as such?

(5) Whether succession to the suit property would be governed by the provisions of the U.P. Z.A. & L.R. Act or the provisions of the Hindu Succession Act?

(6) Whether the suit would be barred by the provisions of Section 331 of the U.P. Z.A. & L.R. Act?

(7) Whether the suit would be barred by the provisions of Section 49 of the U.P. Consolidation of Holdings Act?

On the joint request of Mr. Pramod Jain, learned Senior Advocate assisted by Mr. Ashutosh Srivastava, learned Counsel for the defendant-appellant and Mr. B.P. Singh, learned Senior Advocate assisted by Mr. P.H. Vashistha, learned Counsel for the plaintiff-respondents, list this appeal in the additional cause list on 25.08.2021."

20. On 26.08.2021, learned Senior Advocate appearing for respondent Nos.2 and 3 to the appeal, since long substituted by their heirs and LRs, indicated his intention to file some additional documents that could not earlier be discovered despite due diligence. These respondent Nos.2 and 3, represented through their heirs and LRs, are none else than defendant Nos.9 and 10, to wit, Smt. Keshari Devi and Smt. Kapura Devi. They did move an application under Order XLI Rule 27 of the Code, being Civil Misc. Application No.23 of 2021, but after hearing learned Counsel, it was rejected vide order dated 19.04.2022. The hearing of this appeal, therefore, after remand, proceeded before this Court on behalf of defendant-appellant Nos.1 to 4, all of whom are dead and represented by their heirs and LRs on one hand, and, on the other, the heirs and LRs of respondent Nos.2 and 3, or as already said, defendant Nos.9 and 10, Smt. Keshari Devi and Smt. Kapura Devi.

21. The plaintiff, Gokaran, did not pursue this appeal after the judgment passed on the earlier occasion and remand by the Supreme Court. Likewise, appellant Nos.5, 6 and 7, who are defendant Nos.5, 6 and 7, did not appear at the hearing of this appeal. Appellant No.8, Smt. Lakhraji, who is defendant No.8, is dead and her interest was represented by appellant Nos.1, 2, 3, 4, 5, 6 and 7. Out of all these defendant-appellants, deceased-appellant Nos.1 to 4 are represented by their heirs and LRs, who have been heard in support of the appeal. They represented the interest of Lakhraji as

well. After all, defendant-appellant Nos.1 to 7, which includes the absenting defendant Nos.5, 6 and 7, have all acquired their interest in the suit property through conveyances executed by Smt. Lakhraji, defendant No.8. To sum up, therefore, this appeal has been heard at the instance of the heirs and LRs of defendant-appellant Nos.1, 2, 3 and 4 on one hand and the heirs and LRs of defendant Nos.9 and 10 on the other.

22. Heard Mr. Pramod Jain, learned Senior Advocate assisted by Mr. Shreesh Srivastava, learned Counsel for the defendant-appellants and Mr. B.P. Singh, learned Senior Advocate assisted by Mr. P.H. Vashishtha, learned Counsel for the defendant-respondents.

23. It may be remarked at the outset that in a suit for partition, every party, whether plaintiff or defendant, occupies the position of a plaintiff in the sense that shares of one and all have to be declared. Of course, realization of shares of parties, who desire a partition by metes and bounds, depends upon them, seeking a final decree, subject to payment of court-fee. Thus, notwithstanding the fact that the plaintiff or some of the defendants may not have appeared at the hearing of this appeal, there has to be an accurate declaration of their shares, whether it is by affirmation of the decree passed by the Lower Appellate Court or its modification. When the hearing of this appeal commenced, after remand, learned Counsel for the parties persuaded this Court to formulate four additional questions under sub-Section (4) of Section 100 of the Code.

24. Upon hearing learned Counsel for the parties at length, what this Court finds is that the additional questions, that were formulated on 16.08.2021, are really not involved in this appeal. The reason is that upon facts and some documentary evidence noticed by the Courts below, which is on record, these questions may appear to be attractive, but are indeed not involved. There was no case ever pleaded by any of the defendants that in the absence of a declaration under Section 143 of the U.P. Z.A. & L.R. Act, the suit property cannot be regarded as abadi. This was never the parties' case, upon which they went to trial or heard in appeal by the Lower Appellate Court. Likewise, the other two questions regarding the right to succession being governed by the U.P. Z.A. & L.R. Act, or alternatively by the Act of 1956 was never a case that was suited between parties before both the Courts below. Also, there was never an issue raised or tried between parties, if the suit is barred by Section 331 of the U.P. Z.A. and L.R. Act. There was also never a plea or a case by the defendants that the suit is barred by Section 49 of the U.P. Consolidation of Holdings Act, which would have been determined by the Courts below, if agitated before them at the instance of the defendants.

25. In the absence of parties suiting a case before the Courts below that would support the additional questions, which are essentially questions, that are not pure questions of law, but would require consideration of some evidence, this Court does not think that the present appeal ought be determined on the added questions.

26. The first substantial question of law is, whether the Lower Appellate Court had jurisdiction to entertain the appeal. This question essentially relates to the pecuniary jurisdiction of the District Court, going by valuation of the suit for the

purpose of hearing an appeal, determined by law at the relevant time. The learned Judge in the Lower Appellate Court has dealt with this question as a preliminary point in the appeal. The relief of partition, the plaintiff claimed, was with regard to a 1/3rd share in the property, the total value of which was Rs.45,000/-. The valuation of the plaintiff's share, the Lower Appellate Court has found, would work out to Rs.15,000/-, about which there is a remark that it is not disputed. The further claim of the plaintiff is with regard to recovery of Rs.2136/- and another sum of Rs.840/- as arrears of rent, which too is not disputed. An objection appears to have been taken before the Lower Appellate Court by one of the respondents that the relief of partition would involve cancellation of the four sale deeds executed by defendant No.8, Lakhraji in favour of defendant Nos.1 to 7, worth a total sum of Rs.20,000/-. The valuation of these deeds, if added to the valuation of the relief of partition and recovery of arrears of rent from defendant Nos.9, 10 and 11, would peg the valuation of the suit for the purpose of jurisdiction at a sum of Rs.37,976/-; and a *fortiori* that would be the valuation of the appeal for the purpose of pecuniary jurisdiction. Going by pecuniary jurisdiction of the District Court at the relevant time, the appeal would not be cognizable by the learned District Judge but the High Court.

27. This contention of the party, objecting to the jurisdiction of the District Judge to hear the appeal, was rejected on the foot of the cause of action pleaded by the plaintiff to support his claim for partition, where the four sale deeds executed by Lakhraji were claimed to be *ultra vires*, inasmuch as upon her remarriage to Phagoo, after the death of Tirath Ram, following a custom in the community of *Sonars*, permitting remarriage in the *Sagai* form to a widow, her share in her deceased husband's property was lost by a further custom that remarriage of a widow led her to lose any interest in her husband's estate that she inherited upon his demise. The Lower Appellate Court, therefore, regarded it to be a case where the sale deeds executed by Lakhraji were ultra vires and void, and relying upon the case of **Shaukat Ali v. Kamal alias Abdulla 1980 LLJ 243** held that a sale deed that was alleged to be fictitious did not require cancellation or setting aside. It can be disregarded.

28. The Lower Appellate Court also considered the case of **Kamla Devi v. Sunni Central Board of Waqfs, U.P., Lucknow through its Secretary and another, AIR 1949** All 63, where the plaintiff purchased some waqf property from the heirs of the waqif and then brought a suit for a declaration that the property purchased by him was not a waqf. Rather, the plaintiff was the owner thereof. It was held in that suit, as noted by the Lower Appellate Court, that in effect the suit was one for cancellation of or adjudging void the waqfnama in the plaint, for reason that the waqfnama executed by the waqif was sought to be cancelled on ground that it was not properly executed. The Lower Appellate Court remarked that the said case is distinguishable on facts. The plea of improper execution of a document is not the same as the executant not having power to execute it at all. The Lower Appellate Court opined that according to the plaintiff's case, Lakhraji had no title at all to transfer, and, therefore, her deeds were void. This was premised on the case that her title had ceased upon remarriage in the customary form of Sagai to Phagoo.

29. About the cross-objections, the valuation of which is Rs.30,000/-, the Lower Appellate Court remarked that the cross-objections preferred by defendant Nos.9 and 10 were one that did not challenge the decree of dismissal of the suit nor a decree for declaration of their share was sought. Defendant Nos.9 and 10 laid a case in the cross-objections about the findings recorded by the Trial Court being wrong. The Lower Appellate Court, therefore, opined that the cross-objections cannot be regarded as an appeal and the valuation of the cross-objection made at Rs.30,000/- by the defendant, was of no consequence. It would not in any manner change the valuation of the appeal which would be governed by the valuation of the suit made by the Trial Court. The valuation of a suit for the purpose of jurisdiction is made on the basis of reliefs claimed by the plaintiff, founded on the case that he/ she pleads. We agree with the Lower Appellate Court that the plaintiff, in substance, claimed a partition of his 1/3rd share and recovery of rent in the specified sum from defendant Nos.9, 10 and 11. He valued the suit on the basis of the said relief. He did not value the suit for reliefs of cancellation of the four sale deeds executed by Lakhraji, because he regarded the same to be ultra vires and void. A document, that is void ab initio for want of even a semblance of title in the executant, can always be disregarded and other reliefs claimed by the plaintiff upon establishment of his right. A document or documents regarded by the plaintiff void need not be sought cancellation of, for these do not at all create any rights in derogation of the plaintiff's, or for that matter, anyone else's. This distinction between documents that according the plaintiff's case pleaded are void ab initio and those that must be adjudged void and, therefore, require cancellation is well established. Since a relief for cancellation of a void document, according to the plaintiff's case, is not necessary at all, the plaintiff was not required to seek cancellation of the four sale deeds, executed by Lakhraji, defendant No.8 in favour of defendant Nos.1 to 7. He was, therefore, not required to seek relief of cancellation or implicitly regarded as having sought a relief of cancellation, which would add to the valuation of the suit, and, a fortiori to the appeal. The Lower Appellate Court was, therefore, perfectly right in its reasoning to have kept the relief of cancellation out of the subject matter of the suit and, therefore, its valuation.

30. There is another vantage to it. Though, a suit is to be valued according to the reliefs claimed in the plaint, the plaintiff in any case would never be required to seek cancellation of the four sale deeds. If Lakhraji had a right to execute those sale deeds, the suit being one for partition, the rights of co-sharers and parties to the suit would be determined on the basis that Lakhraji had a share. If Lakhraji did not have a share, the shares of parties to the suit would be determined accordingly. Therefore, in either event, there would be no necessity to seek cancellation of the four sale deeds executed by Lakhraji.

31. In the opinion of this Court, therefore, the suit and the appeal were rightly valued and the appeal was within the pecuniary jurisdiction of the Lower Appellate Court according to the law at the time that he heard the appeal. The learned Additional District Judge was also right in excluding from consideration the valuation shown on the cross-objection, because the cross-objection preferred by defendant

Nos.9 and 10 did not claim any share in the decree or sought the decree of dismissal passed by the Trial Court to be reversed or modified. The cross-objection was limited to certain objections to the findings recorded by the Trial Court, which could in any case be objected to at hearing of the appeal before the Lower Appellate Court, without lodging cross-objections by defendant Nos.9 and 10. We, therefore, answer Substantial Question No.1 in the **affirmative** and hold that the learned District Judge had pecuniary jurisdiction to entertain and determine the appeal.

32. This takes to the second question, to wit, whether the Court below has erred in law in considering the effect of the dismissal of Suit No.64 of 1968.

33. After Tirath Ram's death on 14.01.1961 and apparently after Smt. Lakhraji is said to have entered into a second marriage with Phagoo, defendant Nos.9 and 10, Smt. Keshari Devi and Smt. Kapura Devi, instituted a suit for partition against Smt. Jashoda and Lakhraji, seeking a declaration of their share and Jashoda, excluding Lakhraji. This suit was numbered as Suit No.64 of 1968. It is common ground between parties that the suit was one for partition and that it was dismissed. As appears from the record, Suit No.64 of 1968 was dismissed in default and never restored. It is contended by learned Counsel for defendant-appellant Nos.1 to 4 that Smt. Keshari Devi and Smt. Kapura Devi, having instituted a suit for partition of their share, which was dismissed in default and never restored, they have no right now in the present suit, instituted by Gokaran to seek a declaration of their share. Their right stands barred. The learned Counsel appearing for defendant Nos.9 and 10, on the other hand, contends that the earlier suit being dismissed in default, there is no res judicata that would come into play so as to bar defendant Nos.9 and 10 from asserting their claim to a partition of their share in the suit property.

34. The Lower Appellate Court has remarked on the same lines about the issue as the learned Senior Advocate appearing for defendant Nos.9 and 10 contends. On this issue about the present claim asserted by defendant Nos.9 and 10 to a partition of their share being barred on account of an earlier suit instituted by them for partition being dismissed, albeit in default, it is remarked by the Lower Appellate Court in the following terms:

"……. It may be also mentioned here that before this litigation there was a litigation between Smt. Lakhraji and Smt Jashoda on one hand and Smt. Kesari and Kapura on the other regarding the properties of Tirath Ram. Smt. Kesari and Kapura filed the suit in which according to written statement of Smt. Jashoda and Smt. Lakhraji (copy paper no.156 C), it was alleged that Smt. Lakhraji remarried Phagoo and it was also claimed in the plaint that there was a custom of remarriage in the Biradari of the Sonars which was linked up with the custom that on remarriage the widow ceases to have any interest in the property of her husband of which she becomes divested and these allegations were denied by Smt. Jashoda and Smt. Lakhraji. Smt. Kesari and Kapura are the own daughters of Smt. Lakhraji from her husband Tirath Ram and if there had been no remarriage, they would not have come out with that allegation against their own mother. Therefore, this litigation (O.S. No.64/68) which was dismissed for default vide copy of the order dated 11.3.69, paper no.147 G,

may be said to invoke one instance in === of inheritance divesting was claimed denied. This dismissal in default can have no effect on the merits of this suit because there was no judgment on merits vide A.I.R. 1964 Allahabed 302, Ram Prasad and another Vs. Chhajju and others."

35. Now, a bar of the plaintiff's right to institute a fresh suit under Order IX Rule 9 of the Code, if the suit was dismissed under Order IX Rule 8 of the Code, is entirely different from the bar of *res judicata*. It is attracted in a case where the defendant appears and the plaintiff does not, when the suit is called on for hearing and the Court dismisses it in default. The plaintiff is precluded from bringing a fresh suit on the same cause of action by virtue of Order IX Rule 9 of the Code. His remedy is to apply for an order to set aside the dismissal, i.e. if he satisfies the Court that there was sufficient cause for his non-appearance. If he does not seek restoration of a suit dismissed in the defendant's presence, no fresh suit on the same cause of action can be instituted. However, a dismissal of this kind does not bring in any kind of *res judicata*. Whereas dismissal of a suit under Order IX Rule 9 merely bars the plaintiff's remedy of instituting a fresh suit, *res judicata* prevents the issues involved in the earlier suit from being tried, because they are already decided. Res judicata comes into play when in an action instituted by the plaintiff and contested by the defendant, an issue is decided finally between parties, the effect of which is expressed in a decree. In consequence, the right of the plaintiff or the defendant in terms of the decision in the earlier suit on merits, creates a right in favour of one and extinguishes that of the other, who fails. Therefore, while res judicata decides and determines the right of a party, where the party, who has the issue decided against him, loses his right that he claims, a dismissal of the suit does not lead to a destruction of the party's right, whose suit is dismissed in default. It only bars the remedy. The right survives. Therefore, if in some other and later suit brought by other side, the right in respect of which the remedy to bring a fresh suit is lost to the defaulting defendant because of the provisions of Order IX Rule 9 of the Code, it does not mean that in such suit, rights of the party, whose suit has been dismissed in default, falling for determination, cannot be determined. They ought to be determined because dismissal of the suit under Order XI Rule 8, does not destroy the right itself, as already said.

36. On this reasoning of the matter, defendant Nos.9 and 10 in a suit brought by the plaintiff, where shares of parties have been opened up for determination by the Court, cannot be held barred on account of dismissal in default of the said defendants' earlier suit brought against defendant No.8, Smt. Lakhraji and their grandmother, Smt. Jashoda, arrayed as defendants to the earlier suit.

37. There is another principle why Suit No.64 of 1968 would not bar, defendant Nos.9 and 10 from claiming the determination of their share in the present suit. It has been held for a principle that if in a suit for partition of property, a decree is passed after trial, but the execution of that decree becomes barred by limitation or otherwise, a second suit on the same cause of action for a partition and declaration of shares in the joint property would be maintainable, even by the plaintiff of the former suit so long as the property is joint. This principle is well settled by consistent authority spreading over a period of well

over 100 years. In **Bisheshar Das and another v. Ram-Parshad and another, (1906) 3 All LJ 379,** a Bench decision of this Court, it was held by Stanley, C.J., speaking for the Court:

"The principle laid down in the case of Nasratullah v. Mujibullah [[1891] I.L.R., 13 All., 309.] appears to us to govern this case. In that case it was held that where a decree declaring a right to partition has not been given effect to by the parties and the decree has become by lapse of time or otherwise unenforcible, it is competent to the parties or any of them, if they continue still to be interested in the joint property, to bring a fresh suit for a declaration of their right to partition. In the course of their judgment the learned Chief Justice, Sir John Edge, and one of us stated as follows:— "It appears to us that when a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when by reason of limitation or otherwise they cannot put into effect the decree first obtained. In this respect suits for declaration of right to partition differ from most other suits, so long as the property is jointly held, so long does a right to partition continue. When a person having a right to partition and desiring to partition, has his right challenged, it appears to us he can maintain a suit for a declaration, provided his prior decree is not still enforcible." As it appears to us the right to enforce partition is a legal incident of a joint tenancy and so long as such tenancy subsists so long may any of the joint tenants apply to the Court for partition of the joint property. ….."

38. In **Kannikandath Kizhe Purakkal Velia's Son, Thayan v. Kannikandath Kozhe Purakkal, 1934 SCC OnLine Mad 424 : AIR 1935 Mad 458,** a Bench decision of the Madras High Court, it was held:

"The first point is whether the present suit is barred under O. 9, R. 9 by reason of the former suit Cases of a second suit for partition may fall under three classes: (1) Where the former suit ended in a final decree, e.g. 3 Bom. L.R. 91 [Soni v. Munshi, (1901) 3 Bom LR 94.] distinguished in 10 C.W.N. 839 [Madan Mohan v. Baikanta Nath, (1906) 10 CWN 839], cases where there was preliminary decree but not a final decree example of this are 1915 All. 1 [Mukerji v. Afzul Beg, 1915 All 1 : 27 IC 694 : 37 All 155], 33 Cal. 1101 [Mariamanessa Bibi v. Joyanan Bibee, (1906) 33 Cal 1101 : 4 CLJ 149 : 10 CWN 934] and 1918 Mad. 751 [Sethu Rama Sahib v. Chethu Rama Sahib, 1918 Mad 751 : 40 IO 820]. (3) Cases where the suit was dismissed for default: 28 All 627 [Bisheshar Das v. Ram Pershad, (1906) 28 All 627 : 3 ALJ 379 : 1906 AWN 142.].

The case before us falls under the last heading. Following the decisions in 28 All. 627 [Bisheshar Das v. Ram Pershad, (1906) 28 All 627 : 3 ALJ 379 : 1906 AWN 142] and 1926 Mad. 1018 [Madhura Gramani v. Sesha Reddy, 1926 Mad 1018 : 97 IO 622 : 49 Mad 939], we hold that the present suit is not barred. The reason is that, even after the dismissal of the former suit, the jointness continues and there is a continuing cause of action.

It is unnecessary to consider the decision in 1918 Mad. 751 [Sethu Rama Sahib v. Chethu Rama Sahib, 1918 Mad 751 : 40 IO 820.] and whether 33 Cal. 1101 [Mariamanessa Bibi v. Joyanan Bibee, (1906) 33 Cal 1101 : 4 CLJ 149 : 10 CWN 934.] was rightly dissented from in it. The only other point relates to interest. The plaintiff will have interest only from the date of plaint vide 1930 Mad. 727 [Nanchappa Gounden v. Iuichana Mannadiar, 1930 Mad 727 : 127 IC 630 : 53 Mad 549.]. The decree is affirmed subject to this modification. As the appellant has substantially failed, he will pay the costs of the respondent."

39. In **Devendra Kumar Srivasatava v. Prabhat Kumar Srivastava and others, 2023 SCC OnLine Pat 2458**, it was held by Sunil Dutta Mishra, J.:

"10. In partition suit, the principle is well settled that the cause of action in fact is a recurring one and the contention with regard to Order IX Rule 9 or Order XXII Rule 9 CPC bar of subsequent suit is without substance. Even after dismissal of the former suit, the jointness continues and there is a continuing cause of action. In the present case, the earlier suit was not decided on merit but dismissed for default/non-prosecution. The petitioner if wants to transfer the suit from Siwan Civil Court to Patna Civil Court he can file the appropriate petition before this Court if so advised. The question whether the plaintiff/Respondent No. 1 has violated any order of this Court and committed contempt cannot be decided in the present proceeding."

40. The issue also engaged the attention of the **Himachal Pradesh High Court in Asha Sharma and others v. Amar Nath and others, AIR 2003 HP 32**, where it was held:

"8. So far the question of suit being barred by principle of res judicata is concerned, such principles are not attracted in the present Case. There is no scope of dispute that an order made under Order 9, Rule 8 of the Code of Civil Procedure would not amount to res judicata, as such, a suit cannot be said to have been heard and finally decided by the order of dismissal made for the non-appearance of the plaintiffs under Order 9, Rule 8 of the Code. The only effect of an order made under Order 9, Rule 8 is that a fresh suit based on the same cause of action is precluded by the provisions of Order 9, Rule 9 of the Code. The question, in the circumstances, is whether the second suit for partition filed by the plaintiffs is not maintainable in view of the bar created under Order 9, Rule 9 of the Code.

17. It will also not apply to the cases where the cause of action is recurring or continuous. The right to enforce partition is a legal incident of a joint tenancy, and so long such tenancy subsists, a party has a continuous right for partition.

18. In Nasarat-Ullah v. Mujib-ullah (1) 1891 ILR 13, All 309, principle was laid that so long the property is jointly held, so long does a right of partition continuous. This principle was reiterated in Bisheshar Das v. Ram Prasad, 1906 ILR 28 All 627. In that case plaintiffs and defendants were members of Joint Hindu family. The plaintiffs filed a suit for partition of the joint assets. The suit was dismissed in default. The plaintiffs brought a fresh suit for partition of the assets. The trial Court dismissed the suit. However, the

first appellate Court held that the second suit was barred, as the former suit was regularly dismissed and the remedy was only by way of an appeal.

19. A Division Bench of Allahabad High Court, in this background, held:"As it appears to us, the right to enforce partition is a legal incident of a joint tenancy, and so long as such tenancy subsists so long may any of the joint tenants apply to the Court for partition of the Joint property".

20. In *Madhura Gramani v. Thumala Sesha Reddy*, (1926) ILR 49 Mad 929 : (AIR 1926 Madras 1018), a suit for partition of certain property in which plaintiff claimed 3/4th share was dismissed in default under Order 9, Rule 8 of the Code. A second suit was brought for partition. It was contended that the second suit for partition was barred under Rule 9 of Order 9.

22. In *Mukha Singh v. Ramchariter Singh*, AIR 1956 Patna 143, plaintiff, who was a co-sharer in certain lands, brought a suit for declaration of his title and confirmation of possession and, in the alternative, for possession on the allegation that a cloud was cast on his title by the rejection of his prayer for mutation by the Land Registration Deputy Collector. This suit was dismissed under Order 9, Rule 8 of the Code of Civil Procedure for non-appearance of the plaintiff. The plaintiff subsequently brought a suit for partition of his share in the land on the ground that he was finding it difficult to manage the land along with his co-sharers.

23. A single Judge of the Patna High Court held that the subsequent suit for partition was not barred by the provisions of Order 9, Rule 9 as cause of action for partition suit is recurring one and, therefore, the bar under Order 9, Rule 9 will not operate in the case of partition suits of the same property.

24. *In Manohar Lal Behari Lal v. Onkar Das alias Omkar Dass*, AIR 1959 Punjab 252, A Division Bench of Punjab High Court construing the provisions of Order 9, Rule 8 and Order 9, Rule 9 of the Code observed:

"A suit for partition dismissed for default under Order 9. Rule 9 of the Code of Civil Procedure does not bar a subsequent suit for partition. The reason is that the right to enforce a partition is a continuous right which is a legal incident of a joint tenancy and which ensures so long as the joint tenancy continuous".

26. I have already observed that cause of action is continuous in partition cases which subsists so long the property is held jointly. In other words, the joint owner can file a suit for partition until partition is actually effected irrespective of the fact whether earlier suits for such partition were dismissed in default or an earlier decree for partition was not acted upon."

41. The Kerala High Court **in Manakkal Nadakumar v. M. Subramanyan and others, ILR 2017 (1) Kerala 907** was also confronted with the same issue, where after discussing a wealth of authority, it was held:

"23. So it is clear from the above dictums that in order to attract the bar of res judicata for a subsequent suit, it must be decided on merits and dismissal on technical grounds or it was dismissed as not pressed will not operate as res judicata in

the subsequent suit as the issues have not been heard and decided finally on merit. Further it is also clear from the above dictums that in respect of suit for partition as well redemption of mortgage, the dismissal of an earlier suit as not pressed or dismissed on technical grounds will not amount to res judicata for filing a subsequent suit as it will be having recurring cause of action till the right to claim partition or redemption is totally extinguished."

42. It must be added here that what this Court has observed regarding the right of a party to seek partition of a joint property, where his suit is dismissed under Order IX Rule 8 of the Code, is not in derogation of the wider principles, well acknowledged that a suit for partition after a decision of the first suit, where the decree is not executed for some reason, is not barred. What this Court has held is that notwithstanding the dismissal of a partition suit instituted by a co-sharer under Order IX Rule 8, even if it be regarded that his right to sue is barred, his right to claim a partition of his share in a suit brought by another co-sharer, can never be held barred. This principle is to be understood within the parameters of the wider principles, permitting a second suit for partition to be brought under the circumstances indicated in those decision.

43. In view of what has been said above, Substantial Question of Law No.2 must be answered in the negative holding that the Court below did not err in considering the effect of dismissal of Suit No.64 of 1968.

44. The next substantial question of law that falls for consideration and the last is, whether the Court below has erred in interpreting the effect of Section 14 of the Act of 1956 over the provisions of Section 2 of the Act of 1856.

45. Before we set about the task of answering the substantial question, we accept all findings of fact regarding the relationship of parties, the custom of remarriage amongst the community of Sonars, the factum of customary remarriage solemnized by Smt. Lakhraji, the custom of divesting the widow's right to inherit her husband's estate upon remarraige amongst the Sonars as correct, and, then proceed to determine how the law governed by Section 14 of the Act of 1956 and the provisions of Section 2 of the Act of 1856, would bear on the shares of parties, determined for them by the Lower Appellate Court. In working out the shares of parties on the above parameters, we also regard as correct, the finding of fact recorded by the Lower Appellate Court regarding the share inherited by Smt. Jashoda from her son, the late Tirath Ram in the suit property and the validity of disposition of her share made in favour of Gokaran by registered conveyance.

46. Needless to say that the Lower Appellate Court regarded the conveyance of her share in the suit property by Smt. Jashoda to be a valid disposition made through a registered conveyance in favour of Gokaran. It is on that basis that the Lower Appellate Court has granted a 1/3rd share in the suit property to Gokaran, the plaintiff. The Lower Appellate Court has granted a 1/3rd share to Gokaran and the remainder 2/3rds in the estate of Tirath Ram to his two daughters, defendant Nos.9 and 10, Smt. Keshari Devi and Smt. Kapura Devi on a finding based on the interpretation of the provisions of Section 14 of the Act of 1956 and Section 2 of the Act of 1856, besides the effect of the

custom of divesting amongst the Sonars to the effect that Smt. Lakhraji had lost the share that she had inherited from her husband, upon her customary re-marriage to Phagoo.

47. This Court, therefore, proceeds on the basis of the findings of fact recorded by the Lower Appellate Court that Smt. Jashoda, Smt. Keshari Devi and Smt. Kapura Devi, all have inherited shares in the suit property. The only question is how much. The answer to this depends on what the defendant-appellant Nos.1 to 4 have urged before us. It is urged that Smt. Lakhraji never lost the right to her share that she inherited, notwithstanding her customary remarriage to Phagoo. As already remarked, we accept as correct the findings of her customary remarriage to Phagoo and the existence of a custom regarding divestment of a widow's interest in her husband's estate upon her customary remarriage to another man in the community of Sonars, to which the parties belonged. Section 14 of the Act of 1956 reads:

"14. Property of a female Hindu to be her absolute property.—(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

48. **Section 4 of the said Act provides**:

"4. **Overriding effect of Act.—** Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act, shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

49. The learned Additional District Judge, who decided the appeal in the Lower Appellate Court, held that there was no inconsistency between the provisions of the Act of 1856 providing for the divestment of estate inherited from her husband upon remarriage and Section 14 of the Act of 1956. Likewise, it was held that there was no inconsistency between the customary Hindu law providing for forfeiture of an estate inherited by a widow from her husband upon remarriage,

whether according to the custom in a particular community or the Act of 1856. This was concluded on the foot of the reasoning that there was no inconsistency between absolute vesting envisaged under Section 14 of the Act of 1956 of property possessed by a Hindu female, inherited by her before or after commencement of the Act of 1956 and its forfeiture under the Act of 1856. In reaching that conclusion, the learned Additional District Judge followed **Sankar Prasad Khan and others v. Smt. Ushabala Dasi and other, AIR 1978 CAL 525 and Gangadhar Charan Naga Goswami and others v. Sm. Saraswati Bewa and another, AIR 1962 Orissa 190**. The learned Additional District Judge did not follow a contrary opinion expressed by the Rajasthan High Court in **Mst. Bhuri Bai v. Mst. Champi Bai, 1967 SCC OnLine Raj 10**, holding that the views of the Orissa and Calcutta High Courts appear to be more reasonable and acceptable. According to the learned Judge, there was, by time he rendered judgment, no decision in point of ours or the Supreme Court, that would bind him.

50. It would be apposite to consider the three decisions, two taking one view and one the other, which the learned Additional District Judge has dwelt upon in reaching his conclusions, that give rise to the present question. **Sankar Prasad Khan** *(supra*) was a decision, where the question arose if an estate, inherited by a Hindu widow, would, on her remarriage, be forfeited under the Act of 1856, or belong to her absolutely under Section 14 of the Act of 1956. The facts, giving rise to the issue, **in Sankar Prasad Khan** can best be noticed from the report, which read:

"1. One Ushabala (plaintiff) filed the present suit on the allegation that the disputed properties belonged to her husband, Gostha Behari Khan. The latter died leaving her as widow and a son, Sashanka Sekhar. Her son also died leaving his minor widow, Kalibala, pro forma defendant No. 2. Defendant No. 1, Gobinda Charan Khan, who is Gostha Behari's elder brother, was appointed guardian of Kalibala's person and property by the District Judge, Midnapore, and so the property in question was under his management. On the 29th of Ashar 1361 B. S. Kalibala was married to one Bhutnath Chowdhury, pro forma defendant No. 3. By such remarriage she was divested of her interest in the disputed property and the same devolved on the plaintiff as the next reversioner of her son Sashanka Sekhar. Hence, Gobinda Chandra's guardianship also came to an end with Kalibala's remarriage. He is in wrongful possession of the disputed property. The suit was filed for declaration of title and recovery of possession and mesne profits and also for injunction. Subsequently by amending the plaint the prayer for partition was added.

2. Defendant No. 1 filed a written statement denying the plaintiff's allegations. He alleged that he still continued to be Kalibala's guardian. The alleged remarriage was invalid because no consent of the Court guardian was obtained.

3. The learned Munsif accepted the plaintiff's version in part. He stated that since defendant No. 1 was appointed guardian by the Court, his possession was not wrongful. So he allowed the plaintiff's other prayers but refused the claim for mesne profits.

4. Against that decision defendant No. 1 preferred an appeal. The plaintiff also

filed a cross-objection for getting the mesne profits. The learned Subordinate Judge, Midnapore, allowed the appeal and the cross-objection and remanded the case to find out whether all were ejmali properties and if the plaintiff was entitled to a partition of the same. Against that order the High Court was moved. The High Court stated that the marriage was true. The case was remitted to the Subordinate Judge, Midnapore, to determine the other points and to ascertain the quantum of mesne profits.

5. Thereafter the learned Subordinate Judge found in favour of the plaintiff on all the points. He stated that after Kalibala's remarriage the guardianship of defendant No. 1 came to an end for all intents and purposes. He also stated that with the enactment of Hindu Succession Act, 1956, the provisions of the Hindu Widow's Remarriage Act, 1856 were impliedly repealed. Against that decision the present appeal has been filed."

51. In answering the relevant issue in **Sankar Prasad Khan,** it was held by B.N. Maitra J.:

"9. Let us then discuss the other aspects of the case. Section 4 (1) (b) of the Hindu Succession Act, 1956, says that save as otherwise expressly provided for in the Act any other law in force immediately before the commencement of the Act shall cease to apply to Hindus so far as it is inconsistent with any of the provisions contained in the Act. It does not appear that the provisions of Hindu Succession Act, 1956, are in conflict with Hindu Widows Remarriage Act, 1856, in this respect. The same view will appear from Mulla's Hindu Law, 14th Edition at page 869. Section 14 (1) of the Hindu Succession Act is important in this respect. That sub-s. (1) says that any property possessed by a Hindu female whether acquired before or after the commencement of the Act shall be held by her as full owner thereof and not as a limited owner. Of course the word 'possessed' used in that sub-section connotes both ownership and possession and not possession alone without any title, say the case of a trespasser widow. The principles of the cases of Mangal in AIR 1967 SC 1786 and Dindayal v. Rajaram in AIR 1970 SC 1019 may be cited. The relevant portion of section 2 of the Hindu Widow's Remarriage Act says that rights and interests which any widow may have in her deceased husband's property by way of maintenance or inheritance or by will or testamentary disposition without any express permission to marry shall, upon her remarriage, cease or determine as if she had then died.

10. Kalibala was re-married on the 14th of July, 1954 corresponding to the 29th of Ashar 1361 B.S. At that time Hindu Succession Act was not enacted. So in view of S. 2 of the Hindu Widows Remarriage Act, 1856, the interest which she acquired from her husband, Sashanka Sekhar in the suit land ceased to exist.

11. Then about the provisions of S. 14 (1) of the Hindu Succession Act. She was in constructive possession through the guardian (defendant No. 1) appointed by the District Judge. Now the important question arises if such constructive possession of Kalibala would confer on her an absolute estate, within the meaning of S. 14 (1) of the Act. It has already been pointed out that the expression 'possessed' denotes ownership and possession as well. After her remarriage there was no legal ownership in her regarding the disputed property. She continued to be in

constructive possession of the disputed land through defendant No. 1 and that was her mere possession without any title. It is therefore held that the provisions of S. 14 (1) of the Hindu Succession Act did not confer any absolute estate in the disputed land in her favour."

52. The other authority, which the learned Judge chose to follow and which he regarded as the correct law, adopting the same line of reasoning as **Sankar Prasad Khan,** was the Orissa decision in **Gangadhar Charan Naga Goswami (supra). In Gangadhar Charan Naga Goswami,** the facts can best be recapitulated by a reference to the report, which reads:

"2. Sambhu died sometime in the year 1941 leaving his widow Saraswati Bewa (plaintiff) and his son Madhu. Madhu died sometime in 1952 leaving his widow Sukuri (defendant No.4). Sukurl sold a part of the suit land under Ext.A on 23-12-52 for a consideration of Rs.500/- in favour of defendant 1 comprising an area of 1.27 acres. On the same day she also fold under Ext.B.A.O.31 decimals of land to defendants 2 and 3 for a consideration of Rs.100/-.The plaintiff has filed the present suit for declaration that the sale deeds executed by defendant 4 in favour of defendants Nos.1 to 3 are fraudulent, collusive and without any legal necessity, and the defendants 1 to 3 have acquired no right, title or interest in the suit-lands. She has further claimed for recovery of possession and also for mesne profits; her alternative claim was a charge for her maintenance at the rate of Rs.15/- per month, which however was abandoned at the trial stage. She further alleged that defendant 4 having remarried one Kartic Mahanty (P.W.2) was civilly dead in Madhu's family.

3. Defendants 1 to 3 contested the suit on the ground that defendant 4 never remarried Kartic, and the alienations were for legal necessity and full consideration had passed, under them and they are in their possession. Defendant No.4 was a minor and was represented by a pleader guardian, but in course of the suit she attained majority and filed her written statement contending that the sales were for legal necessity and consideration, that is, to meet the funeral expenses of her husband Madhu and for her own maintenance and she had delivered possession of the suit property to defendants 1 to 3. She however denied her remarriage with Kartic.

4. The trial court held that the sale-deeds, Exts. A and B, were without legal necessity and without consideration, and no title had passed to defendants 1 to 3 thereunder; and defendant No.4 had remarried to Kartic sometime in Baisakha of 1953, that is, a few months subsequent to the sale-deeds. The appellate Court having confirmed these findings of the trial court, defendants 1 to 3, the alienees have preferred this second appeal."

53 . It must be remarked **Gangadhar Charan Naga Goswami** too was a case, where succession from the deceased husband opened out before enforcement of the Act of 1956 and the second marriage by the widow was solemnized in the year 1953, to be precise, in the month of *Baisakha* of that year. In answering the question if the widow forfeited her right under the Act of 1856 or Section 14 of the Act of 1956 would prevail to protect an absolute estate in her favour, it was held:

"6. These very contentions as are now raised, were raised before the Division Bench of this Court and were negatived as would appear from the case reported in Sansir Patelin v. Satyabati Naikani, AIR 1958 Orissa 75, where a reversioner challenged the sale-deed on the ground that it was not for legal necessity; and their Lordships while dealing with the question of applicability of Sec.4 of the Hindu Succession Act held that it is only those provisions which are inconsistent with the provisions of the Act that stand aned by virtue of section 4 and the other provisions must be taken to be prevailing. A careful perusal of the several provisions of the Act shows that it was never the intention of the Parliament to abrogate all other previous laws on Hindu Law prevailing before the Act came into force on 17-6-56. The conception of a reversioner therefore still remains in respect of the properties in which the widow does not get the right of a full owner by virtue of the provisions of Sec.14 of the Act. Thus, their Lordships held:

"Where a female heir transfers the property inherited by her before the Act came into force without any legal necessity, she does not get any absolute status in respect of it as it cannot be said that the property was in her possession. Further, the provisions of the Act are not meant to enhance the rights of the purchasers who at the time of their purchase knew full well that the transaction was not for legal necessity. In such a case the transferee would be entitled to the interest that the female heir had at the time when the transfer took place, namely, the limited interest of the female heir and as the provisions of the Act do not apply to such cases, the old law prevailing among the Hindus regarding the rights of a reversioner must remain intact and must be followed by Courts of Justice."

Their Lordships on coming to the above decision had relied upon the case reported in Venkayamma v. Veerayya, (S) AIR 1957 Andh Pra 280 and Gostha Behari Bera v. Haridas Samantra, (S) AIR 1957 Cal 557, wherein it was held that Sec.14 has no application to a case where the female owner has parted with her property before the Act. The Kerala High Court also took the same view as will appear from the case reported in Thailambal Ammal v. Kesavan Nair, AIR 1957 Kerala 86.In this connection an observation by a Division Bench of this Court in the case reported in Laxmi Debi v. Surendra Kumar (S) AIR 1957 Orissa 1, is pertinent. In that case a reversioner during the lifetime of a widow came with a suit for declaration of his right as reversioner, and their Lordships held that if actually the widows had alienated any of the properties before coming into force of the Act and which were not in their possession at the time of the Act came into force, they do not become full owners in respect of those properties by virtue of Sec.14 of the Act but as no such question regarding alienation arose in that appeal, the matter was left open.In a Full Bench decision of the Patna High Court reported in Harak Singh v. Kailash Singh, AIR 1958 Pat 581, the scope and extent of the application of Sec.14 of the Hindu Succession Act came up for consideration. In that case the plaintiff asked for a declaration that the deed of gift executed by a widow is not binding on the reversioner and is not valid beyond the life-time of the donor. Their Lordships held that a female Hindu cannot be deemed to be a owner of the property of which she made an absolute alienation before the date of commencement of the Act, and Sec.14

cannot apply to such property and the limited interest of the widow in such property is not enlarged to an absolute interest. The Act was not certainly intended to benefit the alienees or to unduly enrich the alienees who with their eyes open purchased the properties from the limited owner without justifying necessity before the Act came into force, and at a time when the vendors held only limited interest of a Hindu woman.In coming to this decision, their Lordships of the Patna High Court relied upon the aforesaid decisions of Andhra Pradesh and Kerala High Courts noticed above. In view of this Full Bench decision of the Patna High Court as also of the Division Bench decision of this Court, which is also the view of the various High Courts in India on the subject, it is no longer open to the learned counsel for the appellants to raise this contention. In fact, these decisions give complete answer to the questions raised by him.

7. Learned counsel for the appellants also relied upon a decision of the Supreme Court reported in G.T.M. Kotturuswami v. S. Veerayya, AIR 1959 SC 577, in support of his contention that the possession of the vendee in a case of this nature shall be deemed to be the possession of the vendor (defendant No.4). In Supreme Court Case a reversioner challenged an adoption made by the widow and the nature of possession contemplated under Sec.14 of the Hindu Succession Act came up for consideration before their Lordships. In that case the possession of the adopted son was however permissive and their Lordships held that even if it is assumed that the adoption was invalid and the adopted son was in actual possession, his possession was merely permissive and the widow must be regarded as being in constructive possession through the adopted son. Their Lordships of the Supreme Court in that case noticed the aforesaid decisions of the High Courts of Andhra Pradesh, Calcutta and Patna and accepted as correct the proposition of law as laid down in the Full Bench decision of the Patna High Court reported in AIR 1958 Patna 581.In the present case it is not a case of permissive possession of the defendants-appellants. They are in possession on their own right by virtue of the sale-deeds. Defendant 4, as stated earlier, had herself admitted to have parted with her interest and possession in the said property in favour of defendants 1 to 3. In view of this position, the decision of the Supreme Court noticed above cannot be said to support the contention raised on behalf of the appellants. No doubt, the possession under Sec.14 of the Act need not necessarily be physical, but may also include the possession of a licensee, mortgagee, lessee etc., from the female owner, but there must be something to show that she was still in control of the property as owner. Where, however, the property itself has been sold away and the possession delivered to the vendee, the vendor can in no sense be said to be still in control or possession of the property. In view of the findings of the Courts below that defendant 4 had already married sometime in Baisakha of 1953, it cannot be disputed that she had incurred a Civil death in her husband's family, of course after the alienations in question. Therefore in the circumstances, as aforesaid, it must be held that defendant 4, who had only a limited interest, had sold the same without any legal necessity and consideration. Therefore the sales are not binding on the plaintiff."

54. The case that the learned Judge chose not to follow and one expressing an opinion contrary to what was regarded as

the correct position of the law is **Mst. Bhuri Bai** *(supra).*

55. In **Mst. Bhuri Bai**, the same issue as to whether upon a widow's remarriage, she would be divested of property inherited from her deceased husband in accordance with the provisions of the Act of 1856, or she must he held to have inherited an absolute estate, of which she could not be divested upon remarriage arose. This question arose in the context of facts, where the succession opened out upon the husband's demise in the year 1950 before the Act of 1956 had come into force, but the widow solemnized her second marriage, either in the year 1957 or 1958, i.e. after the Act of 1956 had come into force. The widow claimed right to the inherited property as her absolute estate, whereas the husband's heirs claimed it by reversion, on account of forfeiture of the limited estate that the widow received, in consequence of her second marriage that she had no power to alienate. The widow had in fact alienated. In answering the question, Chhangani, J. observed:

"15. Next, it was contended that even if the limited estate inherited by Mst. Champi Bai was converted into full estate by sec. 14 of the Act still her right or interest in the property stood forfeited on account of her remarriage with the defendant Nathuram. It was contended that sec. 2 of the Hindu Widow's Remarriage Act (hereinafter referred to as the Act of 1856) has not been expressly abrogated by the Act and that it cannot be considered as having been abrogated by virtue of the provisions of sec. 4(1) of the Act. It was submitted that sec. 2 of the Act of 1856 lays down an independent rule providing for the effect of remarriage on the estate inherited by a widow and that it stands quite unaffected by the provisions of the Act. The learned counsel relied upon the opinion of Shri Gupte expressed in his commentary on the Hindu Law of Succession, 1963 Edition—

"It is, however, still possible to urge as a matter of construction of S. 2 of the Hindu Widows Remarriage Act that she would forfeit her estate, though full, especially as that Act has not been repealed. If an estate is liable to forfeiture it should make no difference whether the estate is converted into a full estate by S. 14 or not. Any estate either absolute or limited may in law still be liable to forfeiture in certain circumstances and situations by an independent rule such as the rule in S. 2 of the Hindu Widows Remarriage Act which has not been repealed."

Referring to the difficulty arising on account of the absence of any rule in the present Act providing for the devolution of the property so forfeited as also on account of the Act not contemplating succession opening second time except to a very limited extent the author says,

"But s. 2 of the Hindu Widows' Remarriage Act in fact provides for devolution on forfeiture Neither the said provision nor the scheme of succession indicated in that section is repugnant to the scheme of succession under this Act……Although S. 2 of the Hindu Widows' Remarriage Act was drafted at a time when a widow succeeding to her husband or to his lineal successor took only a limited estate, the language of that sec. is, it is submitted, capable of applying to a widow having an absolute estate. It is also submitted by S. 2 of that act is not affected S. 4(2) of this Act."

16. In answer, the counsel for respondents submitted that remarriage of

widow after the promulgation of the Act is not a valid ground for divesting an estate inherited by her from her husband and contended that the rule laid down in the Act of 1856 cannot apply to a case covered by the Act. The counsel relied upon some observations made in Mulla's Hindu Law, 1966 Edition, page 796. "The rule laid down in that enactment cannot apply to a case covered by the present Act and a widow becomes full owner of the share or interest in her husband's property that may devolve on her by succession under the present sec. Her remarriage, which would evidently be after the vesting in her or her share or interest on the death of the husband, would not operate to divest such share or interest. The Hindu Widow's Remarriage Act, 1856, is not repealed but sec. 4 of the present Act in effect abrogates the operation of that Act in the case of a widow who succeeds to the property of her husband under the present sec. and sec. 14 has the effect of vesting in her that interest or share in her husband's property as full owner of the same." It was also urged that the interest contemplated by sec. 2 of the 1856 is confined or limited to her life time and that it will not apply to an absolute interest legally acquired by the widow. In support of this, reliance was placed on Lakshmi Ammal v. Thangavel Asari (5) and Ballabha Pani v. Jasodhara Pani (6). The learned counsel emphasised the following observations in Lakshmi Ammal's case (5)—

"The words "shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband or other person entitled to the property on her death, shall thereupon succeed to the same, afford the clue to the scope of the sec. They indicate that the interest contemplated by the sec. is confined or limited to her life time. The sec. will not apply to an absolute interest legally acquired by the widow."

In this case, the following observations made in an earlier decision reported in *Bangaru Reddi v. Mangammal* (7) were quoted—

"It is clear, that this sec. has no effect on property belonging to the widow absolutely on the date of the re-marriage."

17. I have given very careful consideration to the matter and have felt inclined to accept the position taken on behalf of the respondent for reasons which follow:—

The present Act provides that the widow succeeding to her husband shall take an absolute estate. It further provides that any limited estate which the widow inherited before the promulgation of the Act shall be converted into absolute estate if the widow had been in possession of the estate at the time of the promulgation of the Act. The Act further makes a widow a fresh stock of descent. Sec. 2 of the Act of 1856 contemplated the inheritance of limited estate by a widow and does not treat her as a fresh stock of descent and provides for the vesting of the property forfeited by the widow on her husband's heirs. There is thus some kind of inconsistency between the provisions of sec. 2 of the Act of 1856 and the present Act. While in the present Act the property has to be inherited by the widow's heirs under the Act of 1856 the property vests in the husband's heir. This inconsistency should not be brushed aside because the scheme of succession indicated in sec. 2 is not repugnant to the scheme of succession under the Act as has been done by Gupte in his observations quoted above.

In principle, there is an inconsistency between the two enactments on account of the widow being treated as a fresh stock of descent in one case and not so in the other. In this view of the matter, it must be held that sec. 2 of the Act of 1856 cannot apply to a widow who has become full owner under the provisions of the present Act.

18. In this view, I am supported by the provisions embodied in sec. 24 of the Act. This section lays down that "any heir who is related to an intestate as the widow of a pre-deceased son, the widow of a pre-deceased son of a pre-deceas-ed son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has re-married" To constitute a disqualification for succession according to this provision remarriage must have taken place before the opening of the succession and this section does not provide for the divesting of the estate vested in the widow on her remarrying subsequent to the date the succession opens. When the widows specified in sec. 24 do not forfeit the property vested in them on remarriage, it will be hardly proper to hold that the widow of intestate himself should forfeit the property on remarriage even after she has become absolute owner. It is true sec. 24 of the Act does not include the widow of the intestate but the omission appears to be due to the fact that it is not possible to conceive of a person leaving a widow who had remarried. I am clear that while the principle embodied in sec. 24 of the Act points out towards the non applicability of sec. 2 of the Act of 1856 to a widow succeeding or acquiring absolute estate under the Act, the omission of the intestate widow in sec. 24 cannot lend support to a contrary view.

19. There is yet one more consideration very strongly persuading for the adoption of the above view. Indisputably the social, economic and political conditions changed tremendously during the past few decades. The old attitude towards the women changed considerably and it is some times expressed that the progress of civilization moves parallel with the progress of women. In the present conditions women do earn and acquire property and husbands are entitled to inherit partially or wholly the property of their wives. There is no process providing for the forfeiture of the property inherited by a husband from a deceased wife on his contracting a re-marriage. Naturally, in these changed conditions there was a strong movement for remedying the defects of the old Hindu Law of Succession showing very scant regard for the women and for according equal status and treatment to the women in the matter of succession which eventually culminated in the promulgation of the Hindu Succession Act. Considering the social and economic back ground the movement for the reforms in the old Hindu Law of Succession to secure equality for the females and the scheme of the Act under which the widow inherits an absolute estate from her husband and is made a fresh stock of descent, it will be in furtherance and promotion of the objects sought to be achieved by the Act to hold that sec. 2 of the Act of 1856 cannot affect the position of a widow re-marrying after the promulgation of the present Act."

56. In our opinion, there is no conflict between the two decisions of the Calcutta and the Orissa High Courts on one hand and the Rajasthan decision on the other, as the learned Additional District Judge has thought. As the Calcutta High Court decision would show that succession had opened out in favour of the widow before enactment of the Act of 1956 and

she solemnized a second marriage before the enforcement of the said Act. To be precise, in **Sankar Prasad Khan**, that is to say, the Calcutta High Court decision, the widow inherited upon her husband's death prior to enforcement of the Act of 1956. She remarried on 14.07.1954, again before enforcement of the Act of 1956. It was in that context held that she would forfeit her estate under Section 2 of the Act of 1856 that she had acquired from her husband, on account of remarriage. There cannot be any doubt about this principle.

57. Likewise, in **Gangadhar Charan Naga Goswami**, the Orissa High Court decision, the facts show that the widow inherited the suit property from her husband, Madhu sometime in the year 1952 and remarried one Kartik sometime in the month of Baisakha of the year 1953. Both these events took place before enforcement of the Act of 1956. It was in the context of these decisive events that it was held that the widow suffered a civil death in her deceased husband's family upon her remarriage in the month of Baisakha in the year 1953 and would forfeit her inheritance upon remarriage. Decidedly, by that time the Act of 1956 had not come into force. By contrast, the facts in **Mst. Bhuri Bai** would show that the widow inherited from her husband in 1950. Champi Bai solemnized a remarriage, as the report of the decision would describe 'sometime either in the year 1957 or 1958'. By the time, the widow remarried, the Act of 1956 had come into into force and it was in the context of these very different facts, where the Act of 1956 would enlarge the widow's estate into an absolute one that it was held that Section 2 of the Act of 1856 would not apply and the widow would take the property absolutely, her remarriage notwithstanding. There is, thus, no conflict at all between the decisions in **Sankar Prasad Khan** and **Gangadhar Charan Naga** Goswami on one hand, and, that in Mst. Bhuri Bai, on the other.

58. The same position of the law received the imprimatur of the Supreme Court in **Velamuri Venkata Sivaprasad (dead) by LRs v. Kothuri Venkateswarlu (dead) by LRs and others, (2000) 2 SCC 139**. In **Velamuri Venkata Sivaprasad** *(supra)* two questions were considered by their Lordships of the Supreme Court and first of these reads:

"Whether remarriage of a widow prior to the Hindu Succession Act, 1956 would divest her of even the limited ownership of her deceased husband's property, having due regard to the provisions of Section 2 of the Hindu Widow's Remarriage Act, 1856?"

59. Shorn of other details, what is relevant is that the widow in this case one Lakshmamma had acquired a very limited kind of a right under her husband's Will to some properties, which substantially went to the deceased's mother by the same device and in an earlier suit between the deceased's mother and his widow, a compromise was entered into. Venkayamma was the deceased's mother and she filed a second suit in the year 1950, seeking a declaration that Lakshmamma was not entitled to adopt any more in terms deceased's will, and for a further declaration that Venkayamma was entitled to adopt a boy herself. This suit was lost by the deceased's mother up to the appellate stage. Still later in the year 1969, Venkayamma, the deceased's mother and her daughter Sitharamamma filed another suit for declaration of title to the suit property and possession, besides mesne

profits on ground that Lakshmamma did not take the adoption as directed by the device and also because of her remarriage in the year 1953, forfeited all her rights to her deceased husband's estate. The widow remarried apparently much before the Act of 1956 came into force. It was in this context held by their Lordships of the Supreme Court that the widow's rights to her husband's estate would not be protected by Section 14(1) of the Act of 1956, because of her remarriage solemnized prior to the said Act coming into force. In **Velamuri Venkata Sivaprasad,** in answering the question, it was held:

"47. Incidentally, be it noted that the Succession Act of 1956 obviously is prospective in operation and in the event of a divestation prior to 1956, the question of applicability of Section 14(1) would not arise since on the date when it applied, there was already a remarriage disentitling the widow to inherit the property of the deceased husband. The Act of 1856 had its full play on the date of remarriage itself, as such the Succession Act could not confer on the widow who has already remarried, any right in terms of Section 14(1) of the Act of 1956. The Succession Act has transformed a limited ownership to an absolute ownership but it cannot be made applicable in the event of there being a factum of pre-divestation of estate as a limited owner. If there existed a limited estate or interest for the widow, it could become absolute but if she had no such limited estate or interest in lieu of her right of maintenance from out of the deceased husband's estate, there would be no occasion to get such non-existing limited right converted into full ownership right.

49. It may be noted here that even though strong reliance was placed on this decision but by reason of the contextual facts as noticed above, the decision is clearly distinguishable since remarriage in 1953 as noted above makes all the difference having due regard to the Act of 1856.

52. Incidentally, Section 24 of the Succession Act of 1956 placed certain restrictions on certain specified widows in the event of there being a remarriage; while it is true that the section speaks of a pre-deceased son or son of a pre-deceased son but this in our view is a reflection of the Shastric law on to the statute. The Act of 1956 in terms of Section 8 permits the widow of a Hindu male to inherit simultaneously with the son, daughter and other heirs specified in Class I of the Schedule. As a matter of fact she takes her share absolutely and not the widow's estate only in terms of Section 14. Remarriage of a widow stands legalised by reason of the incorporation of the Act of 1956 but on her remarriage she forfeits the right to obtain any benefit from out of her deceased husband's estate and Section 2 of the Act of 1856 as noticed above is very specific that the estate in that event would pass on to the next heir of her deceased husband as if she were dead. Incidentally, the Act of 1856 does not stand abrogated or repealed by the Succession Act of 1956 and it is only by Act 24 of 1983 that the Act stands repealed. As such the Act of 1856 had its fullest application in the contextual facts in 1956 when Section 14(1) of the Hindu Succession Act was relied upon by Defendant 1."

60. The principle laid down in **Velamuri Venkata Sivaprasad** was followed in a very recent decision of the Supreme Court in **Kizhakke Vattakandiyil Madhavan v.**

Thiyyurkunnath Meethal Janaki, 2024 SCC OnLine SC 517, where the vesting of an estate in the widow upon her husband's demise and inheritance from him, upon her remarriage, was held forfeited because both the events happened much prior to coming into force the Act of 1956.

61. The very differing effect, if both or either events take place after the coming into force of the Act of 1956, would be evident from the authority of the Supreme Court in **Cherotte Sugathan v. Cherotte Bharathi**, (2008) 2 SCC 610. In **Cherotte Sugathan** *(supra)*, the question involved and the facts that have to be read together may best be described in the words of their Lordships, which read:

"2. Whether Section 2 of the Hindu Widows' Re-marriage Act, 1856 would apply to the facts of the present case is the question in this appeal.

3. The fact involved herein is as under:

The properties in dispute belonged to one Shri Pervakutty. He had three sons and two daughters, namely, Sugathan, Surendran, Sukumaran @ Soman, Soumini and Karhiayani. He allegedly executed a will on 11-10-1975 bequeathing the said properties in favour of his sons. In the said will, provisions were allegedly made for payment of monthly allowance to the wife of Shri Pervakutty, Defendant 3 (since deceased) as also right of residence in the house situated therein. Shri Pervakutty died on 20-10-1975. Sukumaran died on 2-8-1976.

4. The first respondent is his widow. The first respondent remarried one Elambilakkat Sudharkaran. Sudhakaran died on 12-9-1979. She filed a suit on 31-12-1985 for partition claiming 1/3rd share in the suit property. The appellant herein, inter alia, contended that she, in terms of Section 2 of the Hindu Widows' Re-marriage Act, 1856, having ceased to have any right in the properties inherited by her from her husband Sukumaran, the suit was not maintainable. Respondents 2 and 3, the daughters of Shri Pervakutty, inter alia, raised a contention that the purported will dated 11-10-1975 was not a valid one.

5. By a judgment and order dated 31-3-1992, the said suit for partition was decreed declaring 1/3rd share in the suit properties in favour of the first respondent. It was opined that since the testator bequeathed the tenancy right as contained in Item 2 of the Schedule, the same was available for partition. The appellants preferred an appeal thereagainst. Respondents 2 and 3 (Defendants 4 and 5) also preferred separate appeals.

6. By reason of the impugned judgment, the High Court allowed the appeals preferred by Respondents 2 and 3 holding:

"In this case, the plaintiff has claimed succession on the basis of will. If that be so, the lower court was correct in holding that Section 23 of the Hindu Succession Act is not applicable to Defendants 1 and 2. But if the succession is not on the basis of will, then Defendants 1 and 2 will be entitled to the benefit of Section 23 of the Hindu Succession Act."

In regard to the applicability of the 1856 Act, it was held:

"So far as this case is concerned, according to us, Section 24 of the Hindu

Succession Act applies and the plaintiff is entitled to succeed."

It was directed:

"In the above view of the matter, the appeals are disposed of as follows:

The case is remanded to the lower court to frame issue regarding the validity of the will and to give an opportunity to the parties to adduce evidence regarding the same and decide the issue whether the will is valid or not. The other findings in the judgment are upheld except the finding regarding the building house in Item 1 of 'A' schedule. If the court below takes the view that the will is not valid, then the contention of Defendants 1 and 2 regarding residence in the building house should be considered again."

62. In **Cherotte Sugathan**, the question involved was answered thus:

"11. The Act brought about a sea change in Shastric Hindu Law. Hindu widows were brought on equal footing in the matter of inheritance and succession along with the male heirs. Section 14(1) stipulates that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, will be held by her as a full owner thereof. Section 24, as it then stood, reads as under:

"24. Certain widows remarrying may not inherit as widows.—Any heir who is related to an intestate as the widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has remarried."

12. Upon the death of Sukumaran, his share vested in the first respondent absolutely. Such absolute vesting of property in her could not be subjected to divestment, save and except by reason of a statute.

13. Succession had not opened in this case when the 1956 Act came into force. Section 2 of the 1856 Act speaks about a limited right but when succession opened on 2-8-1976, the first respondent became an absolute owner of the property by reason of inheritance from her husband in terms of sub-section (1) of Section 14 of the 1956 Act. Section 4 of the 1956 Act has an overriding effect. The provisions of the 1956 Act, thus, shall prevail over the text of any Hindu Law or the provisions of the 1856 Act. Section 2 of the 1856 Act would not prevail over the provisions of the 1956 Act having regard to Sections 4 and 24 thereof."

63. Therefore, what is relevant is the date when succession opened out in favour of the widow, and more than that, the date when she remarried. If both dates fall after the enforcement of the Act of 1956, even in a case when the Act of 1856 was still in force, the widow would not be divested of her right at all. In case, the succession opened out before enforcement of the Act of 1956, but the widow remarried after the enforcement of the last mentioned Act, the provisions of Section 2 of the Act of 1856 would not apply and there would be no divestment of property that vests in her absolutely under Section 14(1) of the Act of 1956. Likewise, the Act of 1956 having overriding effect on all laws, if either of the two events have happened after the enforcement of the Act of 1956, any custom or uncodified law, would not apply to divest the widow.

64. In the present case, Lakhraji's husband died on 14.10.1967 and she remarried Phagoo in a customary form of marriage, called Sagai, native to the community to which she belonged, in the month of April, 1968. By the time both events happened, the Act of 1956 had come into force. This, then being the position on facts, Smt. Lakhraji must be held to have inherited the suit property from her deceased husband in the specified share as her absolute estate, of which she could not be divested, either by custom or by virtue of Section 2 of the Act of 1856. The issue, if she was in possession of the suit property when succession opened out, is not seriously or even slightly in issue in this appeal, because it is not in dispute that in whatever manner, she was duly recorded in the revenue records to the exclusion of the other heirs entitled. There is also evidence that she was in possession of the suit property and no one has disputed the said fact. Smt. Lakhraji's share would, therefore, vests in her absolutely, of which she would not be divested upon remarriage to Phagoo.

65. Substantial Question of Law No.3 is, therefore, answered in the **affirmative** and it is held that the Court below erred in interpreting Section 14 of the Act of 1956 regarding its effect on the provisions of Section 2 of the Act of 1856.

66. The result of these conclusions would be that the plaintiff-respondent, Gokaran, who has been held entitled to a 1/3rd share and defendant Nos.9 and 10 to a 2/3rds jointly by the Lower Appellate Court, would each have their share diminished to a 1/4th individually together with a 1/4th in favour of Smt. Lakhraji, now held by her transferees and their LRs.

67. In view of the aforesaid conclusions, this appeal succeeds and is **allowed in part**. The impugned decree passed by the Lower Appellate Court is modified and it is ordered that the appellants together will be entitled to a 1/4th share in the suit property, the plaintiff a 1/4th share and defendant Nos.9 and 10, each to a 1/4th share.

68. Looking to the partial success that the appeal has met with, costs throughout shall be proportionate to the success and failure of parties.

69. Let a decree be drawn up accordingly.

70. Let the Lower Courts' record be sent down at once.

(2024) 6 ILRA 222
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.06.2024

BEFORE

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

Writ-A No. 8927 of 2023

Kamlesh Yadav @ Kumari Kamlesh Yadav ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Nitin Sharma

Counsel for the Respondents:
Monika Arya, A.C.S.C.

A. Civil Law – Indian Evidence Act, 1872 - Section 108 - Service Law- - One-time Peon's services terminated- His whereabout known to those who would normally have heard of him- petitioner is

the wife of the peon- 60% permanently disabled- unemployed woman with no source of sustenance- her husband is missing since 13.04.2010- services terminated in 2018- claim for compassionate appointment on the ground of civil death- presumption under Section 108 of The Indian Evidence Act- Rule 18 of the UP Fundamental Rules- not applicable in such cases- termination order passed without jurisdiction-illegal- quashed- petitioner's claim for pension and death-cum-retirement benefits- compassionate appointment- to be considered- subject to production of Succession Certificate under Section 372 of the Indian Succession Act, 1925- Petition allowed (Para 23, 24, 25, 26 and 28)

HELD: Now, in the present case, even if one were to go by the respondents'stand taken in the supplementary counter affidavit to the effect that the presumption of civil death would not attach in the absence of a missing complaint to the Police, that complaint too has come to be lodged under orders of this Court dated 12.07.2023 by the petitioner, though, on 28.07.2023. Intensive efforts were made by the Police to trace out the missing man but to no avail. It is not just a complaint to the Police or an FIR which is decisive. The missing employee, whose services were terminated on account of being absent from duty by the order impugned dated 31.03.2021 was missing since 13.04.2010. During this period of time, the respondents, who are his employers, had published notices in newspapers to seek him out, but to no avail. The family members never came to know about his whereabouts, and now, the Police too have failed. Thus, the date on which the impugned order terminating the petitioner's services on the charge of long and unauthorised absence was passed by the respondents, was much after lapse of the period of seven years since the employee went missing and never heard of by those who would have naturally heard of him, if alive. None of his family, friends, wife or employers have mentioned in the slightest that they heard of him after 13.04.2010. (Para 23)

In the circumstances, after a lapse of ten years that the employee went missing, the respondents had no jurisdiction to pass the impugned order, treating him to be absent from duties for more than five years, invoking their powers under Rule 18 of the U.P. Fundamental Rules. Rule 18 aforesaid reads :"18. Unless the Government, in view of the special circumstances of the case, shall otherwise determine, after five years' continuous absence from duty elsewhere than on foreign service in India, whether with or without leave, no government servant shall be granted leave of any kind. Absence beyond five years will attract the provisions of rules relating to disciplinary proceedings."
[The earlier Rule 18 of the Uttar Pradesh Fundamental Rules has been substituted by Notification No. G-4-34/X- 89-4-83 dated 12.09.1989]. (Para 24)

A perusal of the said Rule shows that it is never meant to apply to the case of a man who, on the date the question comes up for consideration, has not been heard of since seven years past by those who would have naturally heard of him, if alive. Rule 18 clearly is meant to apply to a man who is known to be around and yet absconding or wilfully remaining absent from duty. It is to the case of the known living men with traceable or fleeting whereabouts that fundamental Rule 18 would apply. It would not apply to the case of persons about whom a presumption of death can safely be drawn on the analogy of Section 108 of the Act of 1872, on the date the order of termination from service is passed against them. (Para 25).

Here, on the date of the impugned order, a period far more than seven years of the employee going missing had elapsed, with none of those who would have naturally heard of him if alive, knowing his whereabouts, including the employers. The additional abortive attempts of the Police, vigorously made under orders of this Court to trace out the missing man, lend credibility to the fact that perhaps the presumption under Section 108 of the Act has turned into a reality. Be that as it may, this Court is of considered opinion that on the date the order impugned was passed, the respondents could not have made it. It is absolutely without jurisdiction and manifestly illegal. (Para 26).

So far as the petitioner's claim for pension and death-cum retirement benefits on account of services rendered by Avinash Yadav or her further claim to seek compassionate appointment is concerned, the respondents will be obliged to consider it, subject to the petitioner producing a succession certificate under Section 372 of the Indian Succession Act, 1925 granted by the Court of competent jurisdiction. The Court, wherever the petitioner makes a petition for the grant of a succession certificate, shall expedite proceedings, considering the peculiar facts and circumstances obtaining in this case. (Para 28)

Petition allowed. (E-14)

List of cases cited:

1. Banarasi Vs Government of NCT of Delhi & ors., ILR (2008) Supp. 2 Delhi 1

2. Smt. K. Lakshmi v. The A.P.S.R.T.C. & ors., 2013 SCC OnLine AP 815

3. The Managing Director, State Express Transport Corporation Tamil Nadu Ltd., Pallavan Salai, Chennai & ors. Vs E. Tamilarasi, 2016-3-L.W. 139 : 2015 SCC OnLine Mad 11975 : 2016 Lab IC 2699

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

The District Cane Officer, Meerut, by his order dated 31st March, 2021, has terminated the services of Avinash Yadav, a one-time Peon in the Office of the Senior Cane Development Inspector, Meerut, a man missing since 13.04.2010, with his whereabouts not known to those who would normally have heard of him, if alive, retrospectively from the date he went missing.

2. It appears that Avinash Yadav disappeared from the lives of his family members as well as his employers on 13.04.2010. He has not been heard of eversince. While the family, particularly, the petitioner, his wife, a handicapped woman with 60% disability in her lower limb, has been destituted, waiting in vain for her missing husband, the respondents, who are Avinash's employers, think that he is guilty of absenteeism from duty. They have punished him on those charges by the order impugned, with retrospective effect, after holding a departmental inquiry, as already said, more than ten years after he went missing.

3. The facts giving rise to this petition are these :

The petitioner, Kamlesh Yadav alias Kumari Kamlesh Yadav's husband, Avinash Yadav, was a Class IV employee, a Peon in the Office of the Senior Cane Development Officer, Meerut. The petitioner is 60% permanently disabled in the right lower limb, suffering this handicap as a non-progressive condition. She is an unemployed woman, with no source of sustenance. The petitioner says that since 13.04.2010, Avinash Yadav went missing and has not been found eversince. He has remained absent from his duties, without sanctioned leave or permission of the respondents. He has not been heard of by the petitioner as well as other members of the family, who would have normally heard of him, if alive. Avinash's family members did their best to trace him out, but with no success. The petitioner says that looking to the duration of his whereabouts remaining unknown both by his employers and the members of his family, including the petitioner, his wife, all of whom would have heard of him, if alive, must lead to raising a presumption of his civil death. After 13.04.2010, when Avinash failed to resume duties, various notices were sent in his name by the respondents, asking for an explanation regarding his unauthorized

absence from duty and directing him to join upon pain of departmental action. The earliest on record is a notice dated 30.06.2010 issued by the District Cane Officer, Meerut. Avinash failed to turn up and report for duty. The Office of the Senior Cane Development Inspector, Daurala, Meerut got a press note published in the Hindi daily *'Dainik Jagran'* issue dated 18.01.2011, asking Avinash to rejoin duty within one week, again upon pain of disciplinary action. His whereabouts remained unknown and the man untraceable. He failed to rejoin duties.

4. On 28.02.2018, almost eight years after Avinash's disappearance, the Senior Cane Development Officer initiated departmental proceedings against him and issued a charge-sheet, asking him to answer charges carried there. These charges read :

आरोप संख्या एक – आप बिना किसी अवकाश प्रार्थना पत्र के दिनांक 13-04-2010 से लगातार अपनी ड्यूटी से अनाधिकृत रूप से अनुपस्थित चल रहे है, जिसके लिए आप दोषी प्रतीत होते हैं।

साक्ष्यः 1- जेष्ठ गन्ना विकास निरीक्षक दौराला का पत्रांक 1811/सी/दिनांक 15-04-2010, 1825/सी/दिनांक 20-04-2010, 1868/सी/दिनांक 11-5-2010, 1881/सी/दिनांक 15-5-2010, 1900/सी/दिनांक 26-5-2010, 1930/सी/07-06-2010, 01/सी/दिनांक 02-07-2010, 84 दिनांक 18-08-2010, 265 दिनांक 13-12-2010, 504 दिनांक 28-3-2011, 413 दिनांक 03-02-2011

2- जिला गन्ना अधिकारी महोदय मेरठ का पत्रांक 817-18 दिनांक 30-06-2010, 568-69 दिनांक 18-025-2011, 985-86 15-06-2011, 3671-72 दिनांक 18-01-2012, 3116-17 23-11-2012 3305-06 08-11-2013, 2360-61 01-09-2014, एवं पत्रांक 4524-25-09-01-2015

आरोप सं० दो- दैनिक समाचार पत्रों में सूचना प्रकाशित कराने के उपरान्त भी आप अपनी डयूटी पर उपस्थित नहीं हुए है, जिसके लिए आप दोषी प्रतीत होते है।

आरोप संख्या तीन- आप अपने मनमाने ढंग से कार्य करने, बिना किसी सूचना आदि के अनाधिकृत रूप से लगातार अपनी ड्यूटी से अनुपस्थित रहने के आदी हो गये हैं, जिसके लिए आप दोषी प्रतीत होते हैं। साक्ष्यः आरोप संख्या एक व दो में अंकित।

आरोप संख्या चार-आपको पूर्व में कई बार दी गयी चेतावनी के बावजूद भी बिना किसी अवकाश प्रार्थना पत्र के लगातार अनुपस्थित रहने की पुनरावृत्ति करने व अपनी कार्य प्रणाली में कोई सुधार न लाने के लिए दोषी प्रतीत होते है।

साक्ष्य- आरोप संख्या एक, दो, तीन में अंकित।

आरोप संख्या पाँच- आप अपने उच्चाधिकारियों के आदेशों एवं निर्देशों की अवहेलना करने तथा कर्मचारी सेवा नियमावली व कर्मचारी आचार संहिता का उल्लंघन करने के लिये दोषी प्रतीत होती है।

साक्ष्य- आरोप संख्या एक से चार में अंकित।

5. The petitioner says that the fact that the Inquiry Officer issued a charge-sheet to Avinash on 28.02.2018, is an acknowledgement of the fact that the respondents considered Avinash still to be in their employ and it is the said fact which led them to initiate departmental

proceedings against him. On 06.11.2019, the Senior Cane Development Officer sent a communication to Avinash Yadav through the petitioner, asking him for an explanation and seeking his cooperation in the departmental proceedings. For the first time ever, the petitioner says it was inquired of her if Avinash is alive or dead, so that the fact may be reported to the Senior Cane Development Officer. In this regard, there is on record a copy of the communication dated 06.11.2019 from the Senior Cane Development Officer, Daurala, Meerut addressed to Avinash through the petitioner, as already said.

6. Since a period of more than nine years had elapsed, with no clue about Avinash's whereabouts, the petitioner asserts that a presumption about his death has to be drawn and acted upon. She applied on 02.06.2020 to the Senior Cane Development Inspector, Daurala, Meerut, where Avinash served, to grant her compassionate appointment, in order to enable her to survive and live with dignity. The petitioner says that at the time she made her application for compassionate appointment, the respondents regarded Avinash alive and in their employ. A period of ten years having come to pass from the date when the man went missing, the respondents had to raise a presumption on the principles of Section 108 of the Indian Evidence Act, 18721 and grant death-cum-retirement benefits to the petitioner, including a consideration for compassionate appointment.

7. On 04.07.2022, the petitioner sent a letter to the Commissioner, Meerut Division, Meerut, requesting release of death-cum-retirement benefits due to her on account of Avinash's services with the Cane Department. She also canvassed her case for grant of compassionate appointment in order to enable her family to survive. The Commissioner, Meerut Division, Meerut asked for a report from the District Cane Officer, Meerut with regard to the petitioner's claim. The District Cane Officer, in his reply, apprised the Divisional Commissioner that Avinash was absent from duty without leave since 13.04.2010 and failed to rejoin, despite a number of notices. Accordingly, his services had been dispensed with vide order dated 31.03.2021 retrospectively with effect from 13.04.2010.

8. Aggrieved by the order dated 31.03.2021, terminating Avinash Yadav's service retrospectively with effect from 13.04.2010, the petitioner has instituted the present writ petition.

9. When this petition came up for admission for the first time on 05.07.2023, the following order was made :

The District Cane Officer, Meerut has passed an order dated 31.03.2021, terminating the services of the petitioner's husband Avinash Yadav, on account of his long absence and closing the departmental proceedings initiated against him. He has done so, on the principle of abandonment of employment.

Let a personal affidavit be filed by the District Cane Officer, Meerut within a week, bringing on record a copy of his order dated 31.03.2021 and specifically indicating the provision in the service rules entitling him to treat an employee to have abandoned service on account of long absence. It will also be indicated in the affidavit, if there is any evidence to show that Avinash Yadav is alive and yet staying away from his duties.

Lay as fresh on 12.07.2023.

Let this order be communicated to the District Cane Officer, Meerut by the Registrar (Compliance) within 48 hours.

10. Again, on 12.07.2023, the following order was passed by this Court:

The personal affidavit filed today is taken on record. Let it be numbered by the Office. This affidavit will also be regarded as a counter affidavit and the learned Counsel for the petitioner shall be at liberty to file a rejoinder affidavit to the affidavit filed today.

Looking to the personal affidavit filed by respondent no. 5, prima facie it appears that the respondents have acted too much on presumption to terminate the services of an employee, who claims to have gone missing since 13.04.2010. The petitioner, who is the missing employee's wife, seeks to quash the order terminating the employee's services. There is an allegation that his whereabouts are not known for past more than seven years by those who should have normally heard of him.

To the Court's mind, proceedings to punish a man whose whereabouts are not known, without properly inquiring into the fact whether he is missing, may not be a lawful course to adopt prima facie. A perusal of the order terminating the petitioner's services shows that the foundation to proceed against the missing employee, treating him to be an absentee and not a missing man whose whereabouts are not known, is the fact that his wife or other family members have not produced any evidence like a missing report lodged with the Police. The missing employee's wife, that is to say the petitioner, is a physically handicapped person with 60% permanent impairment in her right lower limbs. This fact is evident from the perusal of the certificate dated 24.09.2018 issued by the Medial Board in the office of the Chief Medical Officer, Bulandshahr.

In such circumstances, it is ordered that upon the petitioner conveying a written information to the Senior Superintendent of Police, Meerut about the fact of her husband Avinash Yadav going missing, an appropriate case shall be registered forthwith by the Police and whereabouts of the missing man ascertained.

A report with regard to the whereabouts and the circumstances in which he went missing or whatever is gathered by the Police, apart from the follow up action as the law warrants, be reported to this Court by the Senior Superintendent of Police, Meerut on or before 26.07.2023 positively.

In addition, it is directed that the information required to be sent by the petitioner to the Senior Superintendent of Police, Meerut shall be sent within 48 hours by speed post. A copy of the speed post dispatch receipt shall also be brought on record by learned Counsel for the petitioner.

A copy of the report shall also be forwarded to the District Cane Officer, Meerut by the Senior Superintendent of Police, Meerut.

Ms. Monika Arya, learned Additional Chief Standing Counsel shall file a detailed counter affidavit on behalf of

respondent nos. 1 to 6 on or before the date fixed.

List on 26.07.2023 at 2.00 p.m.

Let this order be communicated to the Senior Superintendent of Police, Meerut by the Registrar (Compliance) within 48 hours.

11. Under orders of this Court, a personal affidavit was filed by Rohit Singh Sajwan, Senior Superintendent of Police, Meerut on 03.08.2023 and he also appeared in Court, in compliance with our earlier orders. The following order was passed on 03.08.2023 :

A personal affidavit has been filed by Rohit Singh Sajwan, Senior Superintendent of Police, Meerut,. It is taken on record. In paragraph nos. 9, 10 and 11 of the affidavit, it is averred thus:

"9. That it is further noteworthy to mention here that the husband of the petitioner was gone missing in the year 2010 while the petitioner lodged the FIR after 13 years which on 28.07.2023.

10. That thereafter, RT massage issued by the deponent to the all SHO's/SO's of District Meerut. Moreover, a letter was sent to the Branch Manager Punjab National Bank Daurala, Meerut to provide photograph of the missing person i.e. husband of petitioner. True copy of RT Message issued to all SHO's/SO's of District Meerut dated 28.07.2023 is being annexed herewith and marked as Annexure No. 1 to this counter affidavit.

11. That thereafter, in pursuance of RT letters, all the SHO's/SO's vide provided their report informing that no such missing report has never been lodged in their respective police stations. True copy of information/reports provided by all the SHO's/SO's are being collectively annexed herewith and marked as Annexure No.-1 to this Counter affidavit."

Let a further affidavit be filed by the Senior Superintendent of Police, Meerut after three weeks with regard to the whereabouts of the missing man.

Counter affidavit shall be filed within the same period of time i.e. three weeks.

List on **25.08.2023 at 02:00 p.m.**

Personal presence of Rohit Singh Sajwan, Senior Superintendent of Police, Meerut, who is present in Court today, is exempted.

12. On 25.08.2023, another affidavit was filed before the Court by the Senior Superintendent of Police, Meerut, where, it is averred in paragraphs Nos. 5 to 13 :

5. That now the deponent is bringing on record the steps which are being taken for tracking out the missing Avinash Yadav.

6. That the petitioner moved a missing complaint of her husband Avinash Yadav on 28.07.2003, based on which missing report was recorded at G.D. Rapat No. 31 at 14.16 hours on 28.07.2023, subsequently copy of which was given to the petitioner/applicant.

7. That in pursuance of the application of the petitioner, Kamlesh Yadav was instructed to forthwith provide

the photograph of missing Avinash Yadav. Thereafter, investigation of matter was entrusted to Sub-Inspector Mahesh Kumar and also for assistance of investigation officer, a team was also constituted comprising of Sub-Inspector Sri Navratan Rastogi, Head Constable Deepak Kumar and Constable No. 154 Ajeet Kumar for searching the missing husband of the petitioner (Avinash Yadav).

8. That during the course of investigation, the investigation officer sent a letter dated 28.07.2023 to Manager, Sugar Cane Development Board, Daurala, Meerut and Manager, Punjab National Bank, Daurala for obtaining the salary account and photographs of Missing Avinash Yadav S/o Raghvan Yadav, R/o House No. 629 Jawahar Colony Patel Nagar, Muzaffar Nagar. Subsequently, after obtaining the photograph of the missing person, on 28.07.2023, the investigation officer by preparing the photo patrolling search (Photo Gashti Talash Gumshuda) of missing, sent the report to In charge D.R.C.B- Meerut, Bagpath Station Baghpat, G.R.P. City Stations of District Shamli, Muzaffar Nagar, Saharanpur and Meerut and circulated the R.T. Massage to all the In Charge Inspectors/S.H.Os of all the police station in respect of missing person.

9. That on 11.08.2023 the Sub Inspector Mr. Vinesh Kumar- Police Station Mutaina Daurala was sent to Delhi, District Ghaziabad, Aligarh to search the missing Avinash Yadav and paste pamphlets. Subsequently, the I.O. conducted the search in respect of missing person by roaming around the Police Station GRP Ghaziabad, Railway Station Ghaziabad and Police Station GRP Aligarh, railway station Aligarh, Roadways Bus Stand Aligarh and DCRB Office Aligarh and pasted patrol search pamphlets. Thereafter, on 12.08.2023, the search for the missing was done by roaming around the Roadways Bus Stand, Kashmiri Gate Delhi and P.S. Kashmiri Gate Delhi and pasted patrol search pamphlets.

10. That on 11.08.2023 S.I. Mr. Vinod Kumar Goswami was sent to search the missing Avinash Yadav, who pasted pamphlets to Police Station Balaini, District Baghpat. On making enquiry, one Suresh Chand S/o Vishal Singh, R/o Village Balani had informed as follows:

"अविनाश यादव उर्फ आशु पुत्र स्व० श्री राघवन यादव पूर्व में इसी गांव बालैनी जिला बागपत के रहने वाले थे व मेरे परिवार के ही थे। राघवन यादव लगभग 60 वर्ष पहले गांव छोड़कर मुजफ्फरनगर चले गये थे। राघवन यादव ने मुजफ्फरनगर में रहकर गन्ना विभाग में नौकरी की नौकरी के दौरान ही इनकी मृत्यु हो गयी थी। इसके उपरान्त राघवन यादव की जगह पर अविनाश यादव नौकरी पर लग गया था। अविनाश यादव व विशाल ने अपनी गांव की पैत्रक सम्पत्ति बेच दी जो मैने खरीद ली। अविनाश की शादी कमलेश यादव पुत्री मनवीर सिंह निवासी ग्राम ईस्माईलपुर थाना सिकन्दराबाद, जनपद बुलन्दशहर के साथ वर्ष 2000 में हुई थी। कमलेश यादव अपने पति अविनाश के साथ एक वर्ष तक साथ रही उसके बाद वह अपने मायके चली गयी। कई वार कमलेश का पति कमलेश को लेने अपनी ससुराल गया लेकिन वह नहीं आयी, कई बार दोनों के परिवारजनों की मीटिंग भी हुई लेकिन कमलेश अपनी ससुराल वापस नहीं आयी। इसी समय अविनाश यादव शराब पीने लगा तथा लापता भी हो गया। हमें नहीं पता कि कमलेश यादव के परिजनों ने कमलेश की कहीं शादी की है अथवा नहीं।"

Copy of Written Statement Given by Suresh Chand is being annexed herewith

and marked as ANNEXURE NO.-1 to this affidavit.

11. That on 12.08.2013, S.I. Mr. Vinod Kumar Goswami searched the missing at his residence i.e. House No. 629 Jawahar Colony Patelnagar, Muzaffar Nagar but the missing person was not found at his residence. Thereafter, pamphlets were pasted at P.S. Nai Mandi Muzaffar Nagar. Thereafter interrogation was made from uncle and aunty of missing person namely Sanjeev Yadav and Smt. Anuradha. Subsequently, Sanjeev Yadav by entrusting a letter informed as under:

"मेरे बड़े भाई राघवन यादव के दो पुत्र कमशः अविनाश यादव एवं विशाल यादव पैदा हुए। राघवन यादव की मृत्यु उपरान्त उनके बड़े पुत्र अविनाश यादव को जिला गन्ना समिति दौराला, मेरठ में चपरासी के पद पर नौकरी प्राप्त हुयी। अविनाश यादव की शादी श्रीमति कमलेश यादव व पुत्री पुत्री मनवीर मनवीर सिंह निवासी इस्माइलपुर थाना सिकन्द्राबाद, से वर्ष 2000 में हुयी थी। शादी के उपरान्त कमलेश करीब 01 वर्ष अविनाश यादव के बुलन्दशहर साथ मुजफ्फरनगर रही और एक दिन बाजार जाने की बात कहकर कमलेश यादव अपने भाई और बहन के साथ जो यहां आये हुए थे, सारा जेवर लेकर चली गयी थी। अविनाश यादव 2-3 बार कमलेश को लेने उसके मायके गया लेकिन कमलेश नहीं आयी। उसके बाद सगे-सम्बन्धियों की पंचायत हुयी, उसके उपरान्त भी कमलेश यादव ने आने से मना कर दिया जिस कारण अविनाश यादव अकेला होने के कारण परेशान रहने लगा और शराब पीने लगा और आफिस से भी गायब रहने लगा। केवल तन्ख्वाह मिलने वाले दिन जाता था तथा अपना सभी सामान (घरेलू) शराब पीने के लिए बेच दिया था और कहकर चला गया कि मैं अपने मामा के यहां जा रहा हूँ। अविनाश की ननिहाल सम्मल के आसपास है। करीब 10-11 साल पहले जी०आर०पी० गाजियाबाद से मेरे मो० नम्बर - 9719599308 पर कॉल आयी कि अविनाश यादव का एक्सीडेन्ट हुआ है और उसकी ट्रेन दुर्घटना में मृत्यु हुयी है, हमने उसका अन्तिम संस्कार कर दिया है तो हमने कहा कि हम तो वैचारिक मतभेद होने के कारण अलग रहते हैं फिर हम लोग गाजियाबाद नहीं गये थे और यह बात कमलेश यादव के देवर विशाल यादव को भी बतायी थी, जिसने अविनाश यादव की ट्रेन दुर्घटना में मृत्यु होने की बात कमलेश यादव को भी बतायी थी। कमलेश यादव वहां पर गयी अथवा नही गयी इसकी कोई जानकारी हमें नहीं है। विशाल यादव भी अधिक शराब पीता था, बीमार रहने के कारण दिनांक 10.04.2023 को मुजफ्फरनगर रेलवे स्टेशन पर उसकी मृत्यु हो गयी है, जिसका अंतिम संस्कार मैने अपने हाथों से किया है।

Sri Sanjeev Yadav also provided the photocopy of death certification of younger brother of Avinash Yadav. True copy of death certificate of younger brother of Avinash Yadav and relevant part of the GD revealing the information about missing Avinash Yadav by the Uncle and Aunt of the missing Avinash Yadav are being annexed herewith and marked as ANNEXURE NO.-2 and 3 to this affidavit.

12. That on 14.08.2023, Sub Inspector Mahesh Kumar was sent at office of S.P. G.R.P., Moradabad for pasting the missing photo pamphlets of missing person but no such record or any substantial break through could be found from the office of S.P. G.R.P., Moradabad. Meanwhile, G.R.P. Ghaziabad vide letter dated 16.08.2023 informed that there is no record available at P.S. GRP, Ghaziabad. Moreover, records of the year 2010 are also weeded out in Police Line Ghaziabad.

13. That in view of the aforesaid factum, it is submitted that best possible efforts are being made by the answering respondent for tracking the whereabouts of missing Avinash Yadav but despite of best efforts no such substantial information could be collected. However, the team constituted for the said purpose, are continuously trying their level best in respect of tracing out the missing person.

13. On 12.10.2023, an affidavit dated 11.09.2023 was filed in Court, because the matter could not be taken up on 12.09.2023 and 25.09.2023. The stand of the Senior Superintendent of Police, Meerut in the affidavit dated 11.09.2023 is recorded in the Court's order dated 12.10.2023, which reads :

An affidavit has been filed today in Court on behalf of the Senior Superintendent of Police, Meerut, by Ms. Monika Arya, learned Additional Chief Standing Counsel. It is taken on record. Let it be numbered by the Office.

In paragraph nos. 4, 5 and 6 of the said affidavit, it is averred:

"4. That it is noteworthy to mention here that the husband of the petitioner was gone missing in the year 2010 while the petitioner lodged the FIR after 13 years on 28.07.2023.

5. That in compliance of the aforesaid direction of this Hon'ble Court, deponent craves indulgence of this Hon'ble Court to bring on record copy of letter dated 31.08.2023 sent by Inspector In-Charge Daurala, District Meerut to Inspector In-Charge R.P.F. & G.R.P. Ghaziabad and Inspector In-Charge R.P.F. & G.R.P. Moradabad in respect of providing the post-mortem related details of dead/missing Avinash S/o Raghavan R/o House No. 629 Jawahar Colony, Patel Nagar, P.S. Nai Mandi, District Muzaffar Nagar.

6. That in response to the aforesaid communication, In-Charge R.P.F. and G.R.P. Ghaziabad District Ghaziabad vide his endorsement on the letter sent by the Inspector In-Charge Daurala, District Meerut, informed that as per records, no accident with respect to person namely Avinash S/o Raghavan is recorded in the year 2010 in R.P.F. Post Ghaziabad and also no record is available in G.R.P. Police Station Haza, Ghaziabad. In-Charge R.P.F. Moradabad vide his endorsement on the letter sent by the Inspector In-Charge Daurala, District Meerut, informed that no case is registered with regard to missing Avinash S/O Raghavan and In-Charge G.R.P. Moradabad has informed that no information is mentioned as per the records available in Police Station in relation to the missing Avinash S/O Raghavan. True copy of letter dated 31.08.2023 which bears the endorsement report of In-Charge R.P.F.& G.R.P. Ghaziabad and In-Charge R.P.F. & G.R.P. Moradabad are being filed herewith and marked as ANNEXURE NO.-1 respectively to this affidavit."

Apparently, the whereabouts of the petitioner's husband are not known by those who would have normally heard of him had he been alive.

Let a supplementary counter affidavit be filed within ten days by the Commissioner Cane and Sugar, U.P. Lucknow, the Deputy Cane Commissioner, Meerut, U.P, the Senior Cane Development Inspector, Meerut and the District Cane Officer, Meerut indicating what is the

position under the rules regarding presuming the civil death of an employee, who is absent for a long period of time with his whereabouts not being heard of by those who would have normally heard of him, of (sic) alive. The respondents shall bear in mind that abandonment of service postulates the fact that the employee is alive and has an animus to abandon employment. It requires, if the respondents say that the petitioner's husband has abandoned service, that he is or was alive at the relevant period of time and consciously committed acts of absenteeism entitling the respondents to hold him as having abandoned service. It would require the respondents to produce evidence showing that the petitioner's husband was alive at the time when he abstained form duties or that he is still alive.

The affidavit shall make due reference to the rules and the law on the subject and the manner in which such issues are dealt with by the respondents.

Since this matter has been sufficiently heard and substantial affidavits already exchanged, this petition is admitted.

List for further hearing on 02.11.2023.

Let this order be communicated to the Commissioner Cane and Sugar, U.P. Lucknow, the Deputy Cane Commissioner, Meerut, U.P, the Senior Cane Development Inspector, Meerut and the District Cane Officer, Meerut by the Registrar (Compliance) by Tuesday.

14. This Court must remark that in response to the order dated 12.10.2023, two Government Orders dated 20.03.1987 and 21.07.1991 were quoted extensively in a subsequent counter affidavit filed on behalf of respondents Nos. 2 to 5 about the benefits admissible to the dependants and heirs of government servants going missing. The respondents, in a most insensitive stand, did not acknowledge the position that indeed, Avinash Yadav had gone missing. In the supplementary counter affidavit that they filed in compliance with our order dated 12.10.2023, it was averred :

In the instant matter, the petitioner failed to submit any documentary evidence i.e., Missing complaint, death certificate from any court of law with regard to Mr. Avinash Yadav, succession certificate etc. in her favour. It is further submitted that the alleged husband of the petitioner, Mr. Avinash Yadav absconded from his duties without any sanctioned leave and despite of several notices on his residential address, he failed to present himself on duties to explain the unauthorized absence. Thereafter, considering the unauthorized absence of Mr. Avinash Yadav, through order dated 31.03.2021, the disciplinary authority / opposite party no. 5 terminated the services of Avinash Yadav w.e.f. 13.04.2010 and concluded the disciplinary proceedings initiated against him. More so, as per service book and service records of Mr. Avinash Yadav, the petitioner is not included amongst his family members. Therefore, the petitioner is not liable to receive the retiral dues of Mr. Avinash Yadav as alleged by her in the writ petition. The True and typed copies of the Government Order No. 369-88/10-909-87 dated 20.3.1987 and Government Order No. Bima - 1905 / Ten 91-4687 dated 21.7.1991 are being annexed herewith collectively and marked as **ANNEXURE No. SCA - 1** of this affidavit.

5. That as specified in Rule 35 and 36 of the Uttar Pradesh Subsidiary Rules or in the notes under Rule 66 of the Uttar Pradesh Fundamental Rules; any leave, other than disability leave, admissible under the Fundamental Rules, may be granted to a non-gazetted government servant by the authority whose duty it would be to fill up his post if it were vacant, or such other competent authority to grant such leave or extension thereof. Mr. Avinash Yadav working on the post of 'Peon' in the office of Senior Cane Development Inspector, Daurala, Meerut was continuously absent from duties w.e.f. 13.04.2010 without any permission or sanctioned leave; therefore, through several letters, the office of deponent and the Senior Cane Development Inspector, Daurala, Meerut directed to Mr. Avinash Yadav to join his duties immediately. The aforesaid letters sent at the residential address of Mr. Avinash Yadav at '629, Jawahar Nagar Colony, Patel Nagar, District - Muzaffarnagar' had been returned by the Postal Department of Government of India as unserved at the address of the Mr. Avinash Yadav (address as provided by Mr Avinash Yadav in his Service Book).

15. In this affidavit, a stand has also been taken that in Avinash's service book at Page No. 25 carrying the details of his family members, the name of his brother, Vishal Yadav, alone is mentioned, who is also the nominee entitled to receive Avinash's general provident fund. There is no mention of Avinash's wife. The respondents have virtually disowned the fact that the petitioner is his wife and said that if Avinash is missing, the burden to prove his presumed civil death under Section 108 of the Act of 1872 would lie upon the petitioner. The insistence is on the fact that since there is no missing report lodged regarding Avinash by the petitioner, the fact of his death cannot be presumed. The respondents say that since there is no missing complaint by the petitioner or a death certificate from a Court of law with regard to Avinash Yadav or a succession certificate in the petitioner's favour produced by her, it has to be presumed that Avinash Yadav has absconded without sanctioned leave. The stand taken in the supplementary counter affidavit is, indeed, not only very insensitive and nonchalant, but also very illegal. No one in the world of law would perhaps have heard of a party bearing the burden of proving a presumption, a stand the respondents have had the audacity to put on affidavit in the following words :

8. That it is significant to submit that Section 108 of the Indian Evidence Act, 1872 provides that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

Therefore, the petitioner is having the burden of proving her presumption that her husband Mr. Avinash Yadav is missing dead as per rule of law and settled propositions of law. The observations made by the Hon'ble Apex Court in the case of LIC of India Vs. Anuradha, reported in **(2004) 10 SCC 131**, in para-12, 13, 14 and 15 are relevant in the present context. The true copy of the Judgment and Order passed by the Hon'ble Apex Court in the case of LIC of India Vs. Anuradha, reported in **(2004) 10 SCC 131 is being filed herewith and marked as Annexure No. SCA-3 to this supplementary affidavit.**

(emphasis by Court)

16. Upon hearing learned Counsel for parties and perusing the record, apart from the remarks that we have already made above, it must be said that the respondents' stand, as it were, casting a doubt about the petitioner's status as Avinash's wife, goes against their own stand earlier taken. There is on record of the writ petition Memo No. 427 of 2019 स्था०/जांच dated 06.11.2019 addressed by Sauveer Singh, Senior Cane Development Inspector, Daurala, Meerut addressed to Avinash Yadav through the petitioner, describing her as Avinash's wife in the following terms :

श्री अविनाश यादव पुत्र स्व०श्री राघवन कुमार यादव,
राजकीय चपरासी (ग०वि०परि०, दौराला)।
द्वारा श्रीमती कमलेश पत्नी श्री अविनाश यादव
पुत्री श्री मनवीर सिंह ग्राम इस्माईलपुर डा० खास
सिकंदराबाद जिला-बुलन्दशहर।

17. This letter would show that the petitioner was reputed to be Avinash's wife, not only that she was. The mere fact that her name did not find mention in the Peon's service book may well be attributed to the fact that the service book might have been constructed at a time when the petitioner was not yet married, or for some other reason, not posted with the necessary details about his family members and revision of nomination etc. Even if the respondents still insist that the petitioner is not Avinash's wife, they can always ask her to produce a succession certificate from a Court of competent jurisdiction, entitling her to receive his dues and give them valid acquittance. But, that is not the question here. The question is : If the respondents could terminate the services of a missing man, who ought be presumed dead on principles analogous to Section 108 of the Act of 1872, if not proprio vigore, after proceeding against him in their disciplinary jurisdiction, holding him guilty of the charge of unauthorized absence from duty.

18. The question fell for consideration before the Delhi High Court in **Banarasi v. Government of NCT of Delhi and others2**. Vipin Sanghi, J. (as the learned Chief Justice then was), speaking for the Bench, held :

9. Even though the said Shri Bhagwan Singh was a member of respondent police force, no effort appears to have been made by the respondents to ascertain whether Shri Bhagwan Singh was in fact alive at the relevant time. Even though the address of the family of Shri Bhagwan Singh at Ajmer was furnished by Shri Amar Singh on 10.4.1997, and by the petitioner in her statutory appeal, no efforts seem to have been made to make any enquiry to trace out Shri Bhagwan Singh. No doubt the service record of Shri Bhagwan Singh shows that he was in the habit of remaining absent, inasmuch as, there were 20 occasions cited in the enquiry report between the year 1990 to January, 1996 when he had remained unauthorizedly absent. However, a perusal of the enquiry report shows that even in the said enquiry proceedings none of the witnesses stated that they had seen Shri Bhagwan Singh alive.

10. Merely because the officer who had visited the address at Sikar to

serve notice upon Shri Bhagwan Singh had stated that he was informed by the mother of Shri Bhagwan Singh that he had gone to Ajmer to attend to his ailing children, it cannot lead to a reasonable inference that he was alive at that point of time. Even though the rules of evidence do not apply to departmental enquiries, and it is not for this Court to assess the weight of the evidence produced in a departmental enquiry, it is open to us in judicial review to appreciate, whether there was any evidence or material at all before the enquiry officer to come to his findings or not.

11. The scope of enquiry in judicial review of a departmental enquiry is well established, and we may only quote a short passage from Bank of India v. Degala Suryanarayana, 1999 SCC (L & S) 1036 to refresh ourselves. The Supreme Court held:

"Strict rules of evidence are not applicable to departmental enquiry proceedings. The only requirement of law is that the allegation against the delinquent officer must be established by such evidence acting upon which a reasonable person acting reasonably and with objectivity may arrive at a finding upholding the gravamen of the charge against the delinquent officer. Mere conjecture or surmises cannot sustain the finding of guilt even in departmental enquiry proceedings. The court exercising the jurisdiction of judicial review would not interfere with the findings of fact arrived at in the departmental enquiry proceedings excepting in a case of mala fides or perversity i.e where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at that finding. The court cannot embark upon reappreciating the evidence or weighing the same like an appellate authority. So long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained. In Union of India v. H.C. Goel the Constitution Bench has held:

"[T]he High Court can and must enquire whether there is any evidence at all in support of the impugned conclusion. In other words, if the whole of the evidence led in the enquiry is accepted as true, does the conclusion follow that the charge in question if proved against the respondent? This approach will avoid weighing the evidence. It will take the evidence as it stands and only examine whether on that evidence legally the impugned conclusion follows or not."

12. Such far fetched statements, which are in themselves hearsay, attributed to the mother of Shri Bhagwan Singh, which are also hearsay and are also not based on any other corroborative material, could not, in our opinion, be used to conclude about the existence of Shri Bhagwan Singh on the relevant date. No man acting reasonably and with objectivity could have arrived at a finding that Shri Bhagwan Singh was in existence at the relevant time. We may also state that at the time when the enquiry was held, as not much time had passed since the disappearance of Shri Bhagwan Singh, presumably it did not even cross the mind of the Enquiry Officer or the Disciplinary Authority that he may not be alive. No enquiry into this possibility was held. Consequently, while his absence cannot be disputed and it is a matter of fact, it remains a mystery whether the same was willful or not. It could be said to be willful only if Shri Bhagwan Singh was shown to

have been alive at the relevant time. then, possibly it could be assumed that he was in a position to attend to his duties and he knowingly and deliberately did not report for duty. However, in case he was already dead, there is no question of his absence being willful.

13. Section 107 read with Section 108 of the Indian Evidence Act, 1872 states that when a question arises whether a person is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive shifts upon the person who affirms it. Consequently on the expiry of the seven years period from the date Shri Bhagwan Singh went missing on 24.7.1996, the burden of proving that he was alive rested on the respondent while prior to the expiry of seven years, the burden would have been on the persons who may have wanted to assert his death.

14. In **LIC of India v. Anuradha**, (2004) 10 SCC 131, the Supreme Court held that the presumption under Section 108 of the Indian Evidence Act cannot be extended to a presumption as to the time of death by presuming that the time of death coincide with the time when the said person went missing. The Supreme Court held that there is neither a presumption as to the date or the time of death nor as to facts and circumstances of death of a person under Section 107 and 108 of the Evidence Act. The only inference that is permissible to be drawn on the presumption is that such person was dead at the time when the question arose, subject to the said period of seven years having elapsed. Question of time of death is a question of evidence, factual or circumstantial and is not a matter of presumption. The onus of proving the time of death rests on the person who stakes the claim, establishment of which will depend on proof of date or time of death. However, the Supreme Court also observed that rarely it would be permissible to proceed on the premise that death had occurred on any given date before the expiry of the said period of 7 years.

15. Considering the fact that Shri Bhagwan Singh was not living with his family and was living in police barracks from he went missing and is unheard of since then, we are of the view that the facts of this case are exceptional and rare and, Therefore, circumstantially, it can fairly be inferred that Shri Bhagwan Singh was dead when he went missing or within a reasonable time thereafter.

16. If an employee, who is residing in accommodation provided by the employer, away from his family suddenly goes missing and is thereafter neither seen or heard of, either by his employers, colleagues or his family members, the responsibility of answering the question about his whereabouts lies, at least in the first instance, with the employer and not the family members of the missing person. In this case, the situation is even more grave, inasmuch as the employer happens to be the Police Force which is even otherwise responsible to trace out the missing persons once it is reported to it that a person is missing.

17. The Respondents have also relied **upon Union of India v. Geetha Devi, (2002) 10 SC 166** wherein the Supreme Court held that where the services of a employee had been terminated under Rule 5 of the CCS(Temporary Services) Rule, 1965 after unauthorized absence for

about 2 years, his wife could not claim relief of compassionate appointment, arrears of salary, family pension, etc. on the ground of presumption of her husband's death during his employment as he had remained missing after more than 7 years. This decision does not apply in the peculiar facts of this case, since, as aforesaid, in the present case the husband of the Petitioner was living in the police barracks and not with his family, when he suddenly went missing.

18. Our attention has also been drawn to another decision of Patna High Court in **Arti Devi @ Arti Pandey v. Union of India and others,** 2003 (3) Administrative Total Judgements 126. In that case, the husband of the Petitioner was an employee of the Central Reserve Police Force who proceeded on leave and was not traceable thereafter. He was declared as deserter and dismissed after inquiry and on that basis the claim for family pension and other retiral benefits were denied to the Petitioner. The High Court in the facts of that case directed that the Petitioner may produce evidence and satisfy the authority to discharge the onus upon her under Section 108 of the Evidence Act, whereupon the authorities were required to discharge their onus and to proceed and conclude the matter.

19. We have considered the respective submissions thoughtfully. It is not in dispute that the husband of the petitioner went missing, which was treated as absent from duty. On this basis, disciplinary proceedings were initiated against Sh.Bhagwan Singh, husband of the petitioner. As his whereabouts could not be found, ex parte inquiry was held and he was dismissed from service. Normally, on the charge of absence from duty, such an action could be taken by the respondents. To that extent there may not be any quarrel. However, in the present case, what is to be borne in mind is that it is not a case where Sh.Bhagwan Singh started absenting from duty, though he was very much available. It is a case where whereabouts of Sh.Bhagwan Singh right from the date of his absence could not be known to any person in this world, including his family members. In the process, more than seven years passed and Therefore, presumption under Section 108 of the Indian Evidence Act to the effect that Sh.Bhagwan Singh is not alive came into effect. In such a scenario, it cannot be said that absence of Sh.Bhagwan Singh from service was willful. When he is presumed dead, maybe such a presumption arises after the expiry of seven years from the date he was not seen, it can reasonably be presumed that absence from service by Sh.Bhagwan Singh was not intentional.

20. We are, Therefore, of the view that the claim of the petitioner made in the original application could not have been rejected while placing the entire responsibility of proving the demise of her husband, at the time when he was accused of remaining willfully and unauthorizedly absent, upon her shoulders. In view of the fact that Shri Bhagwan Singh was not residing with his family and was living away from his family in police barracks, when he went missing from the place of duty under the control of the respondents and did not go back to h is own house and his whereabouts could not even be traced, the charge of absence from duty, coupled with the fact that Sh.Bhagwan Singh has not been seen for all these years, cannot be treated as sustained in the facts and circumstances of this case. In fact, it was for the respondents to trace out the

whereabouts of Sh.Bhagwan Singh if he was alive at the relevant time. The petitioner being a lay person cannot be fasten with this responsibility, who claims not to have seen her husband from the time when he went missing while on duty in Delhi.

21. In case the husband of the petitioner was dead when he went missing in 1996, it would be highly inequitable and unjust to the petitioner to deny her family pension. She would be doubly condemned. Firstly because of the death of her husband, and secondly because of the denial of family pension.

19. The same question again arose before the Andhra Pradesh High Court in **Smt. K. Lakshmi v. The A.P.S.R.T.C. and others3**. The short facts giving rise to the issue, as these appear in paragraphs Nos. 2 and 3 of the report in **Smt. K. Lakshmi** *(supra)* read :

2. The facts, in brief, are that the petitioners husband, namely Mr. K. Ramesh, was working in the respondent Corporation as a driver with batch No. E.505379. On 03.04.1992, when he was off duty, the petitioners husband went out, but never came back home. Not knowing the whereabouts of her husband, the petitioner lodged a police complaint on 09.06.1992, based on which, the 5th Town Police Station, Nellore, registered a case in Cr. No. 115 of 1992 for man missing and investigated further. Finally, the S.H.O of the said Police Station informed the petitioner through a notice dated 30.07.1992 that her husband could not be traced.

3. Clueless about what course of action she should take, having lost the bread winner of the family, the petitioner and her three children waited up to 2006 with a fond hope that her husband would turn up. When the wait proved futile, on legal advice, the petitioner filed O.S. No. 267 of 2006 on the file of III Addl. Junior Civil Judge, Nellore, for a declaration that her husband is deemed to have been dead. The competent Civil Court, eventually, allowed the suit through Judgment and Decree dated 11.07.2006, thus declaring that the petitioners husband is deemed to have been dead, in terms of Section 108 of the Indian Evidence Act.

20. The only feature that was different from the present case was that the missing employee's wife had obtained a decree from the Civil Court, declaring his civil death, but that we think is not at all decisive. What is decisive is the man remaining unheard of for a period of seven years by those who would have naturally heard of him. This does not always require a declaration by the Civil Court. This rule of evidence engrafted under Section 108 of the Act of 1872 is based on robust common sense and human experience about life. It cannot be limited and made dependent upon decrees of the civil judicature, as a matter of universal application. It has to be understood and applied pragmatically. In dealing with the issue, in **Smt. K. Lakshmi,** Dama Seshadri Naidu, J. held :

20. The presumption of death of a person unheard of for seven years is an aspect of English Common Law, given statutory recognition in India through Section 108 of the Evidence Act, 1872. In fact, section 108 is not a substantive provision of law, but only a procedural one. Thus, it cannot be stated that the said provision exhaustively covers all the facets of the Common Law concept of presumed

death. For instance, on completion of seven years, as per the first limb of the provision, the initial burden is on the one who asserts that the person has not been heard for seven years to prove it to be so. On such proof, the burden shifts on to the other who asserts the persons existence. As such, section does not deal with the aspect of when the person has exactly died or deemed to have died. It all depends on the facts of each case. In any event, the presumption comes into play only after the completion of seven years, but not before.

21. Though the respondent Corporation has taken recourse to a convenient option of setting the petitioners husband ex parte and passed orders removing him from service, it is not the case of the Corporation that the petitioners husband had deliberately absconded from duty, or had been guilty of any grave crime or misconduct, thus fleeing from the course of justice, by performing the vanishing act.

24. Indeed, the petitioner could have approached the Labour Court invoking Section 2-A of the Industrial Dispute Act. On that count, the learned Standing Counsel for the respondent Corporation has laid much stress, contending that the petitioner has an efficacious alternative remedy available to her. Be that as it may, it is quite prosaic to once again stress what is otherwise a very established legal principle that while exercising powers under Article 226 of the Constitution, though the alternative remedy is one of the factors to be considered, it cannot be said that it is an insurmountable legal hurdle, which cannot be overcome under any circumstance. In fact, confining the discussion to the facts of the present case, it can be stated without fear of contradiction that the totality of the circumstances would amply justify to hold that not taking recourse to Section 2-A of the Act is not fatal, given the history of the litigation i.e., the petitioners approach on more than one occasion to this Court assailing the inaction on the part of the respondent Corporation. In fact, the respondent Corporation ought to have considered the case of the petitioner without insisting on technicalities, especially since it is a peculiar case of delinquent workman disappearing and having never been traced thereafter. Once the respondent Corporation never doubted the bona fidies of the petitioner, it could not have insisted on technicalities, thus denying the petitioners claim, which is otherwise justifiable.

25. Now I may consider the submissions of the learned Standing Counsel for the respondent Corporation that all the terminal benefits were paid, treating the delinquent workman as having been removed from service. In the face of declaration granted by the Civil Court under section 108 of the Evidence Act, the petitioners husband, for all intents and purposes, is dead or deemed to have been dead. Having stated that the presumption comes into play only on the completion of seven years, as a natural corollary, the date of death shall also be presumed to be at the end of the seventh year or thereafter. However, as there cannot be no hard and fast rules in this regard, and such presumption as to the exact time of death is a matter of conjecture, it entirely depends on the facts of each case. In this case, taking recourse to a beneficial approach of the issue, it shall be presumed that the presumption relates back to the initial disappearance of the petitioners husband, on completion of seven years, though.

26. Once such a legal fiction is employed, it should run its full course. Ipso

facto, as the workman was deemed to have been dead on the date of his disappearance, the disciplinary proceedings are deemed to have been initiated against the dead person. Those proceedings are a nullity. A fortiori, the workman is deemed to have died in harness, since by the date of his presumptive death, the workman was not removed from service.

28. In that case the writ petitioners husband has been missing for more than a decade. She has been running from pillar to post seeking from the employer - Electricity Board - Compassionate appointment for herself or family pension. The Board, however, maintained that her husband was unauthorisedly absent for more than five years and for that reason his services stood automatically terminated. The Board gave no consideration to her for either compassionate appointment or family pension. When the wife has approached this Court, this Court has given a direction to treat her husband as legally dead and grant to her family pension. The petitioner-wife has also been allowed to make application for compassionate appointment. This Court further observed that in case such application is filed by her, the Board shall give a sympathetic consideration. Aggrieved there by, the Board has filed a Writ Appeal.

29. The Division Bench of this Court has held that the presumption as to the death of the workman, however, is not in any manner against the interest of the Board, for if he is alive, he is entitled to claim continuity in service until the service is determined in accordance with law and if he is dead for all legal purposes, the obligation upon the Board is to pay the family pension to his wife and dependents only. Finding no merits in the appeal, in that context, their Lordships have observed:

5. We, however, take notice of the long suffering of the wife of an erstwhile employee of the Board and the family which has gone without anything for its subsistence provided by the employer of the husband of the writ-petitioner. While we endorse the directions of the learned Singled Judge, we direct the Board to consider the case of the writ petitioner for compassionate appointment and give to her such appointment in accordance with law at the earliest. As we have noticed above, for all practical purpose the husband of the writ petitioner will be deemed to have died and as he has died while in service of the Board, he will be deemed to have died in harness.

30. Being in respectful agreement with the above ratio laid down by the Division Bench of this Court, I am of the considered opinion that for all practical purposes, the petitioners husband shall be treated to have died in harness. Accordingly, the impugned Order, dt.07.09.2009 passed by the second respondent is hereby set aside. Consequently, the respondent Corporation is further directed to pay the balance of terminal benefits to the petitioner treating the workman to have died in harness.

21. The next authority of seminal importance is the Bench decision of the Madras High Court in **The Managing Director, State Express Transport Corporation Tamil Nadu Limited, Pallavan Salai, Chennai and others v. E. Tamilarasi4**. The short facts giving rise to

the cause in **E. Tamilarasi** *(supra)* can again be best gathered from the description of these from the report of their Lordships' judgment, which read :

3. The respondent's husband was employed as a Conductor in the appellant Corporation. He joined service in the year 1978 and put in about 21 years of service.

4. It appears that on one day in May 1999, the respondent's husband disappeared without any trace. All the attempts made by the respondent to trace her husband, proved futile.

5. After making enquiries in various places, the respondent at last lodged a complaint. An F.I.R. was registered in Cr. No. 259 of 2009, for 'Man Missing'. Eventually, a report was filed on 30.11.2000, that he was not traceable.

6. In the meantime, the appellants issued a charge memo in the name of the respondent's husband on 30.06.1999. The charge was for unauthorised absence. The charge memo returned unserved as the respondent's husband had disappeared in May 1999.

7. Another show cause notice dated 21.07.2000, was issued. It was also returned. Therefore, by a final order dated 09.04.2001, the appellants dismissed the respondent's husband from service.

8. After the final order of dismissal from service, dated 09.04.2001, was served on her, the respondent filed a statutory appeal on the ground that her husband was not traceable. She also sought reconsideration of the decision to dismiss her husband from service. But, the representations did not meet with any response.

9. Therefore, the respondent filed a writ petition in W.P(MD) No. 3796 of 2008. The writ petition was disposed of with a direction to the appellants to consider and pass orders. But, no orders were passed.

10. Therefore, the respondent came up with a writ petition, challenging the final order of dismissal of her husband, dated 09.04.2001 and seeking a direction to grant consequential benefits. The said writ petition in W.P(MD) No. 13064 of 2009 was allowed by a learned Judge of this Court. As against the said order, the appellant Corporation is on appeal.

22. In dealing with the question of civil death, V. Ramasubramanian, J. (as his Lordship then was of the High Court) held :

12. While there can be no dispute about the presumption available under Section 108 of the Indian Evidence Act, 1872, what is important is to see the date on which such presumption arises. As per Section 108 of the Indian Evidence Act, 1872, whenever a question arises whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him, burden of proving that he is alive, is shifted to the person who affirms it.

13. What is provided in Section 108 of the Indian Evidence Act, 1872, is only a presumption. Section 108 of the Indian Evidence Act, 1872 cannot be read in isolation. It should be read along with Section 107 of the Indian Evidence Act, 1872. Under Section 107 of the Indian Evidence Act, 1872, whenever a question arises as to whether a man is alive or dead and it shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

14. Thus, Section 108 is an exception to Section 107. If Section 107 provides the rule, Section 108 provides the exception. Once it is established that a person was alive within 30 years, the burden of proving that he is dead is on the person who affirms it. This is the rule under Section 107. But, if it is proved that such a person, despite being alive within 30 years, has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms that he is alive.

15. Therefore, it follows as a corollary that for the application of Section 107, the outer limit of the period of prescription is 30 years. Similarly, for the application of Section 108, the minimum period of time limit statutorily prescribed for the presumption to arise is seven years.

16. This is why the presumption as to death cannot be raised before the expiry of seven years. It cannot be raised even if the period of seven years falls short by one or two days. In LIC of India v. Anuradha, 2004-4-L.W. 358 : (2004) 10 SCC 131 : AIR 2004 SC 2070, the Supreme Court held that the presumption as to death by reference to Section 108 would arise only on the expiry of seven years and would not by applying any logic or reasoning be permitted to be raised on the expiry of 6 years and 364 days or at any time short of it. More over, the Court pointed out that an occasion for raising the presumption would arise only when the question is raised in a court, tribunal or before an authority who is called upon to decide as to whether the person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings, the occasion for raising the presumption does not arise.

17. Therefore, the expiry of the full period of seven years is essential to raise the presumption under Section 108. This takes us to the next question as to what exactly could be taken as the date of death.

21. ...The question whether a person was alive or dead at a given date will be decided on all the evidence available at the date of the hearing.

22. Therefore, it is impossible to think that a person can be presumed to be dead from the date on which he went missing. Unless a period of seven years expire from the date of his missing, the very occasion for the raising of the presumption does not arise. Therefore, the learned Judge was not correct in thinking that the respondent's husband should be presumed to be dead from May 1999 onwards.

23. Having cleared the said aspect, what is now to be considered is as to whether the dismissal order is valid or not. Fortunately, the respondent has challenged the order of dismissal. The dismissal order has been passed in disciplinary proceedings taken exparte. The reason for non-appearance of the respondent's husband before the disciplinary authority is the factum of his missing. Once it is established that he has not been heard of for seven years from May 1999, it was impossible for him to participate in the enquiry. Therefore, the punishment by itself, cannot stand unless the presumption under Section 108 of the Indian Evidence Act, 1872 is rebutted by the employer.

23. Now, in the present case, even if one were to go by the respondents' stand taken in the supplementary counter affidavit to the effect that the presumption of civil death would not attach in the absence of a missing complaint to the Police, that complaint too has come to be lodged under orders of this Court dated 12.07.2023 by the petitioner, though, on 28.07.2023. Intensive efforts were made by the Police to trace out the missing man but to no avail. It is not just a complaint to the Police or an FIR which is decisive. The missing employee, whose services were terminated on account of being absent from duty by the order impugned dated 31.03.2021 was missing since 13.04.2010. During this period of time, the respondents, who are his employers, had published notices in newspapers to seek him out, but to no avail. The family members never came to know about his whereabouts, and now, the Police too have failed. Thus, the date on which the impugned order terminating the petitioner's services on the charge of long and unauthorised absence was passed by the respondents, was much after lapse of the period of seven years since the employee went missing and never heard of by those who would have naturally heard of him, if alive. None of his family, friends, wife or employers have mentioned in the slightest that they heard of him after 13.04.2010.

24. In the circumstances, after a lapse of ten years that the employee went missing, the respondents had no jurisdiction to pass the impugned order, treating him to be absent from duties for more than five years, invoking their powers under Rule 18 of the U.P. Fundamental Rules. Rule 18 aforesaid reads :

"18. Unless the Government, in view of the special circumstances of the case, shall otherwise determine, after five years' continuous absence from duty elsewhere than on foreign service in India, whether with or without leave, no government servant shall be granted leave of any kind. Absence beyond five years will attract the provisions of rules relating to disciplinary proceedings."

[The earlier Rule 18 of the Uttar Pradesh Fundamental Rules has been substituted by Notification No. G-4-34/X-89-4-83 dated 12.09.1989].

25. A perusal of the said Rule shows that it is never meant to apply to the case of a man who, on the date the question comes up for consideration, has not been heard of since seven years past by those who would have naturally heard of him, if alive. Rule 18 clearly is meant to apply to a man who is known to be around and yet absconding or wilfully remaining absent from duty. It is to the case of the known living men with traceable or fleeting whereabouts that fundamental Rule 18 would apply. It would not apply to the case of persons about whom a presumption of death can safely be drawn on the analogy of Section 108 of the Act of 1872, on the date the order of termination from service is passed against them.

26. Here, on the date of the impugned order, a period far more than seven years of the employee going missing had elapsed, with none of those who would have naturally heard of him if alive, knowing his whereabouts, including the employers. The additional abortive attempts of the Police, vigorously made under orders of this Court to trace out the missing man, lend credibility to the fact that perhaps the presumption under Section 108 of the Act has turned into a reality. Be

that as it may, this Court is of considered opinion that on the date the order impugned was passed, the respondents could not have made it. It is absolutely without jurisdiction and manifestly illegal.

27. In the result, this petition succeeds and stands allowed. The impugned order dated 31.03.2021 passed by the District Cane Officer, Meerut (annexed as Annexure No. CA-1 to the counter affidavit dated 22.08.2023) is hereby **quashed.**

28. So far as the petitioner's claim for pension and death-cum-retirement benefits on account of services rendered by Avinash Yadav or her further claim to seek compassionate appointment is concerned, the respondents will be obliged to consider it, subject to the petitioner producing a succession certificate under Section 372 of the Indian Succession Act, 1925 granted by the Court of competent jurisdiction. The Court, wherever the petitioner makes a petition for the grant of a succession certificate, shall expedite proceedings, considering the peculiar facts and circumstances obtaining in this case.

29. There shall be no order as to costs.

30. The Registrar (Compliance) is directed to communicate this order to the District Cane Officer, Meerut through the learned Civil Judge (Senior Division) Meerut.

(2024) 6 ILRA 244
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.06.2024

BEFORE

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

Writ-A No. 67528 of 2015

Akash Dubey ...Petitioner
Versus
Electricity Service Commission U.P. Power Corp. & Anr. ...Respondents

Counsel for the Petitioner:
Virendra Singh

Counsel for the Respondents:
C.S.C., Abhishek Srivastava, Ayank Mishra, J.P. Pandey

Service Law –Mandamus directing respondents to allow the petitioner to be considered for interview for the post of Junior Engineer (Trainee) in UPPCL- Petitioner holds the degree of Bachelor of Technology in Civil Engineering – essential qualification- Three years Diploma in Electrical Engineering/Civil Engineering- Petitioner qualified the written test- Was not called for interview for not holding a Diploma as required- no place in the scheme of the advertisement to judge if any other qualification possessed by a candidate is higher than the one prescribed- terms of the advertisement make the qualification of a Diploma in Electrical/ Civil Engineering, essential to maintain one's candidature for the post - Holder of a superior degree in Engineering would not be eligible- Petition dismissed. (Para 10, 13, 14 and 18)

HELD:
To this Court's understanding, therefore, there is no place in the scheme of the advertisement to judge if any other qualification possessed by a candidate is higher than the one prescribed. (para 10)

The holding of the Full Bench leaves no manner of doubt that given the terms of the advertisement here, which we have held to be exclusive about the stipulated qualification and not one that speaks about a minimum or a range of graded qualifications, the holder of a degree in Engineering would not be eligible. (Para 14).

In the present case, hardly any rule has been brought to the notice of this Court, that may lend itself to a particular construction, where the holder of a degree in Engineering may be held eligible to apply to the post of a Junior Engineer. To the contrary, terms of the advertisement make the qualification of a Diploma in Electrical/ Civil Engineering, essential to maintain one's candidature for the post. About all the argument based on inherent superiority of a degree in Engineering, the answer of the Full Bench to the issue clinches it. (Para 18)

Petition dismissed.

List of Cases cited:

1. Deepak Singh & ors. Vs State of U.P. & ors., 2019 (7) ADJ 453 (FB)

2. Puneet Sharma & ors. Vs Himachal Pradesh State Electricity Board Limited & anr., (2021) 16 SCC 340

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

1. The petitioner has instituted this writ petition praying that a *mandamus* be issued, directing the respondents to consider his case by allowing him to participate in the interview for selection of a Junior Engineer (Trainee), bearing Post Code No.524, pursuant to Advertisement No. 5/VSA/2015 J.E. issued by the Electricity Service Commission, Uttar Pradesh Power Corporation Limited, Lucknow (for short, 'the Service Commission'). He has further sought a mandamus to the effect that the respondents be commanded to keep one post of a Junior Engineer (Trainee), bearing Post Code No.524, relative to the last mentioned advertisement, unfilled.

2. The petitioner says that he passed the Secondary School Examination-2007 and the Senior Schools Certificate Examination-2009, both conducted by the Central Board of Secondary Examination. He earned his degree of Bachelor of Technology in Civil Engineering from the National Institute of Technology, Patna in the year 2013-14. The Service Commission issued Advertisement No. 5/VSA/2015 J.E., inviting applications online from eligible candidates for a consideration for appointment as Junior Engineer (Trainee), bearing Post Code Nos.521 and 524. The essential qualifications mentioned in the advertisement vide Clause 4 read:

"4. Essential Qualification:

(A) Candidates should have thorough knowledge of Hindi (Devnagri script). If the candidate has not passed High school or equivalent examination in Hindi, he/she has to clear an exam conducted by the Registrar, Department Examination Govt. Of U.P. within 3 years of joining.

(B) A candidate must have passed (I) "Three years Diploma examination in Electrical Engineering/ Civil Engineering awarded by Pravidhik Shiksha Parishad, Uttar Pradesh OR a Diploma, equivalent thereto, recognized by the State Government" OR (II) "Three years All India Diploma Examination in Electrical Engineering/Civil Engineering conducted by the All India Council for Technical Education (AICTE) Govt. of India" OR (lII) "Diploma Examination in Electrical Engineering/ Civil Engineering conducted by any of the Universities in India incorporated by an Act of the Central/State legislature."

Note:- (1) Candidates having received Diploma through Distance Learning Education Programme are Not Eligible to apply for the above posts. (2) Candidates "having Diploma received on

the basis of length of service (without passing the Diploma examination) are also Not Eligible to apply for the above posts."

3. The petitioner says that he fulfilled all the necessary criteria and eligibility for a consideration of his candidature for appointment to the post of Junior Engineer (Trainee), bearing Post Code No.524. It is his case that the selection process involved a written test and interview. The petitioner sat the written test, carrying 200 marks, comprising a total of 200 questions. The petitioner had applied online furnishing details of his academic qualifications. He was allowed to participate in the written examination, evident from the fact that he was issued with an admit card for the purpose. It is averred by the petitioner that his online application form for the post of a Junior Engineer (Trainee), bearing Post Code No.524 shows that he had given details of the qualifying examination, which he mentioned as a B.Tech. Degree earned in the year 2014 from the National Institute of Technology, Patna. It was after verifying the said application that the petitioner was allowed to participate in the written test. The petitioner's result for the written examination was declared on 28.10.2015 and he figured amongst the candidates selected for Post Code No.524 with Roll No.2030175. He was shortlisted to participate in the interview. He received a call letter dated 07.11.2015, requiring him to appear at the Electricity (Trainee) Centre, Sarojini Nagar, Lucknow on 18.11.2015 at 08:00 a.m.. The petitioner was asked to bring along all the original records of his academic qualifications. The petitioner appeared at the venue of interview, reporting within time on 18.11.2015 along with all original records of his academic qualifications.

4. The candidates were given a checklist by the officials of the Service Commission, which was to be filled up by candidates themselves. The petitioner was also issued the checklist, which he duly filled up. The said list was taken back by the officials of the Service Commission, filled up by him. The officials of the Service Commission at this stage informed the petitioner that since he had earned a B.Tech. Degree, he cannot be allowed to participate in the interview. The petitioner pleads that the checklist, that he had handed over duly filled up, was returned to him unacknowledged. He was denied interview. He was not communicated anything in writing by the Service Commission why his candidature was not regarded competent.

5. It is the petitioner's case that a perusal of the qualifications carried in the advertisement shows that the minimum qualification required for the post of a Junior Engineer (Trainee) is a Three year Diploma in Electrical/ Civil Engineering, but there is no bar that a candidate with a higher and better qualification would not have valid candidature, for the reason alone that he does not hold a Diploma in Civil Engineering. The petitioner says that he is eligible, being possessed of better qualifications than the minimum prescribed in the advertisement, but denied interview, and, therefore, opportunity to canvass his candidature finally for selection. Aggrieved, he has instituted the present writ petition for the reliefs claimed.

6. A notice of motion was issued on 17.12.2015. A counter affidavit was filed on behalf of both the respondents on 16.02.2016, to which the petitioner filed a rejoinder on 20.05.2016. On 02.11.2023, when the petition came up before the Court, the parties having exchanged affidavits, it was admitted to hearing,

which proceeded forthwith. It was adjourned to the following day i.e. 03.11.2023. On the said day, Mr. Avneesh Tripathi, learned Advocate was appointed Amicus Curiae to assist the Court in the matter. The matter was next heard on 07.12.2023 and adjourned for further hearing to 08.12.2023. On 08.12.2023, hearing was concluded and judgment reserved.

7. Heard Mr. Virendra Singh, learned Counsel for the petitioner, Mr. Avneesh Tripathi, learned Amicus Curiae and Mr. Abhishek Srivastava, learned Counsel appearing on behalf of the respondents.

8. The question involved in this petition is if the degree in Engineering is to be regarded as a higher qualification to the Diploma advertised by the Service Commission, an essential qualification for selection and appointment as Junior Engineer (Trainee) with the U.P. Power Corporation Limited.

9. This Court must at once say that we have not been referred to any statutory rules on the subject, prescribing qualifications for the post of a Junior Engineer (Trainee) in the establishment of the Power Corporation. What, therefore, has to be fallen back upon as the prescription for eligibility are the terms of the advertisement. The advertisement in question has been quoted *in extenso*. It shows that the essential qualifications advertised are a Three year Diploma Examination in Electrical Engineering/ Civil Engineering awarded by the *Pravidhik Shiksha Parishad*, Uttar Pradesh or a Diploma, equivalent thereto, recognized by the State Government, or a Three year All India Diploma Examination in Electrical Engineering/ Civil Engineering, conducted by the All India Council for Technical Education (AICTE) Govt. of India, or a Diploma Examination in Electrical Engineering/Civil Engineering conducted by any of the Universities in India incorporated by an Act of the Central/ State legislature. Paragraph No.4(B) of the Advertisement, which mentions these essential qualifications, starts with the proscription that "a candidate must have passed", the above referred Diplomas from one or the other institutions in the three set of alternatives. The qualification of a Diploma in Electrical or Civil Engineering is not mentioned in that advertisement as the minimum qualification. Rather, paragraph No.4 itself speaks about essential qualification, of which paragraph No. 4(B) is a part. If the advertisement had mentioned the stipulated alternatives of a Diploma in Civil or Electrical Engineering as the minimum qualification, it would have predicated a higher qualification as well. The employment of the word 'minimum' to qualify 'qualification' introduces an idea of comparison or gradation. The word 'minimum' postulates higher and still higher. The word 'essential' excludes comparison of degree, called anything else; higher or lower. The advertisement here, as already remarked, makes the Diploma in Civil or Electrical Engineering essential qualification to maintain one's candidature.

10. To this Court's understanding, therefore, there is no place in the scheme of the advertisement to judge if any other qualification possessed by a candidate is higher than the one prescribed. This question fell for consideration before a Full Bench of this Court in **Deepak Singh and others v. State of U.P. and others, 2019 (7) ADJ 453 (FB). In Deepak Singh**

(supra), the Full Bench had before their Lordships, the following questions referred for consideration by a learned Single Judge:

"A. Whether a Degree in the field in question is entitled to be viewed as a higher qualification when compared to a Diploma in that field?

B. Whether the decisions in Alok Kumar Mishra and Kartikey lay down the correct position in law when they hold that a Degree holder is excluded from the zone of consideration for appointment as a Junior Engineer?

C. Whether a degree holder can be held to be ineligible to participate in a selection process for Junior Engineer in light of the relevant statutory rules?

D. Whether the exclusion of degree holders from the zone of consideration would meet the tests as propounded by the Supreme Court in State of Uttarakhand v. Deep Chandra Tewari?"

11. Question Nos. A and B were answered together by their Lordships after considering a wealth of authority bearing on the issue. It was held by the Full Bench in **Deepak Singh** thus:

"14. In view of the submissions made at the bar and the Judgments relied upon, the first two questions being Question Nos. A & B in referring order dated 29.11.2018 and the question referred in WRIT - A No. 671 of 2009 are being taken up together and a decision is to be recorded as to whether a degree in the field in question will be viewed as a higher qualification when compared to that diploma in that field.

15. A diploma in engineering essentially is designed to impart practical aspect of the engineering and the mere perusal of the syllabus reveals that the Diploma in Engineering is aimed to equip the candidates, who can cater to the practical requirement of engineering with emphasis on the practical works. In short, it aims to train persons for execution of the works and handling of equipments, etc. whereas the graduates in Engineering are taught with syllabus which provides theoretical training in the field of Engineering with low emphasis on the practical part of the engineering.

16. In India, Diploma Course in Engineering, is offered to the students and is a short duration course with the focus on training a person in a particular field. The curriculum includes basic theoretical knowledge and extensive practical knowledge and the diploma can be conferred by various institutes who may or may not be affiliated to the University Grants Commission (hereinafter referred to 'UGC') or All India Council for Technical Education (hereinafter referred to 'AICTE'). The same can be offered even to students after passing their Class-X Examination, in contrast, the Bachelor in Technical Education is offered to students after their completion of Class-XII Examination. A 'degree' can be granted only by the Institutes affiliated to UGC or AICTE. The duration of the course is longer (at present 4 years) and the emphasis in the curriculum is on academics. Thus, in India, focus and the aim of the two streams of education is entirely different with stress on extensive practical knowledge in the case of diploma holders and major emphasis on academic in the case of degree holders. Thus, the Diploma in Engineering and Degree in Engineering cater to different situations

and, in view thereof, a degree in the field, in question, cannot be viewed as a higher qualification when compared to a diploma in that field.

17. Sri Ashok Khare, learned Senior Counsel, in his usual eloquence, has taken us through the various Judgments, he has relied upon in State of Haryana v. Abdul Gaffar Khan, 2006 (11) SCC 153 wherein the Apex Court was confronted with the selection to the post of Unani Dispenser wherein the educational qualification prescribed was:

(i) Unani Dispenser from any recognised University/Institution or Board or Faculty of Indian System of Medicine established by law in India or Up-Vaidya having the knowledge of Urdu:

(ii) Matric or its equivalent.

(iii) Knowledge of Hindi and English upto Matric standard.

18. The respondents, in the said matter, possessed a qualification of Bachelor of Unani Medicine and Surgery from Kanpur University and were denied appointment for the reasons that they did not possess the qualification of Dispenser of Unani Medicine or Up-Vaidya from a recognised university. The Hon'ble Supreme Court while dealing with submissions recorded as under:

"We have perused the order passed by the High Court. As rightly pointed by the High Court and as per Haryana Ayurvedic/Homeopathic and Unani Technical Group (C) Service Rules, 1997, they do not expressly exclude the degree in Unani Medicine and Surgery for the post of Unani Dispenser. Admittedly, the respective contesting respondents in these appeals possess required qualifications from a recognized University/ Institution or Board and are thus, in our opinion, eligible for appointment to the posts of Unani Dispenser. A close scrutiny of the advertisement issued does not anywhere stipulate the diploma as the required qualification. We, therefore, affirm the order passed by the High Court and direct the appellant-State of Haryana to appoint the respective respondents to the posts of Unani Dispenser within a period of one month from the date of receipt of the order from this Court or on production of the same by the respective respondents herein whichever is earlier. The appeals are accordingly dismissed. There shall be no order as to costs."

19. We are afraid that the said Judgment has no application to the facts of the present case inasmuch as in the present case the specified required qualification was "Diploma in Engineering" and Degree Holders were specifically excluded.

23. The appellants, before the Supreme Court, were holders of B.Tech. degree in Electrical Engineering or Bachelor's degree in Electrical Engineering were non-suited by the Commission. The Apex Court relied upon Rule 10 (a)(ii) which was as under:

"Notwithstanding anything contained in these rules or in the special rules, the qualifications recognised by executive orders or standing orders of government as equivalent to a qualification specified for a post in the special rules and such of those higher qualifications which presuppose the acquisition of the lower

qualification prescribed for the post shall also be sufficient for the post."

On the basis of the said Rule 10 (a)(ii) of the Kerala State and Subordinate Services Rules, 1958, the Apex Court held as under:

"It is no doubt true, as stated by the High Court that when a qualification has been set out under the relevant rules, the same cannot be in any manner whittled down and a different qualification cannot be adopted. The High Court is also justified in stating that the higher qualification must clearly indicate or presuppose the acquisition of the lower qualification prescribed for that post in order to attract that part of the rule to the effect that such of those higher qualifications which presuppose the acquisition of the lower qualifications prescribed for the post shall also be sufficient for the post. If a person has acquired higher qualifications in the same faculty, such qualification can certainly be stated to presuppose the acquisition of the lower qualifications prescribed for the post. In this case it may not be necessary to seek far.

Under the relevant rules, for the post of assistant engineer, degree in electrical engineering of Kerala University or other equivalent qualification recognised or equivalent thereto has been prescribed. For a higher post when a direct recruitment has to be held, the qualification that has to be obtained, obviously gives an indication that such qualification is definitely higher qualification than what is prescribed for the lower post, namely, the post of sub-engineer. In that view of the matter the qualification of degree in electrical engineering presupposes the acquisition of the lower qualification of diploma in that subject prescribed for the post, shall be considered to be sufficient for that post."

The Court also noted that there was no exclusion to candidates to possess a higher qualification. The above referred decision in Jyoti K.K. (supra) turned on the provisions of Rule 10 (a)(ii). In the present case, there is no equivalent Rule akin to Rule 10(a)(ii). A perusal of the said Rule 10(a)(ii) clearly presupposes and provides that the acquisition of a higher qualification would presuppose the acquisition of the lower qualifications prescribed for the post. In the present case, there being no such Rule, we are afraid that the presumption is not available to the petitioners.

24. The next case relied upon by Sri Ashok Khare in Parvaiz Ahmad Parry v. State of Jammu & Kashmir and others, 2016(1) ESC 54 (SC). In the said case, the matter related to appointment to the post of J & K Forest Service Range Officers, Grade-I, wherein the prescribed qualification was B.Sc. (Forestry) or its equivalent from any University recognised by the Indian Council of Agricultural Research (hereinafter referred to as the 'ICAR'). The appellants, in the said case, had a qualification of B.Sc. with Forestry as one of the major subjects and Master in Forestry i.e. M.Sc. (Forestry) on the date when he applied for the post in question, the Apex Court allowed the appeal holding as under:

"In our considered view, firstly, if there was any ambiguity or vagueness noticed in prescribing the qualification in the advertisement, then it should have been clarified by the authority concerned in the advertisement itself. Secondly, if it was not clarified, then benefit should have been given to the candidate rather than to the

respondents. Thirdly, even assuming that there was no ambiguity or/and any vagueness yet we find that the appellant was admittedly having B.Sc. degree with Forestry as one of the major subjects in his graduation and further he was also having Masters degree in Forestry, i.e., M.Sc. (Forestry). In the light of these facts, we are of the view that the appellant was possessed of the prescribed qualification to apply for the post in question and his application could not have been rejected treating him to be an ineligible candidate for not possessing prescribed qualification.

In our view, if a candidate has done B.Sc. in Forestry as one of the major subjects and has also done Masters in the Forestry, i.e., M.Sc.(Forestry) then in the absence of any clarification on such issue, the candidate possessing such higher qualification has to be held to possess the required qualification to apply for the post. In fact, acquiring higher qualification in the prescribed subject i.e. Forestry was sufficient to hold that the appellant had possessed the prescribed qualification. It was coupled with the fact that Forestry was one of the appellant's major subjects in graduation, due to which he was able to do his Masters in Forestry."

The said case has no applicability to the facts of the present case inasmuch as Diploma in Engineering and B.Tech in Engineering are two different courses and thus the ratio of the Judgment in the case of Parvaiz Ahmad Parry v. State of Jammu & Kashmir and others has no applicability to the facts of the present case.

25. Sri Ashok Khare, Senior Counsel, has next relied upon a Full Bench of Punjab and Haryana High Court in the case of Manjit Singh v. State of Punjab and others, 2011 (1) 115 (P&H) (FB). In the said case, the advertisement for appointment to the post of the Physical Training Instructor, the minimum qualification prescribed was C.P.Ed. whereas the candidates possessing B.P.Ed or M.P.Ed. were rejected. The Punjab and Haryana Full Bench held as under:

"From the facts on record and dictum of above noticed Judgments, it emerges that the candidate possessing higher qualification in the same line cannot be excluded from consideration for selection. It is a different matter that he/she may not be entitled to any additional weightage for higher qualification, but cannot be denied consideration at par with a candidate possessing minimum prescribed qualification. Denying consideration to a candidate having better and higher qualification in the same line and discipline would definitely result in breach of Articles 14 and 16 of the Constitution of India."

Thus, higher qualification in same line is the guiding factor. In the present case, we have already held that Diploma in Engineering is not in same line as Graduate in Engineering

26. The next case relied upon by Sri Khare is the Judgment of the Apex Court in the case of Zahoor Ahmad Rather and others v. Sheikh Imtiyaz Ahmad and others, (2019) 2 SCC 404. The Apex Court was confronted with the question regarding the appointment to the post of Technician III wherein the qualification prescribed was Matriculation with ITI in Electrical Trade whereas the persons non-suited were Diploma Holders in Electrical Engineering/Electronics & Communication. The Apex Court, after

discussing the various Judgments including the Judgment of the Supreme Court in the case of Jyoti K.K. (supra), held as under:

"While prescribing the qualifications for a post, the State, as employer, may legitimately bear in mind several features including the nature of the job, the aptitudes requisite for the efficient discharge of duties, the functionality of a qualification and the content of the course of studies which leads up to the acquisition of a qualification. The state is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision making. The state as a public employer may well take into account social perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily. That is why the decision in Jyoti KK must be understood in the context of a specific statutory rule under which the holding of a higher qualification which presupposes the acquisition of a lower qualification was considered to be sufficient for the post. It was in the context of specific rule that the decision in Jyoti KK turned.

Ms Wadia sought to draw sustenance from the fact that the holder of an ITI certification can obtain lateral entry to the diploma course. The point of the matter, however, is that none of the appellants fit the description of candidates who had secured an ITI certification before seeking a lateral entry to a diploma course. Plainly, when an ITI with matric is required, a person who does not hold that qualification is not eligible.

The submission based on Note 12, urged by Ms Wadia, cannot be accepted. The stipulation that the qualification prescribed is the bare minimum requirement of the job emphasises that it is an essential requirement, a threshold which cannot be dispensed with. Under Note 12, the Board is entitled to assign additional weightage for a higher qualification. Whether such a weightage should be assigned is a matter for the Board to determine. The SSSB did not assign an additional weightage for a higher qualification. In not exercising an enabling power, no fault can be found with the SSSB. An enabling provision postulates a discretion which may or may not be exercised. A candidate has no vested right to assert that the Board must as a mandate assign an additional weightage to a higher qualification. Whether to do so or not is a matter for the Board to determine. All that Note 12 postulates is that the mere possession of the prescribed qualification will not entitle a candidate to be called for the written test or interview. The Board may shortlist among eligible candidates by granting a weightage to a higher qualification in the relevant line or discipline. But the words "as may be decided by the Board" in Note 12 indicate that the Board is vested with a discretion in pursuance of an enabling power which it may or may not exercise."

34. Thus, our answer to the first two questions, is clear that a degree in the field in question, cannot be viewed as a higher qualification compared to Diploma in that field and that the Judgment in the case of Alok Kumar Mishra v. State of U.P. and Kartikey v. State of U.P. lay down the correct position in law while holding that a degree holder is excluded from the zone of consideration for appointment of a Junior Engineer."

12. The Full Bench further on observed:

"36. In the case in hand, the only qualification prescribed was "Diploma in Engineering" and it was not the minimum qualification, in fact, the State, as an employer, specifically excluded "Graduate in Engineering".

This aspect of the matter has been duly adverted to by the Hon'ble Supreme Court in Zahoor Ahmad Rather and others v. Sheikh Imtiyaz Ahmad and others wherein the Apex Court held as under:

27. While prescribing the qualifications for a post, the State, as employer, may legitimately bear in mind several features including the nature of the job, the aptitudes requisite for the efficient discharge of duties, the functionality of a qualification and the content of the course of studies which leads up to the acquisition of a qualification. The state is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision making. The state as a public employer may well take into account social perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily. That is why the decision in Jyoti K.K. must be understood in the context of a specific statutory rule under which the holding of a higher qualification which presupposes the acquisition of a lower qualification was considered to be sufficient for the post. It was in the context of specific rule that the decision in Jyoti K.K. Turned.

28. Ms Wadia sought to draw sustenance from the fact that the holder of an ITI certification can obtain lateral entry to the diploma course. The point of the matter, however, is that none of the appellants fit the description of candidates who had secured an ITI certification before seeking a lateral entry to a diploma course. Plainly, when an ITI with Matric is required, a person who does not hold that qualification is not eligible.

29. The submission based on Note 12, urged by Ms Wadia, cannot be accepted. The stipulation that the qualification prescribed is the bare minimum requirement of the job emphasises that it is an essential requirement, a threshold which cannot be dispensed with. Under Note 12, the Board is entitled to assign additional weightage for a higher qualification. Whether such a weightage should be assigned is a matter for the Board to determine. The SSSB did not assign an additional weightage for a higher qualification. In not exercising an enabling power, no fault can be found with the SSSB. An enabling provision postulates a discretion which may or may not be exercised. A candidate has no vested right to assert that the Board must as a mandate assign an additional weightage to a higher qualification. Whether to do so or not is a matter for the Board to determine. All that Note 12 postulates is that the mere possession of the prescribed qualification will not entitle a candidate to be called for the written test or interview. The Board may shortlist among eligible candidates by granting a weightage to a higher qualification in the relevant line or discipline. But the words "as may be decided by the Board" in Note 12 indicate that the Board is vested with a discretion in pursuance of an enabling power which it may or may not exercise."

In subsequent decision of the Hon'ble Supreme Court in Civil Appeal No.

4597 of 2019 (arising out of SLP (Civil) Nos(s). 8494 of 2018) (The Maharashtra Public Service Commission v. Sandeep Shriram Warade and others) held as under :

"The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. The Court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being at par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the Court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the Court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same."

37. In view of the above referred Judgments, we have no hesitation in holding that the State, as an employer, is well equipped to decide the desirable qualification or may prescribe additional qualification including any grant of preference. The Court cannot lay down the conditions of eligibility much less, it can go into the question of desirable qualification being at par with the essential qualification.

38. Now, coming to the third question i.e. Question No. (C) that is whether the degree holder can be held to be ineligible to participate in a selection process for Junior Engineer in the light of the relevant statutory Rules.

39. Sri Khare, in support of his submissions made earlier, has contended that in some of the statutory Rules, Diploma in Engineering is specified as the minimum qualification while with regard to some of the Departments, Diploma in Engineering is specified as required qualification. Be that as it may we have already held that Diploma in Engineering being distinct from Graduate in Engineering, no benefit flows from the advertisement whether the Diploma in Engineering is prescribed as a 'minimum qualification' or 'required qualification'.

40. Testing the said arguments as raised by Sri Khare although on record no Rules have been placed, however, in view of the finding recorded by us that Diploma in Engineering is not the same as Bachelor in Engineering and also the finding recorded by us that the State is well equipped to prescribe the requisite required qualification keeping in view the requirement of posts for which the advertisements are issued, we hold that whether Diploma in Engineering is specified as a minimum qualification or a required qualification, Graduates in Engineering would not be entitled to be considered and will be out of zone of consideration unless a candidate possess both the qualifications to explain it further suppose a candidate after acquiring Diploma in Engineering also passes Graduation in Engineering he would be eligible, in view of the fact that he has Diploma in Engineering which is the

required qualification for applying to the post and cannot be denied to participate only because he has any qualification additional to the prescribed qualification. However, the State Government is free to provide for equivalence as was done by the Kerala State while incorporating Rule 10(a)(ii). Since there is nothing on record in the present case to show that there was any Rule or Directive of the State Government to provide equivalence, it is only logical to conclude that degree holders are ineligible to participate in the selection process for Junior Engineer in the light of the specific provisions incorporated under the advertisement in question."

13. Their Lordships of the Full Bench answered the questions on six counts, in the following words:

"Thus, our answers to the questions posed before the Full Bench are as under:

(1) A Diploma in Engineering and Degree in Engineering are two distinct qualifications and a degree in the field in question cannot be viewed as a higher qualification when compared to Diploma in that field.

(2) The decision in the case of Alok Kumar Mishra (supra) and Kartikey (supra) laid down the correct position in law holding that the degree holder is excluded from the zone of consideration for appointment as a Junior Engineer with regard to the Diploma in question.

(3) The degree holder is held to be ineligible to participate in the selection process of Junior Engineer in the light of the Advertisement issued.

(4) The exclusion of the degree holders from the zone of consideration is in consonance with the tests propounded by the Supreme Court in case of State of Uttarakhand and others v. Deep Chandra Tewari and another.

(5) The State Government, while prescribing the essential qualifications or desirable qualifications are best suited to decide the requirements for selecting a candidate for nature of work required by the State Government and the Courts are precluded from laying down the conditions of eligibility. If the language in the Rules is clear judicial review cannot be used to decide what is best suited for the employer.

(6) The 'O' level Diploma granted by NIELIT is not equivalent to Post Graduate Diploma in Computer Application and there is no presumption available to hold that the PGDCA possess the necessary qualification as prescribed for 'O' level Diploma accorded by NIELIT."

14. The holding of the Full Bench leaves no manner of doubt that given the terms of the advertisement here, which we have held to be exclusive about the stipulated qualification and not one that speaks about a minimum or a range of graded qualifications, the holder of a degree in Engineering would not be eligible.

15. Mr. Avneesh Tripathi, learned Amicus Curiae at this stage brought to this Court's notice, the holding of the Supreme Court in Puneet Sharma and others v. Himachal Pradesh State Electricity Board Limited and another, (2021) 16 SCC 340 to submit that the law laid down by the Full Bench may no longer hold good. The question that was considered by their

Lordships in **Puneet Sharma** *(supra)* arose in the backdrop of facts, which can best be understood in the words of their Lordships as carried in the opening part of the report. It reads:

"2. Whether a degree in Electrical Engineering/ Electrical and Electronics Engineering is technically a higher qualification than a diploma in that discipline and, whether degree-holders are eligible for appointment to the post of Junior Engineer (Electrical) under the relevant recruitment rules, is the issue that falls for decision in these appeals arising out of a common judgment [Robin Kumar v. State of H.P., 2020 SCC OnLine HP 3397] of the Himachal Pradesh High Court [In CWP No. 138 of 2020, Cwpoa No. 3601 of 2019 and Cwpoa No. 3633 of 2019 filed by the degree-holders (hereafter "degree-holders") claiming the right of consideration, and Cwpoa No. 6534 of 2019 and Cwpoa No. 6252 of 2020 have been filed by the diploma-holders ("diploma-holder") opposing the claim of the degree-holders.] . As is evident, this issue is not novel and has an almost endemic tendency requiring judicial attention, albeit in myriad and diverse contexts.

3. The Himachal Pradesh Staff Selection Commission ("Hpssc" hereafter), acting on the requisition sent by the Himachal Pradesh State Electricity Board Ltd. ("Hpseb" hereafter) advertised 222 posts of Junior Engineer (Electrical hereafter referred to as "JE") on 27-6-2018. Degree-holders in the discipline applied for the post concerned; after qualifying the written examination, they were called for verification of documents but the final result was not declared. They approached the High Court in writ proceedings, claiming that since they possessed educational qualifications that were higher than the prescribed minimum (and advertised) qualifications, they could not be denied consideration. The diploma-holders opposed this claim, and argued that the qualifications possessed by degree-holders was neither higher nor can be considered in teeth of the recruitment rules as also on the basis of the advertisement issued by the Himachal Pradesh Staff Selection Commission.

4. The Hpseb adopted a neutral position; however, it highlighted that per the applicable regulations, the minimum essential qualification provided for recruitment to the post of Junior Engineer (Elect.) was "matriculation with Diploma in Electrical/Electronics/Electronics and Communication/Computer Science from the recognised Institution/Board/University duly recognised by the Central or State Government". Hpseb further stated that the Hpssc could not traverse beyond the regulations, and was bound to make recruitments in accordance with them. The Hpssc, which issued the advertisement and conducted the selection, opposed the petitions and asserted that degree-holders could not be considered for recruitment."

16. It was observed **in Puneet Sharma:**

"31. In the present case, what is evident from the rules is that direct recruitment to the post of JEs in Hpseb is to the extent of 72%. Undoubtedly, eligibility is amongst those who passed in matriculation or 10+2 or its equivalent qualification. However, this Court is of the opinion that the diploma-holders' contention that the minimum qualification is matriculation and that the technical

qualification is diploma is incorrect. The minimum qualification for the post cannot be deemed to be only matriculation but rather that only such of those matriculates, or 10+2 pass students, who are diploma-holders would be eligible. The term "with" in this category has to be read as conjunctive.

32. As far as the merits of the main question i.e. whether the degree-holders too can apply for the post of JEs, a close examination of the rules shows that a lion's share of the posts at the JE level is set apart for direct recruitment. However, when it is at the level of the higher post i.e. Assistant Engineer which is a promotional post direct recruitment is only to the extent of 36%. Of the balance 64%, various sub-quotas have been stipulated for feeder cadres; the largest percentage being for Junior Engineers. For a long time, even on the date of the advertisement, two distinct quotas (of 5%) had been set apart for promotion of Junior Engineers holding degree qualifications in the subject concerned.

33. This Court is conscious that the issue in question is whether the minimum qualification of a diploma in electrical or electronic engineering or other prescribed qualifications includes a degree in that discipline. However, the rules have to be considered as a whole. So viewed, the two sub-quotas are:

(1) 5% enabling those diploma-holders who acquire degree qualifications during service as Junior Engineers; and

(2) 5% enabling among those who hold degrees before joining as Junior Engineers.

34. The latter (2) conclusively establishes that what the rule-making authority undoubtedly had in mind was that degree-holders too could compete for the position of JEs as individuals holding equivalent or higher qualifications. If such interpretation were not given, there would be no meaning in the 5% sub-quota set apart for those who were degree-holders before joining as Junior Engineers — in terms of the recruitment rules as existing.

35. The Court's opinion is fortified by the latest amendment brought about on 3-6-2020. This clarifies beyond doubt that even for the post of Junior Engineers, those individuals holding higher qualifications are eligible to compete. In the opinion of this Court, though the amending rules were brought into force prospectively, nevertheless, being clarificatory, they apply to the recruitment that is the subject-matter of the present controversy. Such a position (i.e. clarificatory amendments operative retroactively, despite their enforcement prospectively) has been held in several previous judgments of this Court. In Zile Singh v. State of Haryana [Zile Singh v. State of Haryana, (2004) 8 SCC 1] this Court examined the various authorities on statutory interpretation and concluded : (SCC pp. 8-9, paras 13-14)

"13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only—'nova constitutio futuris formam imponere debet

non praeteritis'—a new law ought to regulate what is to follow, not the past. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., 2004 at p. 438.) It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid., p. 440).

14. The presumption against retrospective operation is not applicable to declaratory statutes…. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well-settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended…. An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69)."

39. The considerations which weighed with this Court in the previous decisions i.e. P.M. Latha [P.M. Latha v. State of Kerala, (2003) 3 SCC 541 : 2003 SCC (L&S) 339] , Yogesh Kumar [Yogesh Kumar v. State (NCT of Delhi), (2003) 3 SCC 548 : 2003 SCC (L&S) 346] , Anita [State of Punjab v. Anita, (2015) 2 SCC 170 : (2015) 1 SCC (L&S) 329] were quite different from the facts of this case. This Court's conclusions that the prescription of a specific qualification, excluding what is generally regarded as a higher qualification can apply to certain categories of posts. Thus, in Latha [P.M. Latha v. State of Kerala, (2003) 3 SCC 541 : 2003 SCC (L&S) 339] and Yogesh Kumar [Yogesh Kumar v. State (NCT of Delhi), (2003) 3 SCC 548 : 2003 SCC (L&S) 346] as well as Anita [State of Punjab v. Anita, (2015) 2 SCC 170 : (2015) 1 SCC (L&S) 329] those possessing degrees or post-graduation or BEd degrees, were not considered eligible for the post of primary or junior teacher. In a similar manner, for "Technician III" or lower post, the equivalent qualification for the post of Junior Engineer i.e. diploma-holders were deemed to have been excluded, in Zahoor Ahmad Rather [Zahoor Ahmad Rather v. Imtiyaz Ahmad, (2019) 2 SCC 404 : (2019) 1 SCC (L&S) 353] . This Court is cognizant of the fact that in Anita [State of Punjab v. Anita, (2015) 2 SCC 170 : (2015) 1 SCC (L&S) 329] as well as Zahoor [Zahoor Ahmad Rather v. Imtiyaz Ahmad, (2019) 2 SCC 404 : (2019) 1 SCC (L&S) 353] the stipulation in Jyoti [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] which enabled consideration of candidates with higher qualifications was deemed to be a distinguishing ground. No such stipulation exists in the Hpseb Rules. Yet, of material significance is the fact that the higher post of Assistant Engineer (next in hierarchy to Junior Engineer) has nearly 2/3rds (64%) promotional quota. Amongst these individuals, those who held degrees before appointment as Junior Engineers are entitled for consideration in a separate and distinct sub-quota, provided they function as a Junior Engineer continuously for a prescribed period. This salient aspect cannot be overlooked; it only shows the intent of the rule-makers not to exclude the

degree-holders from consideration for the lower post of Junior Engineers."

17. The decision of their Lordships **in Puneet Sharma**, like some others referred to in paragraph No.13 of the report, has to be understood for the principle it lays down. It turns on the terms of the rules involved in Puneet Sharma, and that particular rule is about 64% of the posts of Assistant Engineers being filled by promotion from amongst Junior Engineers, where there was a quota of 5% for Junior Engineers, who already had a degree in Engineering before they entered service. It is on this particular feature in the rules that the holding in Puneet Sharma turns, as would be evident from paragraph No.34 of the report; and of course, the concluding remarks in paragraph No.39 of the report.

18. In the present case, hardly any rule has been brought to the notice of this Court, that may lend itself to a particular construction, where the holder of a degree in Engineering may be held eligible to apply to the post of a Junior Engineer. To the contrary, terms of the advertisement make the qualification of a Diploma in Electrical/ Civil Engineering, essential to maintain one's candidature for the post. About all the argument based on inherent superiority of a degree in Engineering, the answer of the Full Bench to the issue clinches it.

19. In our considered opinion, therefore, there is no merit in this writ petition.

20. Before parting with the matter, this Court must place on record our appreciation for the valuable assistance rendered by Mr. Avneesh Tripathi, learned Amicus Curiae.

21. In the result, this writ petition fails and is **dismissed**.

22. There shall be no order as to costs.

(2024) 6 ILRA 259
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.06.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 835 of 2023

Juvenile 'Xyz' ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Mohammad Alishah Faruqi, Mohd. Suhail

Counsel for the Opposite Parties:
G.A.

Criminal Law-The Juvenile Justice (Care and Protection of Children) Act, 2015 - Sections 12 & 18(1) (g)- Revision against the order rejecting bail application of the revisionist-Gravity of the offence not relevant consideration for refusing bail to the juvenile-Maximum period for which a juvenile can be incarcerated in whatever form of detention is three years-Bail for a juvenile who is under the age of 16 years is a matter of course and it is only in the event that his case falls under one or the other disentitling categories mentioned in the proviso to sub-Section (1) of Section 12 of the Act that bail may be refused.

Nothing said against the juvenile appearing from the Social Investigation Report that may show him to be a desperado or misfit-Courts below have held the juvenile disentitled to bail on account of his case falling under each of the three exceptions enumerated in the proviso to sub section (1) of Section 12, for which no reason has been indicated- Both the courts below have also overlooked the statement of

the victim recorded under Section 161 and 164 CrPC and further the courts below have also not considered the radiological age of the victim as per the medical report.

Bail application allowed. (E-15)

List of Cases cited:

1. Kamal Vs St. of Har., 2004 (13) SCC 526

2. Takht Singh Vs St. of M. P., 2001 (10) SCC 463

3. Shiv Kumar @ Sadhu Vs. St. of U.P. 2010 (68) ACC 616(LB)

4. Japani Sahoo Vs Chandra Sekhar Mohanty

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

1 .This revision is directed against the judgment and order dated 01.06.2023 passed by Additional Sessions Judge/learned Special Judge (POCSO) Act No. 1, Lucknow passed in Criminal Appeal No. 259/2022: Shiva Vs. State of U.P.), whereby the criminal appeal filed on behalf of the revisionist has been dismissed and for quashing of the order dated 22.08.2022 passed by Juvenile Justice Board, Mohan Road, Lucknow, in Misc. Case No. 159 of 2022, arising out of the Case Crime no. 613 of 2021, Under Sections 376 DB, 323, 504, 506 IPC & 5m/6 POCSO Act of Police Station Mohanlalganj, District Lucknow, whereby the Juvenile Justice Board has rejected the bail application of the revisionist.

2. In spite of time being granted to opposite party No.2 and after service of notice neither anyone has put in appearance nor any counter affidavit has been filed on behalf of opposite party No.2. It appears that opposite party No.2 is not interested to file counter affidavit or to contest the case.

3. Learned A.G.A. has filed counter affidavit, in reply thereto learned counsel for the revisionist has filed the rejoinder affidavit denying the averments made in the counter affidavit.

4. Heard Sri Mohammad Alishah Faruqi, learned counsel for the revisionist and Sri Ashok Kumar Singh, learned A.G.A.-I for the State and perused the record.

5. Learned counsel for the revisionist submits that the revisionist is innocent and he has been falsely implicated in the present case.

6. Learned counsel for the revisionist further submits that as per the prosecution case the complainant, Sudama, a resident of Gram Ganshkherha, Police Station Mohanlalganj, Lucknow, filed a complaint on 30.12.2021 stating therein that sister-in-law of his son Sonu, namely, aged 11 years, daughter of the late Babu Lal, resident of Koyali ka Purwa, Police Station Nagram, Lucknow, who lives at his house, on 30.12.2021 at about 5.00 p.m. went to the forest to collect wood. At that time, two boys from the village, Akash and Shiva, caught her and committed rape and assaulted her. When the girl started screaming, they beat her and threatened to kill her before fleeing the scene. When the girl returned home, she narrated the entire incident, and the complainant dial at 112 to call the police.

7. Learned counsel for the revisionist further submits that the revisionist is innocent and has been falsely implicated in the present case.

8. Learned counsel for the revisionist further submits that the medical of the

victim was done on 31.12.2021 in which there was no external injuries/no internal injuries were found on the person of the alleged victim.

9. Learned counsel for the revisionist further submits that against the order dated 30.03.2022 passed by the Juvenile Justice Board, Lucknow, by which the revisionist was declared juvenile, neither the informant nor the State Government has preferred any appeal, revision before any court of law.

10. Learned counsel for the revisionist further submits that the revisionist is juvenile and there is no apprehension of reasoned ground for believing that the release of the revisionist is likely to bring him in association with any known criminals or expose him to mental, physical or psychological danger or his release would defeat the ends of justice. He further submits that except this the revisionist has no previous criminal history. The father of the revisionist is giving his undertaking that after release of the revisionist on bail, he will keep him under his custody and look after him properly. Further, the revisionist undertakes that he will not tamper the evidence and he will always cooperate the trial proceedings. There was no report regarding any previous antecedents of family or background of the revisionist. There is no chance of revisionist's re-indulgence to bring him into association with known criminals.

11. Learned counsel for the revisionist further submits that it is not in dispute that the revisionist is a juvenile as he has already been declared juvenile by Juvenile Justice Board, Lucknow vide order dated 30.03.2022. The revisionist was a juvenile aged 13 years 02 months on the date of occurrence. He is in jail since 02.01.2022 in connection with the present crime and has completed substantial period of the sentence out of the maximum three years institutional incarceration permissible for a juvenile, under Section 18(1)(g) of the Act.

12. Learned counsel for the revisionist further submits that thereafter the revisionist applied for bail before the Juvenile Justice Board, Lucknow upon which a report from the District Probation Officer was called for. The bail application was rejected vide order dated 22.08.2022, being aggrieved, the revisionist preferred an appeal under Section 101 of the Act, which was also dismissed vide order dated 01.06.2023. Hence the present criminal revision has been filed before this Hon'ble Court mainly on the following amongst other grounds:

(i) That the bail application of the revisionist was rejected by the court below in a very cursory and arbitrary manner.

(ii) That the revisionist, who is juvenile, is wholly innocent and has been falsely implicated by the first informant in the present case.

(iii) That the courts below have not appreciated the report of the District Probation Officer in its right perspective.

(iv) That the impugned judgment and orders passed by the learned courts below are apparently illegal, contrary to law and based on erroneous assumption of facts and law.

(v) That there was absolutely no material on record to hold that the release of the Juvenile would likely to bring him into association with any known criminal or expose him to moral, physical or

psychological danger or his release would defeat the ends of justice, yet the courts below have illegally, arbitrary and on surmises refused the bail of juvenile.

(vi) That the courts have erred in law in not considering the true import of Section 12 of the Act, 2015 and thus, the impugned orders passed by the courts below suffer from manifest error of law apparent on the face of record.

(vii) That the courts below have acted quite illegally and with material irregularity in not properly considering the case of juvenile in proper and correct perspective which makes the impugned orders passed by the courts below non est and bad in law.

(viii) That bare perusal of the impugned orders demonstrate that the same have been passed on flimsy grounds which have occasioned gross miscarriage of justice.

13. Several other submissions in order to demonstrate the falsity of the allegations made against the revisionist 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 revisionist 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 in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

14. Learned counsel for the revisionist has further argued that the revisionist has already undergone substantial period of imprisonment/institutional incarceration and has placed reliance of Hon'ble Apex Court judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

15. Learned counsel for the revisionist has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463,** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was

filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

16. Learned AGA has opposed the revisionist's case with the submission that the release of the revisionist on bail would bring him into association of some known criminals, besides, exposing him to moral, physical and psychological danger. It is submitted that his release would defeat the ends of justice, considering that he is involved in a heinous offence.

17. This Court has carefully considered the rival submissions of the parties and perused the impugned orders. The juvenile is clearly below 16 years of age and does not fall into that special category of a juvenile between the age of 16 and 18 years whose case may be viewed differently, in case, they are found to be of a mature mind and persons well understanding the consequences of their actions. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, which reads as under:

"(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

18. This Court in the case **of Shiv Kumar alias Sadhu Vs. State of U.P.**

2010 (68) ACC 616(LB) was pleased to observe that the gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile.

19. In the present case it is also taken note of by this Court that the revisionist has by now done substantial period of institutional incarceration. The maximum period for which a juvenile can be incarcerated in whatever form of detention, is three years, going by the provisions of Section 18(1)(g) of the Act. Both the courts below have passed the impugned judgment and orders in cursory manner without placing due reliance on the report submitted by the District Probation Officer as well as facts and circumstances of the case. This Court, thus, finds that the impugned orders cannot be sustained and are liable to be set aside and reversed.

20. A perusal of the said provision show that bail for a juvenile, particularly, one who is under the age of 16 years, is a matter of course and it is only in the event that his case falls under one or the other disentitling categories mentioned in the proviso to sub-Section (1) of Section 12 of the Act that bail may be refused. The merits of the case against a juvenile acquire some relevance under the last clause of the proviso to sub-section (1) of Section 12 that speaks about the ends of justice being defeated. The other two disentitling categories are quite independent and have to be evaluated with reference to the circumstances of the juvenile. Those circumstances are to be gathered from the Social Investigation Report, the police report and in whatever other manner relevant facts enter the record.

21. What is of prime importance in this case is that the juvenile, who is a young boy, less than the age of 16 years, has no criminal history. There is nothing said against the juvenile, appearing from the Social Investigation Report that may show him to be a desperado or misfit in the society. The two courts below have held the juvenile disentitled to bail on account of his case falling under each of the three exceptions enumerated in the proviso to sub section (1) of Section 12, for which no reason has been indicated. That finding, in both the orders impugned, is based on an ipse dixit, in one case of the judge and in the other of the Board. Even if it be assumed that the offence was committed in the manner alleged, it would be rather strained logic to hold that release of the juvenile on bail would lead to the ends of justice being defeated. Both the courts below have also overlooked the statement of the victim recorded under Section 161 and 164 CrPC and further the courts below have also not considered the radiological age of the victim as per the medical report.

22. 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 on the ground of parity and in view of the larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of **Kamal Vs. State of Haryana (supra), Takht Singh Vs. State of Madhya Pradesh (supra), Dharmendra (Juvenile) vs. State of U.P. and others (supra), Japani Sahoo vs. Chandra Sekhar Mohanty (supra) and Shiv Kumar alias Sadhu Vs. State of U.P. (supra),** this

Court is of the view that the present criminal revision may be allowed and the revisionist may be released on bail.

23. In the result, this revision **succeeds** and is **allowed**. The impugned judgment and order dated 01.06.2023 passed by Additional Sessions Judge/learned Special Judge (POCSO) Act No. 1, Lucknow passed in Criminal Appeal No. 259/2022: Shiva Vs. State of U.P.), and the order dated 22.08.2022 passed by Juvenile Justice Board, Mohan Road, Lucknow, in Misc. Case No. 159 of 2022, arising out of the Case Crime no. 613 of 2021, Under Sections 376 DB, 323, 504, 506 IPC & 5m/6 POCSO Act of Police Station Mohanlalganj, District Lucknow are hereby **set aside** and **reversed.** The bail application of the revisionist stands allowed.

24. Let the revisionist, **Shiva** through his natural guardian/father Ram Das be released on bail in Case Crime no. 613 of 2021, Under Sections 376 DB, 323, 504, 506 IPC & 5m/6 POCSO Act of Police Station Mohanlalganj, District Lucknow upon his natural guardian furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Lucknow subject to the following conditions:

(i) That the natural guardian/ father Ram Das of the revisionist will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the natural guardian will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and his natural guardian/father Ram Das will report to the District Probation Officer on the first Wednesday of every calendar month commencing with the first Wednesday of July, 2024 and if during any calendar month the first Wednesday falls on a holiday, then on the next following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board concerned on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

(v) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

25. However, considering the peculiar facts and circumstances of the case, the court below is directed to make every possible endeavour to conclude the trial of the aforesaid case within a period of six months from today without granting unnecessary adjournments to either of the parties.
